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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2019

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 12468 of 2002
Connected with
Writ C No. 37147 of 1996, 39403 of 1999, 32788 of 2000, 44848 of 2000, 53016 of 2000, 16447 of 2006.

Duncans Industries Ltd. ...Petitioner
Versus
State of U.P. And Others ...Respondents

Counsel for the Petitioner:
Sri S. Chatterjee, Sri J.N. Tiwari, Sri Sudeep Harkauli, Sri Naveen Sinha.

Counsel for the Respondents:
C.S.C., Bushra Mariyam, Sri K.P. Agarwal, Ms. Bushra Maryam, Sri R.P. Agarwal, Sri S. Sirohi.

A. Writ - Article 226 of Constitution - Section 2(2) of Industrial Dispute Act, 1947 - Meaning of workmen - Record shows that Supervisor/ Deputy Superintendent are not workmen - Authorities discussed.

B. Writ - Burden of proof - Who asserts must prove - Initial burden is on employees to proof themselves as workmen - failed to discharge initial burden. (E-1)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. These writ petitions were earlier decided by a common judgment and order dated 24.2.2016 passed by the Division Bench of this Court whereby the matters were remanded back to Industrial Tribunal for fresh adjudication.

2. Being aggrieved, the Supervisors Association preferred Special Leave Petition No.1206-1208 of 2017 (Civil Appeal No(s) 9382-9384 of 2017) before the Hon'ble Supereme Court which were decided on 23.2.2018 with the request to the High Court to heard the writ petitions on merit. The relevant part of the order is reproduced hereinafter :- .

"The only dispute remaining to be decided is whether the Supervisors/Deputy Superintendents would be workmen or not. There are already two conflicting views of the Labour Courts. In the above circumstances, we do not find any justification for the High Court remitting the matter again to the Labour Court on the issue. Accordingly, these appeals are allowed. The impugned judgment is set aside. We direct the High Court to decide the issue finally in the true spirit of the order dated 14.9.2010, as explained by us above on the basis of the materials available on record.

3. The facts in brief which are necessary to decide the issue involved in all these writ petitions are as follows :-

(a) The petitioner - Duncan Industries Ltd. is a company registered under the Companies Act, having its factory at Kanpur, which manufactures fertilizers commonly known as UREA. The company has different categories of employees comprising of Management staff, Deputy Superintendents/Supervisors and workman. In the year 1978, the age of retirement of workman of the petitioner-company was raised to 60 years subject to their being medically fit, in pursuance of settlement/agreement dated 7.2.1978 entered between the Management and the Union of Workman. As per the case of the petitioner-

company, the said settlement/agreement was not made applicable to Supervisors/Deputy Superintendents of the company on the ground that they were not workman.

(b) The Management of the company took decisions on various issues after meeting with the representatives of IEL Supervisors Association, Kanpur on 28.5.1985 including the decision regarding the retirement age of the Supervisor which remained unaltered at 58 years.

(c) The IEL, Supervisors' Association claimed that their age of superannuation should be fixed as 60 years as done in the case of workman and raised a industrial dispute which finally referred under Section 4-K of the U.P. Industrial Disputes Act, 1947 *(hereinafter referred as 'the Act of 1947')* to the Industrial Tribunal (III) U.P. Kanpur and was registered as Adjudication Case no.11 of 1988. The term of the reference of the said industrial dispute was as follows :-

"Kya Sevajojakon Dwara Apne Pratishthan Ke Sabhi Deputy Superintendents Evam Supervisors Ki Seva Nivriti Aayu 58 Varsha Ke Sthan Par Shramikon Ki Bhanti 60 Varsha Na Karna Uchit Tatha Vaidhanik Hai ? Yadi Nahin to Sambhandhit Shramik Kya Laabh/Anutosh Relief Pane Ke Adhikari Hai Tatha Anya Kis Vivran Sahit ?"

(d) The industrial dispute was contested by the rival parties and written statements, rejoinder affidavits were also exchanged. Statements of witnesses of both side were recorded and they were cross-examined also. The Industrial Tribunal after considering the material and submissions, passed an award dated 29.4.1999, whereby it was held that the Deputy Superintendents/Supervisors are also entitled for increase of their retirement age from 58 years to 60 years as done in the case of workman.

(e) The Industrial Tribunal (III) sent the award for the publication on 30.7.1999 to the State, however the same was recalled by the Tribunal before publication and the matter was posted for re-hearing.

(f) Being aggrieved, the IEL Supervisory has filed Writ Petition No.39403 of 1999 with the prayer for publication of the award dated 23.4.1999 passed by the Industrial Tribunal. Apparently, no interim order was passed by this Court in the said writ petition.

(g) The Industrial Tribunal again heard the parties and passed the fresh award and sent the same for publication on 16.6.2000 to the State Government.

(h) The IEL Supervisor Association again approached this Court by way of filing Writ Petition No.32788 of 2000 with the prayer for restraining the State Government from publishing the fresh award dated 16.6.2000. Apparently, no interim order was granted by this Court in the said writ petition also.

(i) The State Government instead of publishing the award sent for publication on 16.6.2000, referred the same dispute which was earlier registered as Adjudication No.11 of 1988 in Industrial Tribunal (VIII) Lucknow, vide order dated 30.9.2000.

(j) The Duncan Industries Ltd. being aggrieved by the order dated 30.9.2000 preferred Writ Petition No.44848 of 2000 before this Court wherein the following order was passed on 18.10.2000.

"Heard Sri J.N. Tewari, Senior Advocate assisted by Sri S.Chatterjee learned counsel for the petitioner.

The grievance of the petitioner is that the State Government has made a second reference in the Industrial Disputes Act. The Original reference was made on 14th March, 1998 which gave rise to I.D. case No.11 of 1998.

In this case the evidence of the parties was recorded and the award was prepared. The award was not a convenient approach and made a second reference on the same term and condition on 30.9.2000. The learned counsel for the petitioner urged that the State Government was not empowered to make second reference and to withdraw the award made earlier. The matter requires scrutiny.

Issue notice to respondent no.4 who may file counter affidavit within six weeks. The learned standing counsel may also file counter affidavit on behalf of respondent no.1, 2 and 3 within the same period.

List thereafter.

In the meantime further proceedings pursuant to the reference dated 30.9.2000 shall remain stayed."

(k) I.E.L. Supervisor also challenged the reference order dated 30.9.2000 by way of filing Writ Petition No.53016 of 2000.

(l) Meanwhile, the State Government published the award dated 29.4.1999 passed in Adjudication Case No.11/1988 which was sent for publication on 30.7.1999 on 7.1.2002 whereby Supervisors were also held to be workmen. The Duncan industries then approached this Court by way of filing another Writ Petition No.12468 of 2002. During the pendency of abovementioned writ petitions, the Industrial Tribunal (I) U.P. at Allahabad in another Adjudication Case No.32 of 2001 wherein the industrial dispute 'whether the concerned employee of the Duncan Industries who was employed in the capacity of a Supervisor, was a workman or not, and if so then, whether denial of increment of Rs.10,000/- to him was justified and legal and if not, then whether the workman was entitled to the said relief'? was referred, held that the employee was a workman and he was not discharging managerial functions and held that Supervisor was entitled to receive increment. The said award dated 21.5.2005 is under challenge in Writ Petition No.16447 of 2006 by the Duncans Industries.

(m) Earlier the Labour Court (IV), U.P. Kanpur in Industrial Dispute No.146/1991 between the Management and IEL Supervisor Associations has passed award dated 26.9.1996 wherein it was held that Deputy Superintendent working in the Duncan Industries are not liable for increment as they are not workmen. The said award was also challenged by individuals in Writ C No.37147 of 1996.

(n) A Single Bench of this Court decided the Writ Petition No.39403 of 1999, 32788 of 2000, 4484 of 2000 and 53016 of 2000, vide order dated 7.9.2004, wherein it was held that employer could not placed on record any fact which might authorize the Supervisor to do managerial and supervisory functions. In the other writ petition bearing Writ Petition No.37147 of 1996 wherein the petitioners therein have challenged the finding that they were not declared workmen was however dismissed.

(o) The abovementioned orders dated 7.9.2004 and 22.7.2010 were challenged before the Hon'ble Supreme Court by way of filing Civil Appeal Nos.351-355 of 2006 and Civil Appeal No.8023 of 2010, which were allowed by the Hon'ble Supreme Court vide order

dated 14.9.2000 and the matter was remanded back to High Court for fresh consideration. The relevant part of the order is quoted hereinbelow :-

"In the circumstances, therefore, and keeping in view the fact that the Labour Court has taken two different views in the two references made to it as regards the status of Supervisors and Deputy Superintendents, we are of the view that the matters need to be remanded back to the High Court to enable both the sides to argue the matter afresh and also the High Court to examine the issues that arise for determination.

We, accordingly, allow these appeals, set aside both the impugned orders and remit the matters back to the High Court for a fresh disposal in accordance with law."

(p) After remand, abovementioned writ petitions were finally decided by this Court vide order dated 24.2.2016 whereby the adjudication cases were remanded back to the Tribunal to decide afresh two different views were taken regarding the working of Supervisor and Deputy Superintendent. One being declaring Supervisor/Deputy Superintendent as workman and other being not a workmen by the Labour Tribunal. The operative part of the order dated 24.2.2016 is quoted hereinafter :-

*"**Writ Petition No.44848 of 2000** was dismissed earlier by judgment and order dated 17 September 2004. Learned Counsel for the parties have not made any submissions. Thus, for all the reasons stated in the judgment and order dated 17 September 2004, Writ Petition No.44848 of 2000 is liable to be dismissed and is, accordingly, dismissed.*

***Writ Petition No.12468 of 2002, Writ Petition No.37147 of 1996 and Writ Petition No.16447 of 2006** are disposed of. The Tribunal concerned shall now proceed to hear the adjudication cases bearing Adjudication Case No.11 of 1998, Adjudication Case No.146 of 1991 and Adjudication Case No.32 of 2001 afresh. It shall, however, be open to the parties to bring on record the subsequent facts that may have taken place. This should be done within one month. The Tribunal concerned shall proceed to make the award(s) expeditiously and within a period of four months from the date a certified copy of the order is produced before the Tribunal by either of the parties.*

***Writ Petition No.39403 of 1999 and Writ Petition 32788 of 2000** are dismissed as having become infructuous.*

*Learned counsel for the parties also did not make submissions in **Writ Petition No.53016 of 2000.** The said writ petition was earlier allowed by judgment and order dated 17 September 2004 and the reference order dated 30 September 2000 was quashed. This petition, therefore, stands allowed for the reasons contained in the judgment and order dated 17 September 2004."*

4. As mentioned earlier, the order passed by this Court on 24.2.2016 was challenged by way of filing Civil Appeal No.9382-9384 of 2017 arising out of S.L.P. (Civil) Nos.1206-1208 of 2017 titled as *I.E.L. Supervisors' Association Etc. Etc. vs. Duncan Industries Ltd. & Another,* whereby the Apex Court vide order dated 23.2.2018 has remanded the matter back to this Court to decide afresh on the basis of the material available on record.

5. In this background, this Court has heard learned counsel for the parties at length and perused the record and considered the various judgments placed before this Court by the parties.

6. The issue before this Court is "Whether the Deputy Superintendents/Supervisors working in company would fall under the definition of workmen as contemplated under Section 2(Z) of the U.P. Industrial Disputes Act, 1947 on the basis of evidence produced before the Labour Tribunal to show that they were functioning in a managerial or administered capacity or not"?

7. We have scanned the entire records and the materials placed before the Labour Tribunal by the parties, which are as follows :-

(i)Written statement on behalf of M/s. I.E.L. Ltd. (Fertilizers Division),Panki, Kanpur) -By way of this written statement, the company has submitted that there is no industrial dispute as contemplated in the Act of 1947. The age of retirement of Supervisor/Deputy Superintendent fixed as 58 years which is specifically incorporated in their appointment letters, duly accepted by them, and as such, they are bound by the same.

The note prepared after the discussion between the Company and the Supervisor Association on 24.5.1985 which is on record, the demand of Association regarding the change of age of retirement from 58 to 60 years has already been rejected. Some of the Deputy Superintendent have already moved to civil court for the similar relief, and therefore, the reference is bad in eye of law.

(ii) Written statement on behalf of workmen - The workmen were initially started working under designations of Foreman and General Staff Grade A, however, in or around 1974 they were re-designated as Technical Supervisors/Office SupervisOrs. However, the basic nature of their job remain unchanged and they remained working as workmen. It was further mentioned that there are only three categories of employees in the company namely managerial cadre, lady secretaries and non-managerial cadre and the employees concerned in the present dispute are put under the category of non-managerial cadre as reflected in the medical claim policy of the Company. The employees are undertaking their duties in different shifts and doing general duties like any other workmen.

In the rejoinder affidavit, the employees reiterated that they are born on the muster-roller of the company just as other categories of workmen, whereas in the case of managerial staff, they are not born on the muster-rolls. No definite or distinct job assignment for the workmen concerned in the present dispute.

(iii) Rejoinder statement on behalf of the company - In the rejoinder affidavit, it has been mentioned that time to time certain general staff have been promoted to the post of Deputy Superintendent and some have been upgraded also and their jobs and responsibilities have been enlarged. It was denied that drawing of similar pay or drawing more salary by the workman then Supervisor does not mean that Deputy Superintendent/Supervisor are workmen as grade and scale of pay of workers were decided by way of bipartite negotiations. Additional rejoinder affidavit was also

filed on behalf of the workmen to which company has also filed reply.

(iv) Witnesses produced on behalf of the employees :-

(a) Mr. N.K. Nigam (EW-1) mentioned that subsequent to his re-designation as Supervisor in the year 1975 and subsequently as Deputy Superintendent in the year 1983, he continued to perform same or similar duties has been performed by him with the designation of general staff which were essentially of clerical in nature such as maintaining personal files, preparing annual increment letters, promotion letters etc. It was also mentioned by him that he does not have power to sanction leaves to any employee and similarly did not have power to suspend or charge sheet any employee and he does not exercise any supervisory functions. He was cross-examined by the Employer side wherein he has stated that the pay scale of Office Assistant and Deputy Superintendent are different and they are members of different Union. He has also denied that he had signed Non-Managerial Staff Assessment Form as an Assessor.

(b) Kailash Kumar (EW-2), the second witness examined on behalf of the employees' Association submitted that normally he worked as Clerk, however, sometimes he has also worked under the supervisory capacity. He stated that he was appointed as Technical Supervisor and not as a Superintendent. He has also stated that he look after security of the entire department.

(v) Witness on behalf of the employe :-

(a) Shri V.C. Srivastava, who was working as Work Shop Manager stated that Deputy Superintendents/Supervisors are sanctioning leaves, authorizing material requisition and signing material requisition as authorized signatures. Superintendents are performing supervisory administrative and managerial nature of duties which includes sanction of leave of workmen working under them, to appraise performance of workmen and even they are authorized to issue gate pass to the workmen. He was cross-examined by the employees side wherein he has stated that the work of the general staff was neither managerial nor administrative nor supervisory in nature.

(b) P.C. Jha, who was working as Manager Security Transport, appeared as E.W.2 has stated in his evidence that the cadre of Deputy Superintendents/Superintendents workmen are separate and distinct. He also relied upon certain documents to show that the nature of the duties undertaken by the Supervisor/Deputy Superintendent are supervisory and administrative in nature. He was also cross-examined.

8. The terms and conditions of the employment and nature of work of Workmen vis-a-vis Supervisors/Deputy Superintendents and Workmen placed on record, in the form of a Superintendents chart, which is as follows :-

Terms and conditions of employment of Superintendents Vs. Workmen :-

Items	*Supervisors*	*Workmen*
Basic Pay	Rs.800/- to Rs.5000/- (Increments based on actual performance Appraisal System.)	Grade A1 225-25-375-30-555-35-1395 Grade A 200-20-320-24 464-29-1160 Grade B

		171-16-267-20 387-24-915 Grade C 140-13-218-16- 314-19- 675 Grade D 110-12-182-14 266-16-586
Dearness Allowance	25% OF BASIC + VDA + Fixed DA of Rs.700/- p.m. As per neutralization formula agreed with the DS ASSOCIATION through Record Note of Discussion.	As per provisions of settlement.
House Rent	15% Basic + DA	Rs.400/- per month w.e.f. 1/10/91
Special Allowance	Rs.375/.	-
Additional Special Allowance	Rs.1520	-
Factory Allowance	Rs.200	-
Leave Travel Allowance per year Medical Entitlement	Basic upto Rs.2000/- p.m.....Rs.4000/- p.a. Basic > Rs.2000/- p.m.....Rs.4500/- p.a. Self - Unlimited based on Actuals Family Medical - Basic upto Rs.2000/- p.m.....Rs.5000/- p.a. Basic > Rs.2000/- p.m.....Rs.5500/- p.a.	Rs.2000/-p.a (w.e.f. 5/11/93) Self - 2 months Basic + DA/Year Family ..... Rs.750/- per year Additional 1.For chronic case - 3 months (Basic + DA) 3 times in service career). 2. For Extensive treatment Claim minus one month Basic+DA but, subject to maximum 3 months. (Basic+DA)
Loans	Housing Rs.50,000/-	Housing..... Rs.40,000/- Hardship..... Hardship..... Rs.8,000/- Car..... Rs.35,000/- Car Repair Loan.....Rs.5,000/- Scooter..... Rs.10,000/- Furniture..... .....Rs.10,000/-
		Rs.10,000/- Scooter..... Rs.10,000/-
Standing Orders	Not Covered under certified standing orders.	Covered under certified standing orders.

Naure of work	***Supervisors (Superintendents)***	***Workmen***
Nature of work	Supdt. Primarily Supervise the work of the workmen.	Perform skilled & semi skilled manual work as directed by supervisory staff.
Leave	Approve leave of workmen working under them.	Not applicable.
Performance Appraisal	Appraises the performance of workmen working under them.	Not applicable.
Allocation of work	Allocates work of the Workmen under them.	Not applicable.
Intending Authority	Have authority to indent material inspect and draw material.	Not applicable.
Work permits	Are authorised to issue and receive work permits as per Factories Act, Section 36, sub-	Not applicable.

	section 2A.	
Attendance	Decides attendance, wage deductions if any of workmen authorises overtime work of Workmen.	Not authorised.
Gate Pass	Authorised to issue gate passes of workmen.	Not applicable.
Disciplinary Action	Initiates disciplinary action against delinquent workmen.	Does not apply.
Shift timings	7 am to 3 pm 3 pm to 11 pm 11 pm to 7 am	6 am to 2 pm 2 pm to 10 pm 10 pm to 6 am
Transportation	Are picked up by special vehicles from their residence to work and back.	Comes to Factory and back by the bus Service that piles throughout the city.
Canteen Facility	Authorised to Avail food items from the canteen on free vouchers	Have to pay at subsidised rate to avail foot Items from the canteen.

9. Certain documents such as investigation report investigated regarding theft by some workmen submitted by Deputy Superintendent, recommendation made on the issue of apprehension of miscreant to be a contractor, Non-Management Staff Assessment Forms wherein assessment has been conducted by the Supervisor, application for car loan etc. have been placed on record in order to show that the Supervisor/Deputy Superintendent were not workmen and are working under Supervisory capacity.

10. The labour Tribunal on the basis of the material on record passed award dated 29.4.1999 and come to the conclusion that :-

''सेवायोजको पक्ष के गवाहो के बयानों एवं दाखिल अभिलेखों से यह साबित नही होता है कि वादीगण प्रतिष्ठान में कोई प्रशासनिक या प्रबन्धकीय, परिवेक्षण सम्बन्धी कार्य करते है या एसे कार्य करने के लिए उन्हें अधिकार प्रदत्त किये गये है। इस सम्बन्ध में सेवायोजकों के गवाह ई/ डबलू/ 2 ने स्वयं माना है कि वे अपने विभाग के सुपरिन्टेन्डेन्ट केटेगरी के कर्मचारियों का कार्ड देखते है और आवश्यकता पडने पर सुपरिन्टेन्डेन्ट कैटेगरी के लोगो को कार्य के निर्देश देते है और उनसे कार्य कराते है और जो वे निर्देश देते है और उनसे कार्य कराते है और जो वे निर्देश देते है उसी के अनुसार कार्य होता है इससे यही प्रमाणित होता है कि वादीगणों के उपर भी अनेक उच्च अधिकारी प्रतिष्ठान में कार्यरत है जिनके अधीन और उनके निर्देशानुसार ही डिप्टी सुपरिन्टेन्डेन्ट/ सुपरिटेन्डेन्टस कार्य सम्पादित करते है और इनके कार्य का परिवेक्षण भी उनके द्वारा किया जाता है।

Thereafter, finally held that the employees are entitled for increase in their retirement age from 58 to 60 years. The Award was published on 7.1.2002.

11. In another industrial disputes (Industrial Dispute No.146/ decided on 26.9.1996), the Labour Tribunal IV U.P., Kanpur on the basis of the material produced before it come to the conclusion that the Deputy Superintendents and Supervisors are not workmen. The Labour Tribunal specifically come to the conclusion that -

'' स्पष्ट है कि श्री एस0 के0 मिश्रा के स्वैच्छिक सेवानिवृत्ति से लेने तथा श्री भट्टाचार्य द्वारा विवाद पर बल न दिये जाने की स्थिति मे एक मात्र संदर्भादेश मे निहित बिन्दु श्री एस0 डी0 गुप्ता के सम्बन्ध में निस्तारित किया जाना शेष रह जाता है। प्रश्न यह है कि क्या डी0 एस0 का पदनाम परिवर्तित पदनाम है जिसमें पूर्व नामित पदों के कार्य कलापों से कोई भिन्नता नही आई है अथवा यह पद प्रोन्नति का है। वादी यह प्रमाणित नही कर सके है कि जी0 एस0 ग्रेड – ए/ फोरमैन, टी0 एस0/ ओ0 एस0 के कार्य की प्रकृति डी0 एस0 के कार्य की प्रकृति के समरुप रही है। इसके विपरीत प्रदर्श ई – 1 के 29.2.84

के पत्र से स्पष्ट है कि वादी श्री गुप्ता को डी0 एस0 के पद हेतु चयनित एवं प्रोन्नत किया गया था। अतः यह कहना कि यह प्रकरण पदनाम परिवर्तन का है, सही नही है। पत्र मे उल्लेख है कि प्रोबेशन की अवधि में असंतोषजनक कार्य होने पर उन्हें मूल पद पर प्रत्यावर्तित किया जा सकता है। यह शब्दावली भी प्रमाणित करती है कि उन्हें डी0 एस0 के पद पद प्रोन्नत किया गया। पत्र में स्पष्ट उल्लेख है कि डी0 एस0 का पद सुपरवाइजरी श्रेणी का है तथा सामूहिक सौदेबाजी की परिधि के बाहर समझा जायेगा। नियुक्ति/ प्रोन्नत पत्र मे मूल वेतन, महंगाई भत्ते व अन्य सेवा शर्तों का विशद विवेचन है जिसे वादी ने स्वीकार कर अपने हस्ताक्षर किये है।

12. Learned counsel for the rival parties have relied upon following judgments in order to substantiate their rival submissions :-

(a) In the matter of ***Anand Regional Coop. Oil Seedgrowers' Union Ltd. vs Shaileshkumar Harshadbhai Shah*** reported at 2006 SCC (L & S) 1486; ***2006 (6) SCC 548,*** the Hon'ble Supreme Court has held that :-

"13. The ingredients of the definition of 'workman' must be considered having regard to the following factors:

(i) Any person employed to do any skilled or unskilled work, but does not include any such person employed in any industry for hire or reward.

(ii) There must exist a relationship of employer and employee.

(iii) The persons inter alia excluded are those who are employed mainly in a managerial or administrative capacity.

14. For determining the question as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations.

15. Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration. An undue importance need not be given for the designation of an employee, or the name assigned to, the class to which he belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised. Being incharge of the section alone and that too it being a small one and relating to quality control would not answer the test."

(b) In the matter of ***S.K. Maini vs M/s Carona Sahu Company Ltd. and Others*** *reported at* ***(1994) 3 SCC 510 the Hon'ble Supreme Court has held that :-***

"11. It may be noted in this connection that in view of the amendment of Section2(s) enlarging the ambit of the classification of various types of workmen except managerial force, entire labour force has been included within the definition of workman under Section 2(s) as has been indicated by this Court in S.K. Verma v. Mahesh Chandra8. But if the principal function is of supervisory nature, the employee concerned will not be workman only if he draws a particular quantum of salary at the relevant time as indicated in Section 2(s). In the instant case, it, however, appears to us that Shri Maini as Manager/In-charge of the shop was made responsible and liable to make good such amount of credit whether such sale on credit had been made by him or by any other member of the staff in employment under him with or without his knowledge. Under the terms and conditions of service, he was asked to take charge of the shop to which his service was transferred. Mr Maini, under the

terms and conditions of service, was required to be held responsible and liable for any loss suffered by the Company due to deterioration of the quality of the stock or any part thereof and loss of any of the otherarticles lying in the shop caused by reason of any act of negligence and/or omission to take any precaution by the employees. Mr Maini was also required to notify the Company by trunk call and/or telegram not later than three hours after the discovery in the said shop of any fire, theft, burglary, loot or arson. He was required to investigate into the matter immediately and get the cause and amount of loss established by local authorities. Mr Maini as in- charge of the shop was required to keep and maintain proper accounts as approved by the Company indicating the exact amount to be paid from the receipts from the respective staff. Under Clause XIII of the terms and conditions of the service, Mr Maini would remain fully responsible to the Company for damages or loss caused by acts or commission of the loss of 8 (1983) 4 SCC 214: 1983 SCC (L&S) 510: (1983) 3 SCR 799 the employees of the shop. Under Clause XV of the terms and conditions of service, the shop in-charge was required to keep himself fully conversant with all the regulations in force which may come into force from time to time with regard to Octroi, Sales Tax and Shops and Commercial Establishments Act and/or any other local regulation applicable to the shop. Clause XXI indicates that non- compliance with any of the local or State Acts or Central Acts would be viewed seriously and Manager would be held responsible for any fine/penalty imposed and/or prosecution launched against the Company. It also appears that in the event of a salesman being absent, the shop in-charge is empowered to appoint temporary helper for the said period to work as acting salesman. Similarly, in the event of helper being absent, the shop manager is also empowered to appoint part-time sweeper and to entrust the work of a helper to a sweeper. Such functions, in our view, appear to be administrative and managerial. By virtue of his being in-charge of the shop, he was the principal officer-in-charge of the management of the shop. We therefore find justification in the finding of the High Court that the principal function of the appellant was of administrative and managerial nature. It is true that he himself was also required to do some works of clerical nature but it appears to us that by and large Shri Maini being incharge of the management of the shop had been principally discharging the administrative and managerial work. A manager or an administrative officer is generally invested with the power of supervision in contradistinction to the stereotype work of a clerk. This Court in Lloyds Bank Ltd. v. Panna Lal Gupta has indicated that a manager or administrator generally occupies a position of command or decision and is authorised to act in certain matters within the limits of his authoritywithout the sanction of his superior. In the instant case within the authority indicated in the terms and conditions of his service, Shri Maini was authorised to take decisions in the matter of temporary appointments and in taking all reasonable steps incidental to the proper running of the shop. Precisely for the said reason, Shri Maini had signed the statutory forms as an employer. It should be home in mind that an employee discharging managerial duties and functions may not, as a matter of course, be invested with the power of appointment

and discharge of other employees. It is not unlikely that in a big set-up such power is not invested to a local manager but such power is given to some superior officers also in the management cadre at divisional or regional level. The unit in a local shop may not be large but management of such small unit may fulfil the requirements and incidences of managerial functions. On a close scrutiny of the nature of duties and functions of the Shop Manager with reference to the admitted terms and conditions of service of Shri Maini, it appears to us that the High Court was justified in holding that the appellant was not a work-man under Section 2(s) of the Industrial Disputes Act. In the aforesaid facts, it is not necessary to go into the question as to whether or not domestic enquiry had been properly conducted or the Enquiring Officer had acted with bias. It is also not necessary to decide for the purpose of the disposal of the appeal (1961) 1 LLJ 18 : AIR 1967 SC 428 as to whether or not the Company was entitled to lead fresh evidence in support of the domestic enquiry before the Labour Court. The appeal is, therefore, dismissed without, however, any order as to cost."

(c) In the matter of ***Management of M/s Sonepat Co-operative Sugar Mills Ltd. vs. Ajit Singh*** reported at ***2005 LLR 309; 2005 (3) SCC 232,*** the Hon'ble Supreme Court has held that :-

*"21. It is now trite that the issue as to whether an employee answers the description of a workman or not has to be determined on the basis of a conclusive evidence.*The said question, thus, would require full consideration of all aspects of the matter.

22. The jurisdiction of the Industrial Court to make an award in the dispute would depend upon a finding as to whether the concerned employee is a workman or not. When such an issue is raised, the same being a jurisdictional one, the findings of the Labour Court in that behalf would be subject to judicial review.

23. The High Court furthermore applied wrong legal tests in following S.K. Verma (supra) in upholding the views of the Labour Court which itself approached the matter from a wrong angle. The Labour Court as also the High Court also posed a wrong question unto themselves and, thus, misdirected themselves in law.

24. In Cholan Roadways Limited Vs. G. Thirugnanasambandam [2004 (10) SCALE 578], this Court held:

"34.... In the instant case the Presiding Officer, Industrial Tribunal as also the learned Single Judge and the Division Bench of the High Court misdirected themselves in law insofar as they failed to pose unto themselves correct questions. It is now well-settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of Res ipsa loquitur which wasrelevant for the purpose of this case and, thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not garmane for determining the issue, namely, the passengers of the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the

correct standard of proof in relation to a domestic enquiry, which in "preponderance of probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out."

(d) In the matter of ***Bennett Coleman and Co. Limited (M/s) vs. Shri Yadeshwar Kumar*** reported at ***2007 LLR 62,*** the Delhi High Court has held that :-

"9. A perusal of the Award and evidence shows that duties of the respondent were to supervise chowkidar and sweepers. He used to mark attendance of the chowkidars and security staff working under him. He used to forward leave and overtime slips to the security officer although he was not sanctioning authority but he was recommending authority. Documents with his recommendations were placed on record. It was his duty to report to administrative manager or security officer about any untoward incident.On the other hand the workman relied upon certificate issued by the management that he was a skilled printer. This certificate was of the period when he was working as a printer. Respondent produced another certificate issued by the Labour Officer of the management wherein it is mentioned that workman is a good workman. He alleged that he was doing 8 hours duty being a workman whereas the administrative and officers category persons were working six and a half hours in a day. Because of some supervisory work, apart from doing his main work of a manual/ clerical or technical in nature, he does not become a supervisor.

10. The Tribunal on the basis of the fact that one Chander Kant was a senior officer to the respondent and the work of respondent was being over seen by Chander Kant concluded that respondent was not a supervisor. The Tribunal further observed that management had placed on record the leave applications of persons working under respondent and handled by him, but these were not proved as per rule of evidence. The same could not be relied upon. The Tribunal thereafter concluded that " in the light if the evidence led by the workman is analysed, it is clear that he was simply supervising the work of other persons and his functions were not of managerial or administrative in nature. No doubt certain applications have been sanctioned by Sh. Yadeshwar Kumar as departmental head but there were two persons who were working above him and so he cannot be said to be working in a supervisory capacity.

11. Obviously, the approach of the Labour Court has been contrary to the law laid down by the Supreme court in a series of judgments. In order to decide whether a person is a workman or not, the dominant and main functions are to be considered. A person can be called a supervisor if he is entrusted with the job of supervising other workmen who work under him. There is no dispute that the respondent was not only designated as Night Supervisor but he was having job of supervision over security guards, chowkidars and sweepers. He used to forward over time claims of the persons working under him after verifying the same. He used to recommend leave of the persons working under him. He was in charge of the security of the property of petitioner and used to supervise the work of security guards etc. It is not necessary that a supervisor has to be top cadre management person. A supervisor may occupy a lower position in the organisation chart of the company where

in the descending order may be CMD, MD, General Managers, Deputy Managers, Managers, Administrative Officer and supervisor etc. It has been laid down by the Supreme Court that in order to be a workman a person must be performing one of the functions as specified in Section 2(s) of the Act and it was not sufficient that he was not performing administrative or managerial function. Tribunal also went in wrong in law by observing that strict principles of rules of evidence are required to be followed by the Tribunal. While weighing the material placed before the Tribunal, a Tribunal is not to follow the strict rules of evidence and neither has to arrive at a conclusion by considering the proof beyond reasonable doubt. A Tribunal has to weigh the material placed before it by both sides. All materials which are logically probative for a prudent mind are liable to be considered. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility."

(e) In the matter of ***Vijay Dattatraya Kale vs. Peico Electronics and Electricals Ltd.*** *reported at* ***2009 (121) FLR 577,*** *the High Court of Bombay has held that :-*

"Coming to the observation of the Labour Court in the present case, it appears that the Labour Court has rightly referred to the main attributes of the petitioner's function which were supervisory in nature. The work of appraisal of C-4 category staff and recommendation of their leave have been taken into account by the Labour Court. Moreover, the Labour Court has rightly pointed out that the power to recommend, assess and verify the work done by the subordinate staff was supervisory work and not clerical. In fact, interestingly, the petitioner has not stated anywhere that the nature of his work was clerical. On the other hand, the petitioner admitted that he belongs to M-1 category, which is meant for Manager, and was not covered by any settlement or agreement entered into between the Union and the management. In making these observations, the Labour Court has referred to oral and documentary evidence in the matter. The tasks mentioned earlier in paragraph 5 supra, referred to by the learned Counsel for the respondent No. 1 are also supervisory in nature since they involve the overseeing of actions. In any case, they are not tasks which are performed by the labour force. In this view of the matter, I find no error of law apparent on the face of the record."

(f) In the matter of ***H.R. Adyanthaya and Others vs. Sandoz (INDIA) Ltd. and Others*** *reported at* ***(1994) 5 SCC 737, the Hon'ble Supreme Court has held that :-***

"18. The legal position that arises from the statutory provisions and from the aforesaid survey of the decisions may now be summarised as follows.

19. Till 29-8-1956 the definition of workman under the ID Act was confined to skilled and unskilled manual or clerical work and did not include the categories of persons who were employed to do 'supervisory' and 'technical' work. The said categories came to be included in the definition 9 (1992) 1 SCC 281: 1992 SCC (L&S) 263 w.e.f. 29-8-1956 by virtue of the Amending Act 36 of 1956. It is, further, for the first time that by virtue of the Amending Act 46 of 1982, the categories of workmen employed to do 'operational' work came to be included in the definition. What is more, it is by virtue of this amendment that for the first time those doing non-manual unskilled and

skilled work also came to be included in the definition with the result that the persons doing skilled and unskilled work whether manual or otherwise, qualified to become workmen under the ID Act.

20. The decision in May & Baker case was delivered when the definition did not include either 'technical' or 'supervisory' or 'operational' categories of workmen. That is why the contention on behalf of the workmen had to be based on the manual and clerical nature of the work done by the sales representatives in that case. The Court had also, therefore, to decide the category of the sales representative with reference to whether the work done by him was of a clerical or manual nature. The Court's finding was that the canvassing for sale was neither clerical nor manual, and the clerical work done by him formed a small fraction of his work. Hence, the sales representative was not a workman.

21. In WIMCO case, the dispute had arisen on 18-8-1961 under the U.P. Industrial Disputes Act and at the relevant time the definition of the workman in that Act was the same as under the Central Act, i.e., the ID Act which had by virtue of the Amending Act 36 of 1956 added to the categories of workmen, those doing supervisory and technical work. However, the argument advanced before the Court was not on the basis of the supervisory or technical nature of the work done by the employees concerned, viz., inspectors, salesmen and retail salesmen. The argument instead, both before the Industrial Tribunal and this Court was based on the clerical work put in by them, which was found to be 75 per cent of their work. This Court confirmed the finding of the Tribunal that the employees concerned were workmen because 75 per cent of their time was devoted to the writing work. The incidental question was whether the sales-office and the factory and the factory-office formed part of one and the same industrial establishment or were independent of each other. The Court observed that it would be unreasonable to say that those who were producing matches were workmen and those who sold them were not. In other words, the Court did hold that the work of selling matches was as much an operational part of the industrial establishment as was that of manufacturing.

22. In Burmah Shell case the workmen involved were Sales Engineering Representatives and District Sales Representatives. The dispute had arisen on 28-10-1967 when the categories of workmen doing supervisory and technical work stood included in the definition of workman. The Court found that the work done by the Sales Engineering Representatives as well as District Sales Representatives was neither clerical nor supervisory nor technical. An effort was made on behalf of the workmen to contend that the work of Sales Engineering Representatives was technical. The Court repelled that contention by pointing out that the amount of technical work that they did was ancillary to the chief work of promoting sales and the mere fact that they possessed technical knowledge for such purpose, did not make their work technical. The Court also found that advising and removing complaints so as to promote sales remained outside the scope of the technical work. As regards the District Sales Representatives, the argument was that their work was mainly of clerical nature which was negatived by the Court by pointing out that the clerical work involved was incidental to their

main work of promoting sales. What is necessary further to remember in this case is that the Court relied upon its earlier decision in May & Baker case1 and pointed out that in order to qualify to be a workman under the ID Act a person concerned had to satisfy that he fell in any of the four categories of manual, clerical, supervisory or technical workman.

23. However, the decisions in the later cases, viz., S.K. Verma, Delton Cable, and Ciba Geigy cases did not notice the earlier decisions in May & Baker, WIMC0 and Burmah Shell cases and the very same contention, viz., if a person did not fall within any of the categories of manual, clerical, supervisory or technical, he would qualify to be workman merely because he is not covered by either of the four exceptions to the definition, was canvassed and though negatived in earlier decisions, was accepted. Further, in those cases the Development Officer of the LIC, the Security Inspector at the gate of the factory and Stenographer-cum-Accountant respectively, were held to be workmen on the facts of those cases. It is the decision of this Court in A. Sundarambal case which pointed out that the law laid down in May and Baker case was still good and was not in terms disowned.

24. We thus have three three-Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz., manual, clerical, supervisory or technical and two two-Judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-Judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Burmah SheIl cases have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation."

(g) In the matter of ***Ashok Kumar And Ors. vs Managing Director, U.P. Leather Development and Marketing Corporation and Another*** reported at ***1998 ILLJ All,*** the Allahabad High Court has held that :-

24. It may be noticed that as provided under the Industrial Disputes Act the term 'workman' does not include any such person who being employed in a supervisory capacity, exercises either by the nature of the duties attached to the officer or by reason of the powers vested in him functions mainly of a managerial nature.

25. The word 'supervise' and its derivatives have to be construed in the light of the context. What determines the question as to whether a person is doing supervisory work mainly of a managerial nature or not depends much on the nature of the duties and functions assigned to him. The absence of supervisory work is the supervision by one person over the work of others and it embraces within its fold the authority to control and give

*directions occupying a position of command or authority to take a decision and act within the limit of his authority in an independent manner. Having regard to the various categories of the services the use of different words like 'supervisory', 'managerial' and 'administrative' it is not necessary to import the motions of one into the interpretation of others. Dealing with the disputes with respect to the nature of the work performed by an employee as to whether it was of supervisory nature or otherwise the industrial adjudication generally considers the essence of the matter and does not attach undue importance to the designation of the employee. It is always a matter of determining what the primary duties of an emp*loyee were and the emphasis is not on the injunctions incidental to his main duties.

(h) In the matter of ***Arkal Govind Raj Rao vs Ciba Geigy Of India Ltd. Bombay*** reported at ***1985 AIR SC 985; 1985 (3) SCC 371,*** the Hon'ble Supreme Court has held that :-

"16. The test that one must employ in such a case is what was the primary, basic or dominant nature of duties for which the person whose status is under enquiry was employed. A few extra duties would hardly be relevant to determine his status. The words like managerial or supervisory have to be understood in their proper connotation and their mere use should not detract from the truth."

(i) In the matter of ***Ananda Bazar Patrika Private Ltd.vs The Workmen*** reported at ***1970 SCC 3 248,*** the Hon'ble Supreme Court has held that :-

"3. The question, whether a person is employed in a supervisory capacity or on clerical work, in our opinion, depends upon whether the main and principal duties carried out by him are those of a supervisory character, or of a nature carried oat by a clerk. If a person is mainly doing supervisory work, but, incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and, conversely, if the main work done is of clerical nature, the more fact that some supervisory duties are also carried out, incidentally or as a small fraction of the work done by him wil1 not convert his employment as a clerk into one in supervisory capacity. This principle finds support from the decisions of this Court in South Indian Bank, Ltd. v. A.R. Chacko 1964-I.L.L. J. 19 and May & Baker (India), Ltd. v. their workmen 1961-II L.L J. 94. In the present case, we have, therefore, to examine the evidence to see whether the labour court is right, in holding that, because of the main work of Guptas being clerical in nature, ho was not employed in supervisory capacity.

6. On these facts, we are unable to hold that the labour court committed any error is arriving at the decision that Gupta was employed on clerical work and not in supervisory capacity. The principal work that Gupta was doing was that of maintaining and writing the cash book and of preparing various returns. Being the senior most clerk, he was put in charge of the provident fund section and was given a small amount of control over the other clerks working in his section. The only powers he could exercise over them was to allocate work between them to permit them to leave during office hours, and to recommend their leave applications. These few minor duties of a supervisory nature cannot, in our opinion, convert his office of senior clerk in

charge into that of a supervisor." (emphasis supplied)

13. On the basis of abovementioned submissions and judgments, in order to determine 'whether an employee is a workman or Supervisor', following factors are relevant for consideration :-

(i) According to Section 2(z) of the U.P. Industrial Disputes Act, 1947 which is para materia to Section 2(s) of the Industrial Disputes Act, workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge, or retrenchment has led to that dispute, but does not include any such person -

(a) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(b) who is employed in the police service or as an officer or other employee of a prison; or

(c) who is employed mainly in a managerial or administrative capacity, or

(d) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

(ii) Mere designation of the post is not decisive of nature of the employment.

(iii) An employee employed mainly in a capacity of a Supervisor discharging the duties of allocation of jobs, assessment of work, recommendation of leave, carried out promotional appraisals but incidentally discharging other technical work would not fall within the definition of workman.

(iv) Whether an employee is working on any particular capacity as workman or as a Supervisor is a mixed question of fact and law, which has to be decided on the basis of conclusive evidence only, which includes oral as well as documentary.

(v) Whether a person is doing supervisory work mainly of a managerial nature or not will depend much on the nature of the duties and the functions assigned to him.

(vi) If a person is merely doing supervisory work but incidentally or for a fraction of time also does some clerical work, it would have to be held that he is employed in supervisory capacity and in case, if the main work is done of clerical nature and some supervisory duties are also carried out incidentally the work done by the employee will not convert his employment as a workman into one in supervisory capacity.

14. We have considered the oral as well as documentary evidence, submissions made by the parties, judgments cited and the material available on record.

15. It is well settled principle of law that he who asserts must prove. Burden of proof is the obligation to adduce evidence in support of the claim

asserted. The obligation to lead evidence to establish an fact is on the party making the said fact or is relying upon the said fact. In the present case, the initial burden is on employees to place evidence that they are 'Workmen', however, they have failed to produce such evidence, which is sufficient to discharge their initial burden. The employees have failed to prove their nature of duties being of Workmen, therefore, we are unable to hold on the basis of evidence brought on record that they are undertaking work of a workman.

16. In the matter of ***Workmen of Nilgiri Co-operative Marketing Society Ltd. vs. State of U.P. and others*** *reported at* ***(2004) 3 SCC 514,*** the Hon'ble Supreme Court has held in para 47, 48 , 49 and 50 that :-

"BURDEN OF PROOF :-

47. It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.

48. In N.C. John Vs. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Others [1973 Lab. I.C. 398], the Kerala High Court held:

"The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship."

49. In Swapan das Gupta and Others Vs. The First Labour Court of West Bengal and Others [1975 Lab. I.C. 202] it has been held:

"Where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

50. The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

17. In view of above discussion, we are of considered view that the employees have failed to bring on record conclusive evidence that they are employed mainly as a 'Workmen'. As the employees have failed to discharge their initial burden, we have not considered the evidence brought on the record by the employer to contradict the stand of the employees.

18. Accordingly, these writ petitions are finally decided in the following terms :-

(i) WRIT C No.12468 of 2002 (Duncans Industries Ltd. vs. State Of U.P.And Others) - Impugned award dated 29.4.1999 (published on 7.1.2002) whereby Supervisors/Assistant Supervisors were held to be Workmen, passed by the Industrial Tribunal - III, U.P. Kanpur in Adjudication Case No.11 of 1998 is set aside and the writ petition is allowed.

(ii) WRIT C No.37147 of 1996 (S.D. Gupta vs. Labour Court IV and Others) - Impugned award dated 26.9.1996 passed by Labour Court IV Kanpur in Industrial Dispute No.146/1991 wherein it has been held that Supervisors/Superintendents are not Wokmen is upheld. Accordingly, this writ petition is dismissed.

(iii) WRIT C No.39403 of 1999 (I.E.L.Supervisors Association vs. State Of U.P And Others) - This writ petition has been filed with the prayer for publication of award dated 23.4.1999 which was subsequently published on 7.1.2002 and has been challenged in Writ Petition No.12468 of 2002. Therefore, this writ petition is dismissed as rendered infructuous.

(iv) WRIT C No.32788 of 2000 (I.E.L.Supervisior Association vs. State Of U.P. And Others) - This writ petition has been filed for restraining the State Government from publishing the fresh award dated 16.6.2000. This petition is rendered infructuous as subsequently, award passed earlier was published on 7.1.2002 and has been challenged in Writ Petition No.12468 of 2002. Therefore, this writ petition is dismissed as rendered infructuous.

(v) WRIT C No.44848 of 2000 (Duncans Industries Ltd. vs. State Of U.P.And Others) - This writ petition has been filed against the order dated 30.9.2000 whereby the State Government has referred the Adjudication No.11 of 1988 again for adjudication. This writ petition is rendered infructuous as award has been passed and published on 7.1.2002 which is under challenge in Writ Petition No.12468 of 2002. Therefore, this writ petition is dismissed as rendered infructuous.

(vi) WRIT C No.53016 of 2000 (I.E.L. Supervisors Association and Others vs. Industrial Tribunal And Others) - This writ petition has been filed challenging the reference order dated 30.9.2000. This writ petition is also dismissed as infructuous, as subsequently, the award has been passed and published on 7.1.2002 which is under challenge in Writ Petition No.12468 of 2002.

(vii) WRIT C No. - 16447 of 2006 (Duncans Industries Limited vs. State Of U.P. And Others) - This writ petition has been filed challenging the award dated 21.5.2005 whereby Supervisors were held to be Workmen. The award dated 21.5.2005 is hereby set aside and the writ petition is allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2019

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ–C No. 709 of 2019

Diocese Of Varanasi Education Society And Others ...Petitioners
Versus
State of U.P. And Others ...Respondents

Counsel for the Petitioners:
Sri Pankaj Srivastava

Counsel for the Respondents:
C.S.C.

A. U.P. Self-Financed Independent Schools (Fee Regulation) Act, 2018. Is a legislation to ensure easy accessibility to each and every citizen and further to expand fairness and reasonability in administration of the institutions, including minority institutions, without interference therein for broader interest of the ultimate consumer, as such we do not find any violation of Article 30(1) of the Constitution of India while introducing U.P. Self-Financed Independent Schools (Fee Regulation) Act, 2018.

Writ Petition dismissed in limine.

CHRONOLOGICAL LIST OF CASES CITED:

1: - 2002 (8) SCC 481, TMA Pai Foundation Vs. State of Karnataka

2: - AIR 1958 SC 956,

3: - (2007 (1) SCC 386, Malankara Syrian Catholic College Vs. T. Jose

4: - 2010 (8) SCC 49, Sindhi Education Society Vs. Chief Secretary, Government of NCT of Delhi. (E-7)

(Delivered by Hon'ble Govind Mathur,C.J.
Hon'ble Saurabh Shyam Shamshery, J.)

1. To regulate fees in self financed independent schools in the State of Uttar Pradesh and the matter connected therewith or incidental thereto, the Uttar Pradesh State Legislature enacted an act in the name of "U.P. Self-Financed Independent Schools (Fee Regulation) Act, 2018". The enactment aforesaid received the assent of the Governor on 12th September, 2018 and came to be published in the U.P. Gazette, Extraordinary, Part I, Section (Ka) dated 12th September, 2018.

2. The act aforesaid is having application to all Self-Financed Independent Schools of Pre-Primary, Primary, Upper Primary, High School and Intermediate Colleges granted recognition/affiliation by boards defined under clause (c) of Section 2 by Uttar Pradesh Basic Shiksha Parishad, Board of High School and Intermediate Education Uttar Pradesh, Central Board of Secondary Education, Indian Council of Secondary Education, International Baccalaureate and International General Certificate of Secondary Education or any other Board notified by the Government from time to time. The act is also having application on minority institutions recognized/affiliated by any of the boards referred above.

3. Section 2 of the Act provides definitions to different important terms referred in the act including District Fee Regulatory Committee, Educational purposes, Minority educational institution and Self-Financed Independent School. For ready reference, the definitions of the terms mentioned above, as prescribed under Section 2 of the Act is quoted below:-

*"**Definitions.-** In this Act, unless the context otherwise requires.-*

(a) "Affiliation" means enrolment of a recognized school among the list of approved schools of a Board for the prescribed/approved courses of studies upto Classes V, VII, X and/or XII as well as those preparing students according to prescribed courses for the Boards' examinations;

(b) "Academic Year" means commencement and end of academic session specified by the respective boards;

(c) "Appropriate authority" means the District Fee Regulatory Committee constituted under Section 8;

(d) "Board" means the Uttar Pradesh Basic Shiksha Parishad, Board of High School and Intermediate Education Uttar Pradesh, Central Board of Secondary Education (CBSE), Indian Council of Secondary Education (ICSE), International Baccalaureate (IB), International General Certificate of Secondary Education (IGCSE) or any other Board notified by the Government from time to time.

(e) "District Inspector of Schools" means an officer appointed in each district of the State in such manner as may be prescribed or any other officer authorized by the Government to exercise

the powers and perform the functions of District Inspector of Schools of Secondary Education;

(f) "District Fee Regulatory Committee" means the District Fee Regulatory Committee constituted under Section 8;

(g) "Educational purposes" means any educational activity undertaken by a recognized school, inter alia, including, creation of courses/curriculum, patents, research and development activities, teacher training programmes, staff development programmes,up-gradation of technology, vocational training, co-curricular activities and sports related infrastructure and equipment and establishment of a new branch or a new school;

(h) "Eligible educational entity" means of society registered under the Societies Registration Act, 1860 or public trusts or trusts created under the Indian Trusts Act, 1882, or companies registered under the Companies Act, 2013 or any other entity permitted by any of the Boards which operates, manages and maintains recognized schools in the State;

(i) "Government" means the Government of the State of Uttar Pradesh;

(j) "Guardian" means a parent or a person whose name is registered in school as guardian by the parent of a student;

(k) "Head of the school" means the principal or as may be called by any other name of a recognized school designated by the eligible educational entity to manage the administration and academic affairs of the recognized school, as the case may be;

(l)"Joint Director of Education" means divisional level officer of Education Department of the Government;

(m) "Local authority" means a local area notified by a Nagar Panchayat, Nagar Palika, Nagar Nigam or a Zila Panchayat having jurisdiction over that local area;

(n) "Management Committee" means the body of persons of a recognized school authorized by competent body/authority to manage the functioning of that school;

(o) "Minority educational institution" means an institution established and administered by a minority, whether based on religion or language, having the right to do so under clause (1) of Article 30 of the Constitution of India;

(p) "Parent Association" means an Association of Parents of a recognized school to be constituted in such manner as may be prescribed;

(q) "Parent-Teachers Association" means Parent-Teachers Association framed under Parent-Teachers Association Regulations, 1986 for the schools recognized by Board of Secondary Education, Uttar Pradesh and for the other boards Parent-Teachers Association as constituted by the school with parent and teachers of the school;

(r) "Permitted fee increase" means the increase in fee permitted under Section 4;

(s) "P.W.D." means Public Works Department of the Government;

(t) "Recognized school" means a school recognized by a Board for operation in the State.

(u) "Recognition" means formal certification granted by a Board for operation in the State to a school that it conforms to the standards and conditions laid down by the Government to operate a school;

(v) "Self-Financed Independent School" means an institution imparting education wherein major expenses of the institution, for any purpose whatsoever,

are to be met by the management of such institution itself and/or out of the school funds/revenue or through contributions, loan borrowings including loans obtained by creation of any emcumbrances on School property;

(w) "School" includes;

(i) Pre-primary school imparting education below the primary stage such as nursery and kindergarten; or

(ii) Primary school imparting education from Classes I to V (both inclusive); or

(iii) Upper primary imparting education from Classes VI to VIII (both inclusive); or

(iv) High school imparting education to Classes IX to X; or

(v) Intermediate college imparting education to Classes XI to XII;

managed by an eligible educational entity and affiliated to a Board as a self-financed independent school;

Provided that where such school operates on a standalone basis as a pre-primary school imparting education below the primary stage, it shall not come under the purview of this Act;

(x) "School property" means all movable and immovable property, tangible or intangible, owned by, or in the possession of, the recognized school or the eligible educational entity within the school campus and/or related to the concerned recognized school and all other rights and interests in, or arising out of, such property, and includes land, building and its appurtenances, play grounds, hostels, furniture, books, apparatus, maps, intellectual property, equipment, utensils, cash, reserve funds, investments and bank balances;

(y) "State" means the State of Uttar Pradesh;

(z) "State Appellate Authority of Self-Financed Independent Schools" means State Self-Financed Independent Schools Authority constituted under Section 9."

4. Chapter II of the act relates to admission to schools and fees and as per Section 3 a recognized school shall determine its fee structure under sub-sections (1) and (2) of Section 4 for different classes/grades/school levels commensurate to, *inter alia*, meeting its operational expenses, providing for augmentation of facilities and expansion of infrastructure and for providing facilities to the students, to generate reasonable surplus to be utilized for development of educational purposes including establishment of a new branch of a new school under the management of the same eligible educational entity.

5. The provision aforesaid further provides Possible Fee Components and certain checks in settling the fee including that no school shall except with the prior approval of the appropriate authority, charge, during the academic year any fee in excess of the fee intimated to the appropriate authority under sub-section (4) and further that every recognized school shall ensure that no capitation fee is charges. It is also provided that no student shall be compelled to purchase books, shoes, socks and uniform, etc. from a particular shop and the school uniform shall not be changed within live consecutive academic years. If change is required, it can be changed with proper justification with prior approval of District Fee Regulatory Committee.

6. Section 4 relates to fixation of fee and that reads as follows:-

*"**Fixation of fee.** - (1) Permitted fee increase for existing students - A recognized school may revise its fee annually for its existing students by itself for each grade/class/level of school equivalent to average per centage per capita increase of monthly salary of teaching staff of previous year, but the fee increase shall not exceed latest available yearly per centage increase in consumer price index + fiver per cent of the fee realised from the student;*

Explanation. - At the time of admission, irrespective of the grade/class in which a student is entering the school, the school shall provide to the guardian, the complete fee structure for all grade/class upto grade/Class XII applicable to new students for that particular year. This fee structure shall become the base for calculating subsequent annual permitted fee increase on compounding basis for each grade/class to determine the fee applicable to the students for future grade/class:

Provided that, in case of implementation of the pay commission recommendation in any School, in that year the term "but the fee increase shall not exceed latest available yearly per centage increase in consumer price index+five per cent of the fee realized from the student" shall not apply. When pay commission recommendation has been implemented in the school, that year, school may revise its fee annually for its existing students by itself for each grade/class/level of school equivalent to average per centage per capita increase monthly salary of teaching staff of previous year. This shall be applied from year 2018-2019;

In case of the implementation of levy of any new cess, it may be charged with proper justification with prior approval of District Fee Regulatory Committee upto the level of impact of that cess;

For the previously admitted students, computation of Permitted Fee increase for the first Year 2018-2019 in accordance with sub-section (1) The fee to be fixed for Year 2018-19 shall be the lower of the fee computed taking base Year 2015-16 and computations of fee based on taking 2017-18 as base year and calculated as per provision of sub-section (1);

(2) Permitted fee fixation for new student- The school shall be free to determine its fee for the new students for any class/grade/level seeking fresh admissions, in a particular academic year subject to guidelines, if any, notified by the Government. Increase in fee for subsequent years for these students shall be in accordance with sub-section (1)."

7. Section 6 of the act provides for Development Fund and according to that not more than 15% of total income of school during the financial year transferred to Eligible Educational Entity as development fund.

8. As per Section 7, a school shall 60 days prior to commencement of admissions in each academic year, publish on its notice board or on its website the details relating to issues mentioned below:-

"... (a) general information about the recognized school, accreditation, and affiliation;

(b) admission policy;

(c) details of the fee and fund structure for the previous year, current year and the ensuing year;

(d) details of facilities including hostel, sports, co-curricular activities and extracurricular activities;

(e) details of student to space ratio and student to teacher ratio;

(f) details of the salaries of teachers in Academic Year 2015-2016, 2016-2017, 2017-2018;

(g) calendar of major events being organized by the recognized school throughout the academic year for students; and

(h) calendar of major events being organized by the recognized school throughout the academic year for teacher training and staff development programmes;

(2) Unless otherwise specified under this Act or the rules made thereunder and the information disclosed in sub-section(1) shall remain in the public domain for the entire academic year;"

9. Section 8 of the Act provides for District Fee Regulatory Committee, its constitution, functions and power. As per this provision, a District Fee Regulatory Committee is required to be constituted in every district of the State consisting of District Magistrate (Ex-officio Chairman), a Chartered Accountant to be nominated by the District Magistrate, an Engineer, not below the rank of Executive Engineer of PWD nominated by the District Magistrate, a senior officer of State Finance and Accounts Service nominated by the District Magistrate, a parent of Parent Teachers Association of a school situated in the district nominated by the District Magistrate, an eminent principal/manager/administrator of a self-financed school nominated by the District Magistrate and the District Inspector of Schools. The District Fee Regulatory Committee is having powers as prescribed under sub-section (4) of Section 8 and those are as under:-

"8(4).- The District Fee Regulatory Committee shall have power to:-

(a) take decisions on proposals received from the management committee regarding the proposed fee increase beyond the permitted fee increase under sub-section (1) of Section 4;

(b) hear complaint of a student or guardian or parent teacher association of such School whose complaint remains unheard by the Head of the School within fifteen working days under this Act:-

(i) made for fee being charged in excess of the fee intimated to the appropriate authority under Section 4;

(ii) made for capitation fee being charged;

(iii) made for revision of fee during ensuing academic year; and

(iv) made for increase in fee more than the permitted fee increase without obtaining approval of the appropriate authority;

(v) made for compulsion to purchase books, shoes, socks and uniform, etc., from a particular shop;

(vi) change of school dress within five years, without prior approval of District Fee Regulatory Committee;

(vii) made for not making disclosure as provided under Section 7;

(viii) made for non-refunding of security money/caution money after violation of provision made in clause (c) of sub-section 3 of Section 3;

(ix) made for violation of Section 6."

10. Sub-section (8) of Section 8 provides that every recognized school

which proposes to increase its fee beyond the permitted fee increase shall, at least three months before the commencement of the academic session, submit a proposal containing the details of the proposed fee with appropriate documents justifying the need for such increase to the District Fee Regulatory Committee. An Appellate authority is also prescribed under the act in the name of State Self Finance Independent School Appellate Authority to adjudicate grievance of the recognized institutions, if any, arising out of any order under the act.

11. The constitutional validity of the act is challenged by the petitioner, a minority institution on the count that as per article 30(1) of the Constitution of India no interference in administration of minority institutions can be made by the State authorities statutorily or otherwise.

12. Reliance is placed by learned counsel appearing on behalf of the petitioner upon the judgment of Hon'ble Supreme Court in ***TMA Pai Foundation Vs. State of Karnataka, 2002 (8) SCC 481.***

13. It is stated that minority institutions are having right to adopt their own procedure to admit the students, to set up reasonable fee structure, to constitute governing body, to appoint staff and to take action, if there is dereliction of duty on the part of any employee. The act in question as per learned counsel appearing on behalf of the petitioner is violating a valuable constitutional right of the minority institutions.

14. It would be appropriate to state that the petitioner-institution is not receiving any aid of the Government of Uttar Pradesh but recognition of the courses undertaken by it.

15. Heard learned counsel at length.

16. Article 30 of the Constitution of India prescribes fundamental right of minorities to establish and administer educational institutions. According to clause (1) of Article 30 all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice. The right aforesaid has been crystallized by the Supreme Court of India in several cases and at the first instance the matter came up before it in Reference The Kerala Education Bill, 1957, AIR 1958 SC 956. On the basis of the legal foundation laid down in the case aforesaid the rights of the minorities as prescribed under Article 30 of the Constitution of India were examined in detail by the Apex Court in ***TMA Pai Foundation (supra)*** holding therein that the right to establish an educational institution can be regulated; but such regulatory measures must, in general, ensure the maintenance of proper academic standards, atmosphere and infrastructure including qualified staff and prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. The Court while strengthening the rights protected under Article 30 of the Constitution of India shown its concern about interference of the government may that by way of statute in day today administration of the minority educational institutions. It would be appropriate to state that the court in the case of **TMA Pai (supra)** make a fine distinction in right to "administer" and "maladminister" the minority institution.

17. The issue was again considered by the Apex Court in ***Secretary, Malankara Syrian Catholic College Vs. T. Jose, (2007 (1) SCC 386.*** The Apex Court summarized the general principles relating to establishment and administration of educational institutions by minorities as under:-

"... (i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

(a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(b) to appoint teaching staff (teachers/lecturers and Headmasters/Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees;

(c) to admit eligible students of their choice and to set up a reasonable fee structure;

(d) to use its properties and assets for the benefit of the institution.

(ii) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, etc. applicable to all, will equally apply to minority institutions also.

(iii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilisation of the aid, without however diluting or abridging the right under Article 30(1)." "Aided institutions give instruction either in secular education or professional education. Religious education is barred in educational institutions maintained out of the State funds. These aided educational minority institutions providing secular education or professional education should necessarily have standards comparable with non-minority educational institutions. Such standards can be attained and maintained only by having well-qualified professional

teachers. An institution can have the services of good qualified professional teachers only if the conditions of service ensure security, contentment and decent living standards. That is why the State can regulate the service conditions of the employees of the minority educational institutions to ensure quality of education. Consequently, any law intended to regulate the service conditions of employees of educational institutions will apply to minority institutions also, provided that such law does not interfere with the overall administrative control of the management over the staff."

"We may also recapitulate the extent of regulation by the State, permissible inrespect of employees of minority educational institutions receiving aid from the State, as clarified and crystallized in T.M.A. Pai. The State can prescribe:

(i) the minimum qualifications, experience and other criteria bearing on merit, for making appointments,

(ii) the service conditions of employees without interfering with the overall administrative control by the management over the staff,

(iii) a mechanism for redressal of the grievances of the employees,

(iv) the conditions for the proper utilization of the aid by the educational institutions, without abridging or diluting the right to establish and administer educational institutions."

18. **The summary quoted above in quite unambiguous terms convey that all laws made by the State to regulate the administration of educational institutions and grant of aid will apply to minority educational institutions also. But if any such regulations interfere with the overall administrative control of the management over the staff or abridges/duties, in any other manner, the right to establish and administer educational institutions, such regulations, to that extent, will be inapplicable to minority institutions.**

19. The Apex Court further examined the rights enshrined under Article 29 and 30 of the Constitution of India in ***Sindhi Education Society Vs. Chief Secretary, Government of NCT of Delhi, 2010 (8) SCC 49***, the Apex Court examined the question relating to the extent the State can regulate the right of the minorities to administer their educational institutions when such educational institutions are receiving aid from the State/not receiving the aid from the State. The Court after recapitulating the law crystallized in **TMA Pai Foundation (supra) held that all laws made by the State to regulate the administration of educational institutions and grant of aid will apply to minority institutions also but if any such regulation, if interfere with the overall administrative control by the management then that would be inapplicable to minority institutions.**

20. On going through the law thrashed by the Apex Court in all the judgments referred above, we are having no doubt in arriving at the conclusion that article 30 protects the minority institutions from interference of the Government in their establishment, management and administration but that in no manner prevents the State to ensure good administration by putting checks on the eventualities giving rise to "maladministration". The right to administer educational institutions by minorities does not permit to indulge in malpractices including, commercialization of

education. The State if satisfies the test of reasonableness and the test that the provision applied is regulative of educational character and is conducive to make the minority educational institutions more effective for education to the minorities then such provision is not at all hit by the right protected under Article 30 of the Constitution of India. In other words such provision is in furtherance to the right given to ensure better and brighter educational status to such institutions.

21. Under the act under consideration, there is no provision that may cause interference with overall administrative control by the management with right of a minority educational institutions in settling the fee. On the contrary, as per Section 3 a recognized school shall determine its fee structure and while doing so it is required to meet certain guidelines given under Section 4 of the act. Section 3 also provides possible fee components and optional fee components those may be charged by the schools. The restrictions prescribed are that no school shall, except with the prior approval from the appropriate authority, charge during the academic year any fee in excess of the fee intimated to the appropriate authority earlier and, further that no capitation fee shall be charged by such institutions. The restrictions are quite reasonable. The institution, if has settled a fee after taking into consideration all the relevant factors then the same in normal course must not be changed without a justifiable reason. If for any reason change in fee structure is warranted then the recognized institutions must seek approval from the appropriate authority. The restriction as a matter of fact checks maladministration and ensures fair administration of the institutions by the management itself. So far as capitation fee is concerned that is nothing but a mark of commercialization of education and therefore, in light of the judgments of Hon'ble Apex Court that has rightly being checked under the Act.

22. Section 4 of the Act gives a broad idea and factors to be kept in mind for fixation of fee. The provisions of Section 4 of the Act no where restricts a recognized institution in settling fee, but prescribes a reasonable mode as a guiding factor while fixing the fee structure.

23. The provision on its face is a reasonable and is a statutory effort to stop commercialization of education and exploitation of the students joining educational institutions including minority institutions. While assessing constitutional validity of a provision at the scale of right given under Part-III of the Constitution of India, it must be kept in vision that ultimately the rights given protects the persons/citizens/legal entities, as the case may be, from arbitrariness, unreasonability, unjustifiability and fancy. If a provision is just and reasonable and otherwise satisfies the four corners of Article 13 of the Constitution of India, it must be held constitutionally acceptable to extend the protection of any right given under Part-III.

24. On fair analysis of the Act of 2018, we find it a legislation to ensure easy accessibility to each and every citizen and further to expand fairness and reasonability in administration of the institutions, including minority institutions, without interference therein for broader interest of the ultimate consumer, as such we do not find any violation of Article 30(1) of the Constitution of India while introducing U.P.

Self-Financed Independent Schools (Fee Regulation) Act, 2018.

25. The writ petition for the reasons given above, lacks merit and hence is dismissed in limine at threshold.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.09.2019

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Second Appeal No. 447 of 1981

Smt. Chamela ...Appellant
Versus
Maharajdin & Ors. ...Respondents

Counsel for the Appellant:
Sri Arif Khan, Sri Anurag Narain Srivastava, Mohiuddin Khan

Counsel for the Respondents:
Anurag Narain, Anurag Narain Srivastava, D.C. Mukerjee, Gauri Shanker Maurya, Mukesh Sharma, S.P. Maurya

A. Second appeal - Scope of Section100 C.P.C.- Suit for cancellation of power of attorney and sale deed - on ground of impersonation - Trial court applied principle of *'Pardanashin'*– plaintiff being villager, rustic and uneducated lady. First appellate Court held - principle of *'Pardanashin'* not applicable as plaintiff pleaded impersonate. No substantial question of law.

B. Second Appeal - Scope of Section 100 C.P.C. - Burden of proof - Once execution of registered power of attorney admitted in examination-in-chief - No doubt as to veracity of such power of attorney - Burden of proof did not shift upon defendants - Finding being a question of fact recorded by lower appellate court on the basis of evidence - Need not to be interfered.

C. Second Appeal - Scope of Section100 C.P.C.- Sale deed executed by attorney. Plea of insufficient consideration – would not affect rights of vendee under the sale deed.

D. Second Appeal – Scope of Section 100 C.P.C. – Section 168-A U.P. Seminary Abolition and Land Reforms Act. Lack of permission under Section 5-c(ii) of U.P. Consolidation of Holdings Act –Held: finding of lower appeal court – Plots were neither fragmented nor consolidation operations were going on. Village was de-notified before sale deed executed. No requirement of prior permission being necessary for any consolidation proceedings being in progress at the relevant point of time – No interference warranted. (E-1)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Mohd. Arif Khan, learned Senior Counsel, assisted by Sri Mohd. Aslam Khan, learned counsel for the appellant and Sri Anurag Narain who has put in appearance on behalf of the respondents.

2. This second appeal has arisen against the judgement and decree dated 10.4.1981 rendered in Civil Appeal No. 167/79 reversing the judgement and decree rendered by the trial court on 7.5.1979 in Regular Suit No. 173/78. The appeal was admitted by order dated 29.5.1981, however, substantial questions of law came to be framed when the appeal was heard on 9.5.2019. The substantial questions of law framed by this Court read as under:

"1. Whether the lower appellate court has rightly construed the principle of Pardaneshin lady while setting aside the trial court judgment?

2. Whether the burden of proof of non-execution of impugned Mukhtarnama dated 29.7.1976 lay on the plaintiffs and as to whether the sale-deed was hit by the statutory bar as mentioned in para 6 of the plaint and the courts below have rightly dealt with the same."

3. Briefly stated, the facts of the case are that one Smt. Chamela brought about a suit for cancellation of registered power of attorney allegedly obtained by impersonation on 29.7.1976 as well as for cancellation of the sale deed dated 4.8.1976 through such attorney impleading the purchasers of the property as defendants no. 1, 2 and 3 as well as the attorney holder as defendant no. 4. After exchange of pleadings, the trial court proceeded to frame two issues. The first issue was framed to the effect *"as to whether the power of attorney as well as the sale deed, in view of what was stated in paragraph 6 of the plaint, was liable to be cancelled" and the second issue was "as to whether, in view of what was stated in paragraph 6-A of the plaint, the sale deed and the power of attorney were liable to be cancelled".*

4. The trial court considered issues no. 1 and 2 jointly for the purpose of adjudication. The trial court having regard to the evidence on record proceeded to construe the benefit of Pardanashin lady in favour of the plaintiff, treating her to be a villager, rustic and uneducated lady. It was also observed by the trial court that insofar as the payment of sale consideration is concerned, an inconsistent stand was taken by the defendants, therefore, once the execution of power of attorney having been denied by the plaintiff stood disproved, the sale deed executed on her behalf was consequently bad in the eye of law. The suit was accordingly decreed in favour of the appellant-plaintiff who is survived by the legal representatives substituted during pendency of this appeal.

5. The judgement and decree rendered by the trial court on 7.5.1999 in Regular Suit No. 173/78 came to be questioned in Civil Appeal No. 167/79. The appellate court below on the aspect of validity of power of attorney framed the point of determination and went into the correctness of the appreciation of evidence by the trial court and by re-appreciating the evidence, has recorded findings reversing the findings recorded by the trial court, to the contrary.

6. The first appellate court below, insofar as the extension of principle of Pardanashin lady to late Smt. Chamela is concerned, has observed that such a principle was not applicable in the facts and circumstances of the present case for the reason that Smt. Chamela in the present case had denied the execution of power of attorney and had rather pleaded that the same was impersonate. Once a case of this description was pleaded in the plaint, there was no admission of any physical act of which consciousness or unconsciousness was to be proved treating her to be a Pardanashin lady. The first appellate court also proceeded to observe that Smt. Chamela who had previously executed the registered power of attorney on 11.1.1967 in favour of one Faiya Singh and Bam Bahadur Singh for pairvi of cases but such a fact was not disclosed in the plaint. The later power of attorney in favour of Faiya Singh alone was also registered which included the power of sale.

7. The first appellate court below, insofar as the power of attorney executed on 29.7.1976 inclusive of power to sell is

concerned, has observed that once the execution of such a power of attorney was admitted by the executant in paragraph 9, 12 and 13 of the examination-in-chief, no question to doubt the veracity of such a power of attorney for shifting the burden of proof upon the defendants would arise and in fact, the evidence available on record proved beyond doubt that she herself had executed the registered power of attorney executed on 29.7.1976. This finding being a question of fact, has been recorded by the first appellate court below on the basis of evidence.

8. Having heard the arguments at length on the aspect of Pardanashin lady, extending the same benefit to the appellant-plaintiff treating her illiterate and uneducated village lady, the disapproval by the first appellate court, in my humble opinion, has correctly been opined by the appellate court below and the view taken by the trial court being erroneous has rightly been set right.

9. Insofar as payment of sale consideration to late Smt. Chamela is concerned, the first appellate court below has merely supported the legitimate sale consideration which the attorney, Faiya Singh, out of his free will, had set out to the disadvantage of appellant-plaintiff. It was the appellant-plaintiff's authority to sell the property which was misused by the attorney and the resultant cause, if any, would arise against the attorney alone. The attorney as per his own statement has admitted the receipt of sale consideration to the tune of Rs. 5000/- although the real price of the property in dispute might have been Rs. 40,000/- as quantified.

10. Learned counsel for the appellant has not placed any judgement or law on the point as to how a registered sale deed for a definite consideration though mentioned contrary to the market value of property, can be understood to be a nullity within the ambit of law.

11. Once the authority to transfer was duly held by power of attorney and his authority to transfer did not lack legitimacy, the judgement rendered by the first appellate court below on the premise of evidence of the contesting witness (plaintiff) as well as the attorney, in my humble opinion, does not leave any scope for interference within the scope of Section 100 CPC.

12. Learned counsel for the appellant has also taken this Court through the aspect of fragmentation of the plots being hit by Section 168-A of U.P. Zamindari Abolition and Land Reforms Act affecting the sale transaction as well as for the lack of permission under Section 5-c(ii) of U.P. Consolidation of Holdings Act, the sale deed was attempted to be established as void.

13. Having closely scrutinuzed the judgement rendered by the first appellate court below, the categorical finding recorded by the appellate court is to the effect that the plots transferred through the impugned sale deed were neither fragmented nor at the relevant point of time, any consolidation operations were going on. The first appellate court below has recorded that the village in question was denotified on 14.11.1970 and the sale deed in question was executed much subsequent to the said date. No evidence was brought to the notice of this Court establishing any fragmentation of the land transferred through the impugned sale deed or the requirement of prior

permission being necessary for any consolidation proceedings being in progress at the relevant point of time.

14. Lastly, the learned Senior Counsel argued that the mandate of Order XLI Rule 31 CPC was not adhered to by the first appellate court. On this aspect of the matter, this Court is not convinced with the submissions put forth, rather, the first appellate court has thrashed out the relevant points of determination and in my humble consideration, the appellate court judgement does not fall on the strength of the argument advanced by learned counsel.

15. The exhaustive submissions made by learned Senior Counsel on behalf of the appellant are thus unconvincing and both the substantial questions of law framed above are answered in negative and against the appellant-plaintiff.

16. The second appeal thus fails and the same is hereby dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.
THE HON'BLE IFAQAT ALI KHAN , J.

CRL. MISC. BAIL APPLICATION No. 359475 of 2016
In
CRIMINAL APPEAL No. - 6137 of 2016
AND
CRL. MISC. BAIL APPLICATION No. 359419 of 2016
In
CRIMINAL APPEAL No. - 6138 of 2016

Ramveer @ Pappu ...Appellant
Versus
State of U.P . ...Opposite Party

Counsel for the Appellant:
Sri Rajesh Kumar Yadav

Counsel for the Opposite Party:
G.A.

A. Conviction under section 302, 307 IPC and 3/25 of Arms Act. Bail Application pending appeal. Period of prolonged detention suffered though invites leniency by Courts, yet, no straight jacket formula to grant bail on that count.

Appeal ready for arguments. Reluctance to argue the appeal. The nature of crime, the gravity of offence, the sufficiency and nature of evidence available, the background of the offender and other circumstances relevant. - Bail rejected. (Para 3)

Reluctance on the part of counsel whose keenness appears to be confined only with regard to procurement of bail. (Para8) (E-2)

(Delivered by Hon'ble Karuna Nand Bajpayee, J. & Hon'ble Ifaqat Ali Khan, J.)

1. These two applications relate to two connected appeals arising out of common judgment and order of conviction and, therefore, are being disposed of by the common judgment. 2. Counter affidavits filed in both the appeals are taken on record.

3. The aforesaid bail applications have been moved on behalf of appellants Ramveer @ Pappu and Rajveer @ Ashok Kumar seeking their release on bail who have been convicted and sentenced in S.T. No.293 of 2008 (State Vs. Rajveer @ Ashok Kumar & others) arising out Case Crime No.58 of 2008, u/s 302, 307 I.P.C. and in S.T. No.295 of 2008 (State Vs. Ramveer @ Pappu) arising out of Case Crime No.80 of 2008, under Section 3/25 of

Arms Act, Police Station Kishni, District Mainpuri.

4. Heard learned counsel for appellants and learned A.G.A.

5. Submission of counsel for appellants is that co-accused Om Prakash has been released on bail and, therefore, on the ground of parity the appellants also deserve to be released on bail. Further submission is that the firing, said to have been resorted to by the accused appellants, was made from a higher pedestal which makes the nature of injury as has been caused to the deceased and injured improbable and, therefore, on the ground of this medical inconsistency, the truthfulness of the prosecution case becomes suspect. It was also contended that it has not been specified in the evidence as to which of the appellants is the author of which specific injury. Period of detention was also pointed out. Bail has been sought on the aforesaid grounds.

6. Perused the record in the light of submissions made at the Bar.

7. Learned A.G.A. while opposing the bail has drawn attention of the Court to the order passed with regard to co-accused Om Prakash who is the father of two appellants before us and it has been shown that the order passed with regard to co-accused apparently appears to have been guided apparently by the advanced age of co-accused which was said to be above 80 years. In such circumstances, the principle of parity is simply inapplicable with regard to the present appellants. It was also shown that both the appellants were armed with fire arms. Appellant Rajveer was carrying a double barrel gun while appellant Ramveer was having a country made pistol. There is categorical evidence that both these appellants used their respective fire arms. Attention was also drawn to the post mortem examination of the deceased and also the medical examination of injured witness Virendra and it has been emphasized that the nature of injuries as had been caused to two persons lends clinching corroboration to the use of those weapons. Victim Virendra has received a number of fire arm injuries having multiple entry wounds. Injury no.1 said to have been received by victim Virendra shows that it was a fire arm injury spread in the area of 32 x 24 c.m. While injury no.2 indicates that it was a fire arm wound in an area 30 x 8 c.m. Injury no.3 indicates two fire arm entry wounds while injury no.4 indicates an entry wound having a dimension of 0.3 x 0.3 c.m. Injury no.5 was in an area of 22 c.m. x 4 c.m. It was submitted that the nature of injuries is such that the survival of victim Virendra was just an act of providence while the accused did whatever was within their power to do in order to cause the death of Virendra. It was also shown that the injury found on the dead body of deceased was again having a number of entry wounds which resulted in the death of deceased. Pellets were also recovered from the body of deceased. Submission is that there is absolutely no inconsistency between the medical examination and the ocular version of the incident. Contention in this regard is wholly lacking of any factual basis. It was also submitted that the evidence produced by the prosecution shows that a number of persons indulged in the act of indiscriminate firing which killed one man and caused serious injuries to another and in such circumstances of the incident it is impossible to watch the trajectory of projectiles and it will be

unnatural to except that witnesses would be in a position to vouchsafe as to which fire arm wound was caused by which accused. The accused came together with the common intention and having same object in their mind and after resorting to such indiscreet firing they went away together and the act of one accused would also make in such circumstances the other accused liable vicariously for the same offence. The evidence against the appellants is clear, cogent and unassailable that they are authors of the injuries caused to the deceased as well as to the victim. The number of entry wounds and the number of accused are also not inconsistent with each other and it is certainly not a case in which one may argue that the number of assailants was far more than the number of injuries caused to the victim side showing their false implication.

8. It may be observed that ordinarily this Court leans liberally in favour of accused in cases where the period of detention is prolonged but the same alone cannot be applied as a straight jacket formula in all cases without keeping in perspective the nature of crime, the gravity of offence, the sufficiency and nature of evidence available, the background of the offender and several other relevant circumstances. This is much more so because this Court has expressed its inclination and openness to have final hearing in the matter. But ironically enough there appears reluctance on the part of counsel in this regard whose keenness appears to be confined only with regard to procurement of bail. It is certainly not a matter where it may be said that as there is no likelihood of early hearing or conclusion of this appeal therefore, the accused should be released on the ground of longer detention. It is indeed disappointing to see this unhealthy trend insidiously creeping in and gaining ground that complete reluctance to argue the appeal finally is being displayed at the bar which in its turn contributes not only to the prolongation of detention period of accused but also to the rise of staggering pendency of appeals. We cannot lend our countenance to such kind of reluctance on the part of appellant or his legal representative nor can we allow the same to be used as a contrivance to procure bail in the name of prolixity of detention period to which they themselves are contributory.

9. Therefore, in this background so far as the bail matter is concerned, looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the appellants have not made out a case for bail. Therefore, the prayer for bail of the appellants is rejected.

10. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

11. **(Order on Appeal)**

12. Office is directed to prepare the paper book and list for hearing immediately thereafter.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2019

BEFORE

THE HON'BLE MANJU RANI CHAUHAN, J.

CRIMINAL MISC. BAIL APPLICATION
No.17657 of 2018

Riyaz Alam ...Applicant
Versus
The Union of India ...Opposite Party

Counsel for the Applicant:
Sri Mohd. Shabbir, Sri Gopeshwar Sahai Bisaria, Sri Mohd. Shamim Khan.

Counsel for the Opposite Party:
Sri Sanjay Kumar Singh, Sri Narendra Deo Rai

A. Restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act are in addition to limitations for grant of bail under section 439 Cr.P.C.
(Para 8)

The jurisdiction of the Courts to grant bail is circumscribed by the provision of Section 37 of the NDPS Act. Bail can be granted in a case where there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. Contraband item more than the commercial quantity, recovered from the accused. Hence no ground for bail made out. (Para 7)

Bail application rejected. (Para 22)

Chronological list of Cases Cited: -

1. SK. Raju alias Abdul Haque alias Jagga vs. State of West Bengal(2018) 9 SCC 708

2. Satpal Singh vs. State of Punjab, (2018) 13 SCC 813

3. Union of India Vs. Rattan Mallik alias Habul (2009) 1 SCC (Cri) 831

4. Narcotics Control Bureau Vs. R. Paulsamy (2000) 9 SCC 549

5. Union of India Vs. Ram Samujh and another (1999) 39 ACC 643

6. Thankgod Afam Ezeme vs. B.D. Goel and Another 2000 (1) Mh.L.J. page 82

7. 2003 (47) ACC-763 (Madan Lal and another Vs. State of Himanchal Pradesh)

8. 2003 Crl.L.J.-4329 (Megh Singh Vs. State of Punjab)

9. 2005(52) ACC-710 (State of Himanchal Pradesh Vs. Pawan Kumar)

10. Varinder Kumar Vs. State of Himachal Pradesh, reported in 2019 SCC Online 170

11. Himanchal Pradesh vs. Pawan Kumar (2005) 52 ACC 710

12. Alakh Alok Srivastava Vs. Union of India and Another reported in AIR 2018 (SC) 2004. (E-2)

(Delivered by Hon'ble Manju Rani Chauhan, J.)

1. Heard Mr. Gopeshwar Sahai Bisaria, learned counsel for the applicant, Mr. Narendra Deo Rai, learned Special Public Prosecutor (Narcotics).

2. I have gone through the material on record.

3. The instant bail application has been filed by the applicant- Riyaz Alam respectively with a prayer to enlarge them on bail in Case Crime No. 05 of 2017, under Section 8/20 N.D.P.S. Act, Police Station- Central Narcotic Bureau, Bareilly, District-Bareilly, during the pendency of the trial.

4. The factual matrix of the case is that on 01.08.2017, the team of Central Narcotic Bureau, Bareilly, arrested the applicant Riyaz Alam and on surprise search, 4.500 kg. of *'charas'* has been recovered from the trolley bag, which he carried on his shoulder and Rs. 1,85,700/- was also recovered from his possession. A

recovery memo was prepared in front of two witnesses, namely, Mr. Vinod Kumar and Mr. Manoj Kumar, after informing the applicant about his right as provided under Section 50 of NDPS Act, hence the present F.I.R. was lodged under Section 8/20 of NDPS Act.

5. It has been argued by the learned counsel for the applicant that the applicant is innocent and has been falsely implicated in the present case. He is originally resident of Viswan (Bhiswan), Parsa, Nepal and runs a medical shop there for which he has a license. On 30.07.2017, he had proceeded from Anand Vihar to Muzaffarpur, Bihar by Suptkranti express but on the way at Moradabad, he was asked to get down, by the Police personnels in-ordinary dress. They had also taken his suitcase. Thereafter, the Police took him from Moradabad to Bareilly and falsely implicated him in the present case. It is further argued by learned counsel for the applicant that on 01.08.2017, he was not present at Satellite Bus Stand, where he is said to have been intercepted by the Police personnels on a surprise check. The alleged witnesses, namely, Vinod Kumar and Manoj Kumar are not the actual witnesses. Nothing was recovered from his possession and the alleged recovery is false and concocted. It is further argued by the learned counsel for the applicant that the alleged recovered money of Rs. 1,85,700/- was his own but the Police after taking Rs. 2.00 Lacs from him, has shown only 1,85,700/-. It is further argued by the learned counsel for the applicant that no compliance of the provisions of NDPS Act has been made by the police at the time of his arrest. The Police has also not complied with the provisions of Section 50 of NDPS Act as he was not searched before any Magistrate or gazetted officer. In the present case, 4.500 kg of 'charas' has been recovered from the bag being carried by the applicant and Rs. 1,85,700/- has also been recovered from the personal search, hence Section 50 of NDPS Act was attracted. In support of his contention learned counsel for the applicant has relied upon the judgement of Hon'ble Apex Court in the case of ***SK. Raju alias Abdul Haque alias Jagga vs. State of West Bengal, (2018) 9 SCC 708***. It is further argued by the learned counsel for the applicant that no prior information was given by the police personnels regarding any such drugs being carried by the applicant, which is mandatorily required under Section 50 of NDPS Act. It is further argued by learned counsel for the applicant that the applicant has no criminal antecedents to their credit except the present one. As the present case is false, the applicant is liable to be enlarged on bail. It is further argued by the counsel for the applicant that the applicant has been detained in jail for a period of more than two years, i.e. on 01.08.2017, seeing period of detention, he requests for grant of bail. There is no possibility of the applicants of fleeing away from the judicial process or tampering with the witnesses and in case, the applicants are enlarged on bail, the applicants shall not misuse the liberty of bail.

6. Per contra, Mr. Narendra Deo Rai, learned Special Public Prosecutor (Narcotics) has vehemently argued that since the recovery was made from a bag, which was carried by the applicant and not from the personal search of the applicant, hence the provisions of Section 50 of NDPS Act is not attracted in the present case. He further submitted that

since the bag contained 4.500 kg. of charas, which exceeds the limit of commercial quantity then for consideration of bail the provisions of Section 37 of NDPS is attracted.

7. The jurisdiction of the Courts to grant bail is circumscribed by the provision of Section 37 of the NDPS Act. Bail can be granted in a case where there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The provision makes the offences under the Act cognizable and non-bailable. It would be useful to quote Section 37 of NDPS Act.

" 37. Offences to be cognizable and non-bailable- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973-

(a) every offence punishable under this Act shall be cognizable;

(b) No person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27A and also for the offences involving commercial quantity shall be released on bail on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force, on granting of bail.

8. From a bare perusal of non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application, the other two conditions, viz (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail have to be satisfied. It is manifest that conditions are cumulative and not alternative.

9. Hon'ble Apex Court in ***Satpal Singh vs. State of Punjab, (2018) 13 SCC 813***; in paragraph no.3 has held as follows:-

"3. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the

alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court."

10. Hon'ble ***Apex Court in Union of India Vs. Rattan Mallik alias Habul (2009) 1 SCC (Cri) 831*** observed thus:

"We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

11. In ***Narcotics Control Bureau Vs. R. Paulsamy (2000) 9 SCC 549,*** Hon'ble Supreme Court observed thus:

"In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which the learned Single Judge should have been taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections."

12. In ***Union of India Vs. Ram Samujh and another, (1999) 39 ACC 643***, Hon'ble Supreme Court held as under:

"It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or inflicting death blow to number of innocent young victims, who are vulnerable, it causes deleterious effects and deadly impact on the society, they are hazard to the society, even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely."

13. Bearing in mind the above broad principles laid down by Hon'ble Supreme Court, I shall now consider the contentions raised by the learned counsel for the parties.

14. Mr. N.D. Rai, also contended that the contention raised by the learned counsel for the applicant that while search was made, compliance of mandatory provisions of Section 50 of NDPS Act was not followed by the officers of the Narcotics Department. It would be useful to quote Section 50 of the NDPS Act:-

50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female. 1[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

Section 50 of the NDPS Act gives a right to the persons concerned that he can be searched before a gazetted officer and if he opts like that, the search shall be before the gazetted officer.

15. Mr. N.D. Rai, also contended that perusal of the records, clearly shows that 4.500 kg. charas was recovered from the bag, which was possessed by the applicant, besides that a cash of Rs. 1,85,700/- was also recovered from him. In the recovery memo, it has been mentioned that the accused-applicant was informed about his right for search before the Magistrate or gazetted officer as provided under Section 50 of NDPS Act. That the public witnesses have also been shown of the alleged recovery. For his proposition, learned counsel relied upon the decision of Hon'ble Supreme Court in ***Thankgod Afam Ezeme vs. B.D. Goel and Another reported in 2000 (1) Mh.L.J. page 82*** in which the Hon'ble Apex Court has held that the mandatory provisions of Sections 42 and 50 of the NDPS Act are not applicable to chance

recovery as such recovery is not on prior information which is requirement of Section 50 of NDPS Act and such provisions are applicable only, in case, of personal search. In para nos. 7 and 8 of the said judgment, it was observed as follows:-

"7. .....there is non-compliance of provisions of sections 42 and 50 of the N.D.P.S. Act. In support of her contention she relied on the decision of the Supreme Court in the case of State of Punjab vs. Balbir Singh reported in AIR 1994 SC 1872. According to her the procedure laid down under the said provisions which is mandatory was not complied with. In our view the said provisions cannot be invoked for the simple reason that this was a case of chance recovery and the officers were not acting on the prior information which is the requirement of section 50 of the Act. It was only when the baggages of the appellant were taken through X-ray screening counter that the officer suspected the concealment in the said baggages and, therefore, informed the PW 3 and other officers of the Customs about the suspicion.

8. Secondly, the said provision would be applicable only in case of personal search that is the search of articles from the person or body of a person or the search is made of articles in immediate possession such as bag and other baggage carried by the person or in physical possession of the person to be searched. The decision of the Supreme Court in Balbir Singh's case was considered and interpreted by the Full Bench of this Court in the case of Ebanezer Adebaya @. Monday Obtor vs, B. S. Rawat, Collector of Customs and another reported in 1996(2) Mh.LJ. 280. According to the Full Bench the provisions of section 50 would be applicable only in case of personal search of a person i.e. of articles on the person or body of the person or of articles in immediate possession of such person such as bag and other luggage carried by him or in physical possession of the person to be searched and such search was effected on prior information and not in case of accidental recovery of the contraband from any person. The Full Bench was further pleased to observe that the provisions of section 50 would not be applicable to a search of bag or baggage which are presumed to be in possession of the person even though it may be lying in a house or railway compartment or at the Airport nor would it be applicable to a case of search of a place, conveyance or a house if the accused is physically present at the time of search. Similar view was taken by the later decision of the Supreme Court in the case of Namdi Francis Nwazor vs. Union of India and another, (1998) 8 SCC 534 the facts of which are similar to the facts in the present case. In para 3 of the Judgment of the Supreme Court it was observed as follows :

"3. On a plain reading of sub-section (1) of section 50, it is obvious that it applies to cases of search of any person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. "

In that case also the Court was concerned with the accused who was a Nigerian National and was found in possession of narcotic drugs while on his way to Lagos at the IndiraGandhiInternationalAirport, New Delhi. In that view of the matter reliance

on the aforesaid Judgment of the Supreme Court in Balbir Singh's case is misplaced.

The view taken by the Supreme Court in Balbir Singh's case has been upheld by the Constitution Bench of the Supreme Court in the case of State of Punjab vs. Baldev Singh in Criminal Appeal No. 396 of 1999 decided on 21st July, 1999."

16. Apart from this, it has also been held by the Hon'ble Apex that the provisions are of Section 50 of NDPS Act stands attracted in case of personal search and not, in the case where the search was given effect otherwise than from the personal search of the accused. Following cases were relied upon:-

1. 2003 (47) ACC-763 (Madan Lal and another Vs. State of Himanchal Pradesh).

2. 2003 Crl.L.J.-4329 (Megh Singh Vs. State of Punjab)

3.2005(52) ACC-710 (State of Himanchal Pradesh Vs. Pawan Kumar).

In the aforesaid judgments, it has been held by the Hon'ble Apex Court that Section 50 of NDPS Act applies only in case of personal search of a person. It does not extend to search of a vehicle or container or a bag or premises. In the present case, the contraband 'charas was recovered from a bag, which was being carried by the applicant, hence it was not a personal search.

17. Apart from this, in the case of ***Varinder Kumar Vs. State of Himachal Pradesh, reported in 2019 SCC Online 170,*** it has been stated that Section 50 of NDPS Act reiterated had no application, since the recovery was not a personal of the applicant but from the bag being carried at his shoulder. There was no material to conclude that the witnesses was withheld or suppressed by the prosecution with any ulterior motive.

18. Moreover, in the case of State of ***Himanchal Pradesh vs. Pawan Kumar (2005) 52 ACC 710*** wherein meaning of the word "person" has been discussed, the word "person" would mean a human being with appropriate covering and clothing and also footwear. A bag, brief case or any such articles or container, etc. can, under no circumstance be treated as a body of a human beings.

19. Mr. N.D. Rai, has further contended that in the present case, it is a chance recovery and the charas has recovered not from personal search, therefore, compliance of Section 50 of NDPS Act is not mandatory. Even otherwise, with regard to Section 50 of NDPS Act, there is compliance of Section 50 of NDPS Act as mentioned in the recovery memo that the accused-applicant was informed of his right of personal search before the Magistrate or a gazetted officer and was issued notice under Section 50 of NDPS Act. There is nothing on record to show that there was any material to falsely implicate the applicant in the present case.

20. So far as the contention raised by the learned counsel for the applicant that the applicant has been detained in jail for a period of more than two years, i.e. on 01.08.2017, to which Mr. N.D. Rai has stated that the period of detention is not a valid reason to release the applicant on bail in such a heinous crime, wherein charas of 4.500 kg, which is more than commercial quantity, has been recovered from the bag being carried by the applicant.

21. Dealing with the complicity of applicant-accused and in light of the material on record, Mr. N.D. Rai, learned Special Public Prosecutor (Narcotics) vehemently submits that no case for bail is made out and the bail application of the present applicant is liable to be rejected. It is lastly contended that the innocence of the applicant cannot be adjudged at this stage, therefore, he do not deserve any indulgence.

22. Having considered the submissions made by the learned counsel for the applicant, the learned A.G.A. for the State and upon perusal of the evidence brought on record as well as the complicity of the applicant, I do not find any good reason to exercise my discretion in favour of the accused applicant. Thus, the bail application stand rejected.

23. However, the trial court is expected to gear up the trial of the aforesaid case and conclude the same as expeditious, as possible from the date of receipt of certified copy of this order, keeping in view the law laid down by the Apex Court in the case of **Alakh Alok Srivastava Vs. Union of India and Another reported in *AIR 2018 (SC) 2004*,** if there is no legal impediment, in accordance with law, without granting any unnecessary adjournment to either of the parties, provided the applicant fully cooperate in conclusion of the trial, if there is no other legal impediment.

24. Office is directed to transmit a certified copy of this order to the court concerned within a fortnight.

25. It is clarified that any observations, if any, made by this Court are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Misc. Writ Petition No.18596 of 2019

Babir Singh Chandel ...Petitioner
Versus
State of U.P.& Ors. ...Respondents

Counsel for the Petitioner:
Sri Sukendu Pal Singh

Counsel for the Respondents:
G.A.

A. Article 226:- Writ Petition for quashing F.I.R. or a charge-sheet should be exercised sparingly and only in exceptional cases and Courts should not ordinarily interfere with the investigations of cognizable offences. (Para 5)

The questions of fact cannot be examined by this Court in proceedings under Article 226 of the Constitution of India.
(Para 9 &10)

Writ petition dismissed. (Para 13).

Chronological list of Cases Cited:-

1. AIR 1992 SC 605 State of Haryana and others Vs. Ch. Bhajan Lal

2. Ajit Singh @ Muraha v. State of U.P. (2006 (56) ACC 433)

3. Satya Pal v. State of U.P. (2000 Cr.L.J.569)

4. State of Haryana v. Bhajan Lal (AIR 1992 SC 604)

5. R. Kalyani v. Janak C. Mehta and Others reported in 2009 (1) SCC 516

6. State of Haryana vs. Bhajan Lal (supra)

7. Rupan Deol Bajaj v. K.P.S. Gill (1995) SCC (Cri) 1059, Rajesh Bajaj v. State of NCT of Delhi (1999) 3 SCC 259

8. Medchl Chemicals & Pharma (P) Ltd. v. Biological E Ltd. & Ors 2000 SCC (Cri) 615(E-2)

(Delivered by Hon'ble Ramesh Sinha, J.)
Hon'ble Raj Beer Singh, J.)

1. Heard Sri Sukendu Pal Singh, learned counsel for the petitioner, Sri G.P. Singh, learned A.G.A. for the State-respondents and perused the material on record.

2. This writ petition has been filed with the prayer to issue a writ, order or direction in the nature of certiorari quashing the impugned F.I.R. Dated 25.06.2019, which has been registered as Crime No. 0201 of 2019, under Sections 13 (1)(b), 13 (2) of Prevention of Corruption Act, Police Station Kakadeo, District Kanpur Nagar.

3. Learned counsel for the petitioner has argued that no offence under Sections 13 (1) (b) and 13 (2) of Prevention of Corruption Act is made out against the petitioner and that impugned FIR is abuse of the process of law. It has been submitted that petitioner has retired from police service on 28.09.2011 and now, he is a practising Advocate and his wife, who is also an Advocate, was running business of transport and a coaching centre. Besides these sources of income, she has also income from her agricultural land but her income from these sources, was not taken into consideration. Similarly, income of the petitioner from agricultural land, was also not taken into consideration. It was further submitted that earlier an inquiry was conducted by Ram Suresh Yadav, Deputy Superintendent of Police, Kanpur Unit of Bhrastachar Nivaran Sangthan but the charges were not proved and inquiry was closed. It has also been submitted that the amount incurred in purchase of immovable property and vehicles was duly explained but those facts have not taken into consideration by the concerned Enquiry Officer and similarly his income tax returns were also not considered in correct perspective. It was pointed out that an inquiry was also conducted by Kanpur Unit of Bhrastachar Nivaran Sangthan and a report has been submitted by the said Unit on 22.02.2014 and perusal of the said report shows that the allegations of disproportionate assets were not proved against the petitioner. Further, there were discrepancy in amount shown towards expenditure and there was also mathematical error in totalling in expenditure head in the FIR. It was stated that perusal of the FIR and material brought on record shows that no such case is made out against the petitioner that assets of petitioner were not in excess than of his income and thus, the impugned FIR is illegal and mala fide and thus, liable to be quashed.

4. Learned A.G.A. has submitted that there are clear allegations against the petitioner that the petitioner has incurred an amount of Rs. 97, 51, 731/- in various expenditures, which was more Rs. 35,86,552/- than his source of income and that a prima facie under Sections 13 (1) (b) and 13 (2) of Prevention of Corruption Act is made out against the petitioner. At this stage, disputed questions of fact cannot be examined and merely it is to be seen whether a prima facie case is made out against the petitioner or not. It was argued

that no case for quashing of the impugned FIR is made out and the petition filed by the petitioner is liable to be dismissed.

5. The legal position on the issue of quashing of FIR or criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases and Courts should not ordinarily interfere with the investigations of cognizable offences. However, where the allegations made in the FIR or the complaint even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, the FIR or the charge-sheet may be quashed in exercise of powers under Article 226 or inherent powers under Section 482 of the Cr.P.C. In the well celebrated judgment reported in AIR 1992 SC 605 State of Haryana and others Vs. Ch. Bhajan Lal, Supreme Court has carved out certain guidelines, wherein FIR or proceedings may be quashed but cautioned that the power to quash FIR or proceedings should be exercised sparingly and that too in the rarest of rare cases. Guidelines are as follows:

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety to do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 156(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can every reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

6. The Full Bench of this Court in **Ajit Singh @ Muraha v. State of U.P. (2006 (56) ACC 433)** reiterated the view taken by the earlier Full Bench in **Satya Pal v. State of U.P. (2000 Cr.L.J. 569**) after considering the various decisions including **State of Haryana v. Bhajan**

Lal (AIR 1992 SC 604) that there can be no interference with the investigation or order staying arrest unless cognizable offence is not ex-facie discernible from the allegations contained in the F.I.R. or there is any statutory restriction operating on the power of the Police to investigate a case.

7. In the case of **R. Kalyani v. Janak C. Mehta and Others reported in 2009 (1) SCC 516**, the Hon'ble Apex Court has held as under:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

8. Keeping in view the above stated settled position of law, in the instant case, perusal of the record shows that there are allegations against the petitioner in the FIR that on the basis of inquires, it has been found that petitioner had incurred an amount of Rs. 97,51,731/- under various heads of expenditure during relevant time, which was in excess of Rs. 35,86,552/- than his source of income and that petitioner has failed to furnish any satisfactory reply in that regard. In the FIR, details of various transactions of sale and purchase etc. have been given. The FIR was lodged after a detailed inquiry. It is apparent from the FIR and material on record that a prima facie cognizable offence under Sections 13 (1) (b) and 13 (2) of Prevention of Corruption Act is made out against the petitioner. The case of the petitioner does not fall in any of the category enumerated by the Apex Court through various judicial pronouncements for quashing of the FIR.

9. It is well settled that at this stage, this Court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the F.I.R. requires to be investigated or deserves quashing. The ambit of investigation into the alleged offence is an independent area of operation and does not call for interference in the same except in rarest of rare cases.

10. As noted in the case of **State of Haryana vs. Bhajan Lal (supra),** power of quashing of FIR or proceedings should be exercised sparingly and with circumspection and that too in the rarest of rare cases. In the judgments of **Rupan**

Deol Bajaj v. K.P.S. Gill; reported in (1995) SCC (Cri) 1059, Rajesh Bajaj v. State of NCT of Delhi; reported in (1999) 3 SCC 259 and Medchl Chemicals & Pharma (P) Ltd. v. Biological E Ltd. & Ors; reported in 2000 SCC (Cri) 615, the Apex Court clearly held that if a prima facie case is made out disclosing the ingredients of the offence, Court should not quash the complaint. However, it was held that if the allegations do not constitute any offence as alleged and appear to be patently absurd and improbable, Court should not hesitate to quash the complaint. The note of caution was reiterated that while considering such petitions the Courts should be very circumspect, conscious and careful. Thus, there is no controversy about the legal proposition that in case a prima facie case is made out, the FIR or the proceedings in consequence thereof cannot be quashed. Here it would also be pertinent to mention that questions of fact cannot be examined by this Court in proceedings under Article 226 of the Constitution of India.

11. The submissions raised by learned counsel for the petitioners call for determination on questions of fact which may be adequately discerned either through proper investigation or which may be adjudicated upon only by the trial court and even the submissions made on points of law can also be more appropriately gone into only by the trial court in case a charge sheet is submitted in this case. The perusal of the record makes out, prima facie, offences at this stage and there appears to be sufficient ground for investigation in the case. Here it would be pertinent to mention that probabilities of the prosecution version cannot be analysed at this stage. Likewise, the allegations of mala fides of the informant are of secondary importance. **(vide State of Orissa v. Saroj Kumar Sahoo (2005) 13 SCC 540).**

12. In view of the aforesaid, considering the allegations made in the FIR and material brought on record, it cannot be said that no prima facie is made out against the petitioner rather there appears to be sufficient ground for investigation in the matter. Accordingly, we do not find any justification to quash the impugned F.I.R.

13. The petition lacks substance and thus, writ petition is, accordingly, **dismissed**.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.07.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

CIVIL MISC. WRIT PETITION No.22648 of 2019 (u/s -482 Cr. P.C.)

Krashnkant &Ors. ...Applicants
Versus
State of U.P. &Anr. ...Opposite Parties

Counsel for the Applicants:
Sri I.K. Chaturvedi, Sri Ganga Bhushan Mishra.

Counsel for the Opposite Parties:
A.G.A., Ruchita Jain, Sri Pratap Kanchan Singh.

A. Criminal Procedure Code, 1973 – Section 482 Cr.P.C – If without going into the evidence and fact, a conclusion is possible that there is misuse of the process of the Court, only then the jurisdiction under section 482 Cr.P.C. has to be invoked.

State of Haryana vs Bhajanlal, 1992 SCC (Crl.) followed (Para 10)

B. Criminal Procedure Code, 1973– Efficacious Remedy against Summoning Order is of Criminal Revision. (Para 8)

C. Criminal Procedure Code, 1973 – Final Report – when final report is given by the police it is incumbent on the part of the court to issue notice to the informant before passing any order on the final report. (Para 9)

D. Criminal Procedure Code, 1973 – It is complainant's prerogative to examine a witness of his choice - whom he feels that they will going to support the complaint. (Para 9) (E-5)

List of cases cited:-
State of Haryana vs Bhajanlal, 1992 SCC (Cri.)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Shri I.K. Chaturvedi, Senior Advocate assisted by Shri Ganga Bhushan Mishra, learned counsel for the applicants, Shri Pratap Kanchan Singh, learned counsel for the complainant and learned A.G.A. for the State.

2. This application has been filed under section 482 Cr.PC seeking quashing of summoning order dated 29.03.2019 passed in Criminal Complaint No. 2320 of 2018 (Tika Ram Vs. Krashna Kant and others), by learned CJM, Jhansi, under section 147, 148, 302, 352 IPC, P.S. Lahchura, District Jhansi as well as entire proceedings of the aforesaid complaint case including the order dated 21.07.2018, passed by learned CJM, Jhansi, whereby the learned Magistrate after rejecting the final report submitted in the case crime No. 0056 of 2018, under section, 147, 148, 302, 352 IPC, P.S. Lahchura, District Jhansi, treated the Protest Petition of the opposite party no. 2 as a complaint.

3. According to the FIR, the alleged incident took place on 9/10.04.2018 at about 1 a.m. in the night and opposite party no. 2 lodged FIR which was registered as crime no. 0056 of 2018, under sections 147, 148, 302, 352 IPC. In the FIR it was alleged that opposite party no. 2 and his wife with his son Lal Singh were present at their agricultural field for crop harvesting in the night, thereafter, Lal Singh proceeded to his house and when he arrived near his house at about 1 a.m., suddenly the named accused persons who were armed with Lathi and country made pistol, made an assault upon him. Upon hearing his voice, younger son Ram Kumar and his wife and wife of Lal Singh came out side the door and saw that the accused persons were armed with lathi and country made pistol and after challenging the accused persons, they escaped from the spot, after committing scuffle with his son. Thereafter, his son Ram Kumar picked up Lal Singh and informed him. The police was called and thereafter he came to police station with injured son on Maruti van. The police took his injured son to hospital at Mauranipur from where he was referred to DistrictHospital, Jhansi. On the way his son expired in the vicinity of the village Sakrak. It was further alleged in the FIR that there was old enmity going on with the accused and that is why his son was murdered by them. The matter was investigated by police and after concluding investigation a final report dated 17.04.2018 was submitted to the court, in which it was also requested that a proceedings should be initiated under section 182 IPC against the informant.

4. Aggrieved by the final report opposite party no. 2 filed protest petition

on 14.05.2018 on which the court passed an order on 21.07.2018, rejecting the final report and directing to register the protest petition of informant as complaint and complainant was directed to produce the witnesses. Thereafter the statement under section 200 Cr.PC of the informant and the statement of the witnesses under section 202 Cr.P.C. was recorded by the court and passed the impugned summoning order.

5. Aggrieved by the summoning order, this application has been filed, submitting that the impugned order was passed ignoring the police papers on record and only relying on the witnesses examined in support of the complaint. It is clear that the injuries found on the body of the deceased was on one side of his body. The impugned order has been passed on the ocular account of C.W.-1 and C.W.-3, but they have not stated that they have seen the accused persons committing scuffle. The applicants has been summoned without assigning the reason and no specific role has been assigned to any of the applicants and only on the general allegations, the impugned order was passed.

6. It has been further alleged that the Investigating Officer had indicated that the death of the deceased occurred as he fell from the roof and the injury report of the deceased also indicated same thing The fact alleged and discovered during investigation, creates serious doubt about the occurrence. It is also pertinent to mention that Smt. Kaushlya wife of deceased Lal Singh claimed insurance under Mukhya Mantri Kisan evam Sarvhit Bima Yojana showing accidental death of her husband Lal Singh on 20.12.2018. What happened to that claim is not known to the applicants even if efforts were made to know about it.

7. It has been further alleged that the deceased was drunken and he fell down from the roof in a drunken condition and serious laceration, abrasion and contusion resulted, because of that his death occurred. On this basis the applicants have requested for the quashing of the impugned order and the entire case.

8. On being asked whether any criminal revision has been filed against the impugned summoning order or not, learned counsel for the applicants has submitted that no such criminal revision was filed. It is pertinent to mention that against summoning order, the remedy for criminal revision is provided under Criminal Procedure Code, where equally efficacious remedy is available. It appears strange that this Court has been approached for extra ordinary remedy under section 482 Cr.P.C.

9. It appears from the record that when the final report was filed, protest application was given from the side of informant. It is needless to mention that when final report was given by the police it is incumbent on the part of the court to issue notice to the applicants before passing any order on the final report. When the informant filed the protest application, the legal way of handling the protest petition has no where been flouted by the learned court and when the protest petition was filed, the same was registered as complaint directing the complainant to adduce evidence in his favour. Following the direction of the court, the complainant examined himself and five other witnesses including the Doctor who

conducted the postmortem. It has been submitted that the Investigating Officer was not examined. It is needless to point out that the Investigating Officer who has submitted the final report on completion of investigation was not needed to be examined by the complainant, at least at this stage. It is also to be noticed that it was not the choice of the applicant which witness should be examined by the complainant, it is the prerogative of the complainant to examine the witness of his choice, whom he feels that they will going to support the complaint, that is what the complainant has done.

10. The Law with regard to exercise of the power under section 482 Cr.PC. is that, while exercising this power, the Court is not expected to enter into the intricated facts and evidence. If without going into the evidence and fact, a conclusion is possible that there is misuse of the process of the Court, only then the jurisdiction under section 482 Cr.P.C. has to be invoked.

11. In **State of Haryana vs Bhajanlal, 1992 SCC (Cri.) 426,** the Supreme Court has summarized the extra-ordinary power of the High Court under Article 226 or inherent power under section 482 of the Criminal Procedure Code, which can be exercised to prevent abuse of the process of any court or to secure justice in following cases:

1. Where the allegations in the FIR/complaint, even if taken at their face value do not prima facie constitute any offence against accused.

2. Where the allegations in the FIR/complaint or other materials do not constitute a cognizable offence justifying an investigation by the police except under an order of the Magistrate u/s 155(2) of the Criminal Procedure Code.

3. Where the uncontroverted allegations in the FIR/complaint and the evidence collected do not disclose commission of any offence.

4. Where the allegations in the FIR/complaint constitute only non-cognizable offence to which no investigation is permissible without order of the Magistrate u/s 155(2) of the Criminal Procedure Code.

5. Where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground to proceed against the accused.

6. Where there is express legal bar in the Code or in the Statute concerned (under which the proceeding is instituted) to the institution or continuance of the proceedings.

7. Where there is a specific provision in the Code or in the Statute concerned, providing efficacious/alternative remedy for the grievance.

8. Where a criminal proceeding is manifestly attended with mala fide or malicious with ulterior motive for wreaking vengeance on the accused with a view to spite him due to private and personal vengeance.

9. That it should be exercised very sparingly to prevent abuse of process of court or otherwise to secure the ends of justice and should not be resorted to like remedy of appeal and revision.

10. The high court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not.

12. The order has been passed by the learned trial court by making a judicial inquiry as provided under the Criminal Procedure Code and after finding that the prima facie case is being made out, the impugned order has been passed. The applicant will have occasion to put their point of view at the time of framing of charge and at the time of recording of the evidence.

13. On the basis of above discussions, I do not find any good reason for interfering in the impugned order. The application has got no force and therefore, it is liable to be dismissed.

14. The application U/S 482 Cr.P.C. is dismissed accordingly.

15. The learned counsel for the applicants has requested that some protection may be given as the applicants have been summoned in the complaint case.

16. It is directed that if within 30 days from today, the applicants appear before the court and file their bail application, the same shall be disposed of expeditiously preferably on the same day and for these 30 days no coercive measures shall be taken against the applicants.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

CIVIL MISC. WRIT PETITION No.38158 of 2012
(U/s -482 Cr. P.C.)

Vishweshwar Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Imran Ullah.

Counsel for the Opposite Parties:
A.G.A., Sri N.L. Pandey, Sri Pankaj Srivastava, Sri G.P. Singh.

A. Indian Penal Code–Section 499 IPC– First, it must be established that matter printed and offered for sale was defamatory; second, if proved, next it must be examined whether the accused committed such act with the requisite intention or knowledge, etc. to make his act culpable. (Para 22)

B. Indian Penal Code – Defamation - Once trial court finds - that a news item printed was defamatory- then whether the news item was printed- knowingly that the same would tarnish the image of the opposite party or not - is a matter of evidence for which a full-fledged trial is required to be held for the same - Proceedings cannot be nibbed in the bud by the High Court exercising extraordinary power u/s 482 Cr.P.C (Para 21)

C. Indian Penal Code-Defamation-If news item-printed in newspapers-without making proper care/enquiry-possibility that the same have been published in order to bring down the image of the opposite party cannot be ruled out, completely. (Para 18)

D. Certain news item was printed, which was found by the trial court to be defamatory against the opposite party no. 2, as two witnesses stated upon reading the said piece of evidence, they started viewing the opposite party no. 2 in poor light, considering that he was a criminal.

Held:-It would be appropriate to have a full-fledged trial so as to gather the intention of

the accused, whether it was there to defame the opposite party no. 2 in order to lower his image in the estimation of the public and with that motive the news item was printed or whether it was simply a statement of fact. Prayer for quashing the proceedings was refused. (Para 23)

Application Rejected

List of cases cited

1. Md. Abdullah Khan v. Prakash K. (2018) 1 SCC 615 followed

2. K. Sitaram and Another v. CFL Capital Financial Service Limited and Another (2017) 5 SCC 725

3. S.K. Alagh v. State of Uttar Pradesh (2008) 5 SCC 662

4. Md. Abdullah Khan v. Prakash K. (2018) 1 SCC 615 (E-5)

(Delivered by Hon'ble Dinesh Kumar Singh- I, J.)

1. Heard learned counsel for the applicant Shri Imran Ullah and in opposition, learned counsel for opposite party no. 2 Shri N.L. Pandey, learned A.G.A. for the State Shri G.P. Singh and perused the record.

2. This application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code') has been moved on behalf of the applicant with a prayer to quash the entire proceedings in Complaint Case No. 583 of 2012 (Natthu Lal Yadav v. Pradhan Sampadak and others), under Sections 500, 501 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.'), Police Station - Kotwali, District - Varanasi, pending in the court of A.C.J.M.-II, Varanasi.

3. In order to appreciate the arguments advanced by learned counsel for the applicant and the contentions made in the affidavit filed on his behalf, it would be pertinent to refer here in brief, the complainant's case as narrated in the complaint and the evidence which has been adduced in support thereof. According to the complaint, one Sessions Trial No. 642 of 1999 was initiated against the opposite party no. 2/complainant under Sections 302, 120B of I.P.C., Police Station - Chowk, District - Varanasi pertaining to Crime No. 10 of 1999, in which he was acquitted vide judgment and order dated 05.08.2002 by the Additional District Judge, Fast Track Court No. 5. The Advisory Committee of the National Security Agency (N.S.A.) had communicated by FAX to the opposite party no. 2 that his detention was found to be against law and a direction was issued for his immediate release. Earlier, the District Magistrate had cancelled the license of S.B.B.L. gun of the opposite party no. 2, but subsequently, a report was sent by Inspector, Kotwali pertaining to Crime No. 10 of 1999 in respect to the cancellation of gun license of the opposite party no. 2 and after consideration of the same, the District Magistrate vide order dated 25.08.1999, had cancelled his gun license, against which an appeal was preferred by him before the Commissioner, Varanasi under Section 19 of the Arms Act, 1959 and vide order dated 26.02.2001, the order of District Magistrate was confirmed, against which the opposite party no. 2 had preferred a writ petition No. 20298 of 2010 before the High Court, in which the orders of the District Magistrate and the Commissioner were set aside and the said gun was released in favour of opposite party no. 2 and his armed license gun was

renewed up to 2009 and was valid till then. The accused-applicant along with two other co-accused were fully aware of these facts, but in order to assail his dignity, at the instance of co-accused (Sanjay Singh, Inspector, Police Station - Kotwali, District - Varanasi), on 13.06.2007, untrue facts were published in the newspapers, which were derogatory to the opposite party no. 2 and considerably dented his esteem in the eyes of public and people started looking upon him in adverse light and this also led to the breakage of betrothal ('sagaai') of the complainant's son and people started avoiding to meet him so much so that it became very difficult for him to move around and live peacefully a dignified life. This caused immense physical, mental and financial loss to him.

4. The said complaint was registered as Complaint Case No. 2025 of 2007 against the applicant and two other co-accused and on 25.06.2007, the statement of the opposite party no. 2 was recorded under Section 200 of the Code, in which he narrated the same version which has been stated above in the complaint, further clarifying that all the three accused, which included the applicant, in conspiracy with each other, published news item in 'Hindustan' and 'Amar Ujala' daily newspapers on 13.06.2007. The local editors of the said two daily newspapers were made accused along with the S.I. Sanjay Singh who were stated to have deliberately published the said news item, which led to the defamation of the opposite party no. 2 and therefore, it was mentioned that a sum of Rs. 10 lacs should be directed to be paid by the accused to compensate the opposite party no. 2.

5. In support of the complaint, one Manoj Kumar Srivastava was examined by the opposite party no. 2 as P.W.1 under Section 202 of the Code, who has stated that he knew the opposite party no. 2 and had read news item in 'Amar Ujala', Varanasi edition dated 13.06.2007, carrying news item pertaining to the opposite party no. 2, after reading which, he received a big jolt that the opposite party no. 2 was a man with criminal antecedents, having case under Section 302 of I.P.C. and he was a history-sheeter. His other friends were having the same kind feeling towards him after having read the news and started avoiding to meet him. The other witness, namely, Kashi Seth was also examined by the opposite party no. 2 as P.W.2. He also has stated that he read the Varanasi Edition of the 'Amar Ujala' daily newspaper dated 13.06.2007 and came to know about the opposite party no. 2 being a history-sheeter and this led him not to have confidence in the opposite party no. 2 as his reputation had gone down badly. The marriage of opposite party no. 2's son which was likely to take place also had broken because of the said news item having been widely read by the general public.

6. Based on the said evidence, the trial court passed the order dated 10.01.2008, wherein it was recorded that the news item which was published by the accused-applicant was nothing but publishing correct news and therefore, the same would not fall in the category of any offence. The accused being an editor of the 'Amar Ujala' daily newspaper, had published the said item only thinking that the said news item was correct and it would not appear to him that if the same was published by him, it would bring down the esteem of the opposite party no. 2 in the eyes of public. As regards the third accused Sanjay Singh, Inspector, Kotwali, the action taken by him fell within the domain of his official duty in

respect of cancellation of arm's license of opposite party no. 2. Merely on account of opposite party no. 2 being acquitted, it could not be said that accused no. 3 had proceeded to take action for cancellation of arms license in order to damage his reputation. Accordingly, the trial court dismissed the complaint under Section 203 of the Code. Against the said order, a revision (Criminal Revision No. 09 of 2008) was preferred in which the Sessions Judge, Varanasi vide judgment and order dated 29.02.2008, set aside the order of the learned Magistrate mentioned above and remanded the matter back to the trial court to decide the matter afresh after hearing the counsel for the complainant and considering the evidence on record. While passing the said order, the learned revisional court observed that although the complainant had been acquitted in the cases pending against him, getting benefit of doubt, but in the publication dated 13.06.2007, it was written ''हिस्ट्रीशीटर भी लेकर घूम रहें लाइसेंसी असलहा''. The name of the opposite party no. 2 was also mentioned therein, therefore, it was not appropriate for the newspaper to publish such news without proper enquiry. The opposite party no. 2 had been acquitted by the Additional District Judge on 05.08.2002 and by the order of High Court in Writ Petition No. 20298 of 2001, the petition of opposite party no. 2 was allowed and his arm's license was restored in the year 2003. Thus, after 2003 till 2007, there was nothing against the opposite party no. 2 which could be the basis for publishing such news item that he was a history-sheeter detenue of "RASUKA" (Rashtriya Suraksha Kanoon). Further, it is mentioned in the said judgment that the publication of the fact mentioned in the complaint could not be said to be bona fide and the conclusion drawn by the learned trial court that true facts were published could not be said to be in accordance with evidence on record and accordingly, the revision was allowed.

7. Thereafter, the trial court passed the impugned order dated 09.07.2009, in which it has been recorded that the revisional court, while allowing the revision on 29.02.2008, has directed it to pass fresh order on the basis of evidence, after hearing the parties again. The revisional court in its order while drawing the conclusion, has mentioned that the publication made in the newspapers did not appear to have been published bona fidely and hence, according to the conclusion drawn by the revisional court, the accused deserves to be summoned to face trial under Section 500 of I.P.C. and accordingly, summons were issued against the applicant along with other two co-accused.

8. The main thrust of the argument of the learned counsel for the applicant was that the impugned order was totally illegal because the same was not passed on the appreciation of the evidence on record by the learned Magistrate, rather it has been passed in accordance with the wishes/opinion formed by the revisional court, which is wrong. The learned Magistrate was directed to consider the evidence afresh and after hearing the parties, he should have passed fresh order, expressing his own opinion as to whether *prima facie* case under the relevant sections were made out or not and it should not have passed the order merely because the revisional court had expressed opinion that the said offence was found to be made out.

9. Attention of this Court was also drawn to the order of the District

Magistrate, Varanasi dated 15.10.2007 at page no. 85 of the paper book, in which as many as four criminal cases are shown to have been recorded against opposite party no. 2 and it was also mentioned therein that on the basis of police report, showing those cases to have been initiated against opposite party no. 2, was held to be the basis for cancelling the arm's license of the opposite party no. 2. He was issued notice to show cause on 19.07.2007. In response to the said notice, the opposite party no. 2 had filed objection on 17.08.2007, stating therein that the Crime No. 10 of 1999 was registered against him because a widow lady had received a bullet injury and concerning that, proceedings were also initiated against him under N.S.A. His arm's license was also cancelled vide order dated 25.08.1999, against which he had preferred an appeal before the Commissioner, Varanasi Division, which too was dismissed and thereafter, a writ petition No. 20298 of 2001 was preferred by the opposite party no. 2 and in the said petition, vide order dated 14.05.2003, the orders of District Magistrate and the Commissioner were set aside and the arm's license of the opposite party no. 2 was directed to be restored and on that basis, the show cause notice was taken back with immediate effect and the gun was directed to be restored to opposite party no. 2. It was argued after having shown the said order, that the said order was passed on 15.10.2007, while the publication of news item was made on 13.06.2007, which was stated to be derogatory and defamatory against the opposite party no. 2. Therefore, it is apparent that the accused-applicant did not have any knowledge that any such order was passed by the District Magistrate, restoring the arm's license to the opposite party no. 2 after having found that the criminal case shown pending against him had resulted in acquittal and the High Court had passed a direction in his favour to restore the license and the weapon as well.

10. The sole basis of making publication of the said news item was that there was report of the co-accused Sanjay Singh to the effect that the above-mentioned four cases were pending against him and hence, he had made the said publication simply on the basis of the police report. There was no intention while publishing the said news item to defame the opposite party no. 2, rather it was simply a news item, which was statement of fact, basis of which was police report, which later on came to be set aside by the order of District Magistrate dated 15.10.2007, hence, he cannot be held liable for having caused offence under Sections 500 and 501 of I.P.C.

11. On the other hand, learned counsel for the opposite party no. 2 vehemently opposed the quashing of the proceedings against the applicant because according to him, it was very much in the knowledge of the accused-applicant that those criminal cases, which are cited above, had already been closed and the accused-applicant had been acquitted and the license of the gun was also restored to the opposite party no. 2 and yet, knowing full well, the said news item was published in the said papers with a view to maligning the image of the opposite party no. 2, hence, offence under Sections 500 and 501 of I.P.C. were made out on the basis of evidence which has been recorded by the trial court.

12. Reliance has been placed by learned counsel for opposite party no. 2 on the judgment of Hon'ble Apex Court in the case of ***K. Sitaram and Another v. CFL Capital Financial Service Limited and Another.*** In the above-mentioned case, it has been held by the Hon'ble Apex Court that when a person files a complaint and supports it on oath, rendering himself liable to prosecution and embezzlement, if it is false, he is entitled to be believed unless there is some apparent reason for disbelieving him; and he is entitled to have the person, against whom he complains, brought before the court and tried. The only condition requisite for the issue of process is that the complainant's deposition must show sufficient ground for proceeding.

13. From the side of the applicant, in paragraph no. 32 of the affidavit, it is mentioned that a perusal of the order dated 15.10.2007 passed by the District Magistrate would itself demonstrate that the D.M. was not in the knowledge of earlier proceedings and as such, if at all he had given any statement against opposite party no. 2, that was on the basis of criminal proceedings and relying on the police report. However, the reporting of the publishing was done only on the basis of the statement given by the then District Magistrate and after doing preliminary enquiry by the reporter concerned, whereby he was shown the papers regarding criminal prosecution as well as the reports given by the police station concerned to the District Magistrate and as such, it cannot be said that the said reporting was done with laxity and without proper investigation, with an intention to defame any person. The petitioner/applicant, at the time of the said reporting, was Resident Editor of Hindustan Times Media Ltd. The said reporting was not done by him. There was no intention nor any personal enmity with the complainant to publish false report against him, rather it was a plain and simple reporting of the fact as narrated by the then District Magistrate, Varanasi and there was no ulterior motive against the complainant to defame him or tarnish his image. The trial court has ignored the settled principle of law that in order to constitute abetment, the abettor must be shown to have intention as well knowledge to have aided in the commission of the offence.

14. In the instant case, the applicant cannot be said to be an abettor as there was no intention or knowledge to commit the offence. There was no prima facie case made out against the applicant. There is not an iota of single specific allegation against the applicant in relation to the publication of the said news item and yet he has been summoned. Further, it was mentioned that under Section 7 of the Press and Regulation of Books Act, 1867, it is only the office of the "editor" as defined under Section 1(1) of the Act who can be held responsible for the publication and no other person. The said Act has been reproduced in the affidavit. It was necessary that the editor should have been directly responsible for publishing any news item.

15. Reliance has also been placed upon the judgment of Hon'ble Apex Court in the case of ***S.K. Alagh v. State of Uttar Pradesh***, in which it is held that there is no concept of vicarious liability under criminal law. The trial court has miserably failed to appreciate the evidence on record and has taken cognizance erroneously, which needs to be set aside.

16. From the side of opposite party no. 2, counter affidavit has been filed, in which all the submissions made in the affidavit have been rebutted and it has been asserted that there was sufficient evidence on record for the trial court to summon the accused under the aforesaid sections.

17. In the rejoinder affidavit filed from the side of the applicant, the same facts have been reiterated, which have been mentioned in the affidavit and nothing new has been stated.

18. The facts in the case are very much clear, as has been mentioned above. It is a fact that the opposite party no. 2 was an accused under Section 302 of I.P.C., but he had been acquitted for the same by the trial court way back in the year 2002 and the gun license was issued in favour of opposite party no. 2, which was cancelled by the District Magistrate and thereafter, the said decision was upheld by the Commissioner. Both the orders were set aside by the High Court in Writ Petition No. 20298 of 2001 vide order dated 14.05.2003 and the said license was restored to the opposite party no. 2, while the news item in question has been published in 2007. It is apparent that the said news item appears to have been printed in newspapers without taking proper care and making proper enquiry and the possibility cannot be ruled out that the same could have been published in order to bring down the image of the opposite party no. 2, as has been stated in the complaint and supported by the two witnesses named above. It has been argued by the learned counsel for the applicant that the applicant had no intention to defame opposite party no. 2 and that he had simply printed the news item on the basis of his information which he had received from the District Magistrate and also on the basis of police report, is something which needs to be decided by the trial court after having appreciated the evidence on record of both the sides and after having appreciated in the light of cross-examination made as to whether the evidence to be adduced by the parties proves the offence as has been committed by the accused-applicant or not. In case the trial court comes to the conclusion that there was no sufficient evidence on record to hold the accused guilty of having published the said news item deliberately in order to lower his image in the estimation of public, then the accused may get acquittal from the trial court, but at this stage, prima facie there is evidence against the applicant which discloses commission of offence under Sections 500 and 501 of I.P.C.

19. Sections 500 and 501 of I.P.C. are reproduced herein below :-

500. Punishment for defamation.-Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

501. Printing or engraving matter known to be defamatory.-Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

20. It is apparent from the above definition of offence under Section 501 of

I.P.C. that if someone prints or engraves any matter knowing that such matter is defamatory of a person, he shall be punished with two years' simple imprisonment or with fine or with both.

21. In the present case, there is certainly a news item printed, which is found by the trial court to be defamatory against the opposite party no. 2, as two witnesses have stated that when they read the said piece of evidence, they started viewing the opposite party no. 2 in poor light, considering that he was a criminal and tried to stay away from him and the marriage of his son had also broken on that account. Therefore, the fact as to whether the said news item was printed in the said newspapers knowingly that the same would tarnish the image of the opposite party no. 2 or not, is a matter of evidence and a full-fledged trial is required to be held for the same. Therefore, at the initial stage, the proceedings against the applicant cannot be nibbed in the bud and reliance may be placed by me upon the judgment of Hon'ble Apex Court in the case of ***Md. Abdullah Khan v. Prakash K.,*** wherein it was held that it must be established that matter printed and offered for sale is defamatory within the meaning of expression under Section of 499 of I.P.C. If so proved, the next step would be to examine the question whether the accused-respondent committed the acts which constitute the offence of which he is charged, with the requisite intention or knowledge, etc. to make his act culpable. The answer to question depends upon facts. If the respondent is the person who either made or published the defamatory imputation, he would be liable for punishment under Section 500 of I.P.C. and if he is the person who "printed" the matter, then within the meaning of expression under Section 501 of I.P.C. Whether there is sufficient evidence to establish the guilt of the respondent for the said offence, is a matter that can be examined only after recording the evidence at the time of the trial. In this case, the Hon'ble Apex Court had held that the High Court did not choose to give any reason, whatsoever, for quashing the complaint, except concluding that the prosecution of accused would lead to miscarriage of justice, which was held to be wrong and it was considered proper that the trial ought to have been held.

23. Adopting the above principle of law in the present case, I am of the view that in the present case as well, it would be appropriate to have a full-fledged trial so as to gather the intention of the accused, whether it was there to defame the opposite party no. 2 in order to lower his image in the estimation of the public and with that motive the news item was printed or whether it was simply a statement of fact. This Court cannot prejudge this issue without the full trial.

23. In view of the aforesaid, the prayer for quashing the entire proceedings in the aforesaid case is refused and resultantly, the instantly application stands **rejected.**

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH-I, J.

CIVIL MISC. WRIT PETITION No. 6919 of 2015
(u/s -482 Cr. P.C.)

Smt. Rekha Gupta &Ors. ...Applicants
Versus
State of U.P.& Anr. ...Opposite Parties

Counsel for the Applicants:

Sri S.S.Shah

Counsel for the Opposite Parties:
A.G.A., Sri Ram Ker Singh, Sri S.L. Kesharwani, Sri S.L. Kesharwani, Sri Saurabh Srivastava, Sri Laukush Kumar Shukla.

A. Cr.P.C.- Section 482- Quashing of entire proceedings- matter is of civil nature- civil suit pending - initiation of criminal proceedings is abuse of process of court. (para 15)

B. Section 467, 468, 471, 120-B, 504, 506 Indian Penal Code- FIR lodged by opposite party no. 2 - agreement to sell half portion of applicant's plot- earnest money of Rs. 50,000 received - sale executed in favour of third persons.

Held:- Intention of the accused-applicant was to cheat the opposite is apparent on the face of it as even after receiving certain amount they executed the deed in favour of third persons. Further, they did not return or intent to return Rs. 50,000. (para 16)

Chronological list of Cases Cited: -
1. 2012 LawSuit (SC) 840 Paramjeet Batra Vs. State of Uttarakhand

2. AIR 1979 Supreme Court 850 Trilok Singh and others Vs. Staya Deo Tripathi

3. 2002 LawSuit (SC) 112 Kunstocom Electronics Pvt. Ltd. Vs. GILT Pack Ltd.

4. 2013 LawSuit (SC) 69 Rajiv Thapar and others Vs Mandan Lal Kapoor

5. (2010) 6 SCC 562 S.G. Gupta Vs. Ashutosh Gupta

6. (2007) 5 SCC 228 N. Devidrappa Vs. State of Karnataka (E-10)

(Delivered by Hon'ble Dinesh Kumar Singh- I, J.)

1. Heard Sri S.S. Shah, learned counsel for the applicants, Sri Laukush Kumar Shukla for opposite party no. 2, Sri G.P. Singh, learned A.G.A. and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the entire proceedings of Criminal Case No.1582 of 2014 arising out of case crime no. 722 of 2013 under sections 420, 467, 468, 471, 120-B, 504, 506 IPC Police Station Civil Lines, District Meerut pending in the Court of Additional Chief Judicial Magistrate, Meerut and also a prayer is made to stay the proceedings in this case till the disposal of this application.

3. To understand the dispute involved in the present case, it would be appropriate to recount here the facts of the matter, which are as follows:-

4. The opposite party no. 2 has lodged an FIR in the present case on 16.11.2013 stating therein that he had got an agreement to sell executed of half portion of plot No. A-82 situated in Takshila Colony, Garh Road, Meerut which was owned by one Rekha Gupta accused-applicant no. 1 wife of Ved Prakash on 1.07.2008 after advancing her an amount Rs.50,000/- and the remaining portion of the said plot was agreed to be sold in favour of brother of opposite party no. 2 Subhash Chandra and from him also the same amount was taken i.e. Rs.50,000/-. As per the terms and conditions of the agreement the accused-applicant no. 1 was required to execute the sale deed of the said plot after obtaining permission as well as obtaining succession certificate within one month but the accused-applicant no. 1 had taken on various dates an amount of Rs.6,00,00/- from the brother of opposite

party no. 2 and Rs.16,00,000/- from the opposite party no. 2, apart from amount which was already advanced under the agreement on the pretext for seeking permission and continued to avoid execution of the sale deed saying that she had not got permission and sometimes she would say that her son was not agreed to the said sale. The opposite party no. 2 due to old relation with the accused-applicant could not put much pressure on her and believing her assurance continued to pay her money but he came to know that the accused-applicant no. 1 had taken permission stealthy from the committee on 10.11.2009 and she was keeping him under false impression that the same had not been given and thus she wanted to usurp the amount which had already been extended to her by playing fraud upon the opposite party no. 2. Further it is mentioned in the said FIR that in order to usurp the said money of opposite party no. 2 and his brother, accused applicant no. 1 and accused-applicant nos. 2 to 4 who are his sons namely, Varun Gupta, Rajat Gupta and Vaibhav Gupta had conspired with each other and sold the said plot to one Vimla wife of Brahma Singh, Dinesh Kumar son of Brahma Singh, Savita wife of Dinesh Kumar, resident of 118-B, Takshila Colony, Meerut in a forged manner also colluding with the Registrar and representing that the said property was clear property. When the opposite party no. 2 talked to Vimla, Dinesh Kumar and Savita etc. it transpired that they had full knowledge about the agreement having been executed in favour of the opposite party no. 2 in respect of the said plot but in order to deprive the opposite party no. 2 of his rights, they got the said sale deed executed in their favour with ill intention, playing fraud upon the opposite party no. 2. They raised illegal wall on the said plot on the northern side and wanted to grab the whole plot. When the opposite party no.2 visited the spot and tried to stop illegal possession being taken, they indulged in abusing and also gave threat that the said plot had been purchased by them and if he comes again, he would be killed. The Investigating Officer, after having investigated the case, submitted charge-sheet against the above-mentioned accused-applicants under the abovementioned sections.

5. In the affidavit filed in support of the application, it is stated by the applicants that the husband of the applicant no. 1 Ved Prakash Gupta had purchased the plot in question on 21.2.1987 through a registered sale deed and the same was mutated in his name. After his death, the applicants came in its possession. The opposite party no. 2 intended to purchase the said plot from applicant no. 1 regarding which an unregistered agreement was entered into between them on 08.05.2008. The total sale amount settled was Rs.16,25,000/- and payment of Rs.50,000/- was made to the applicant no. 1. and as per the terms and conditions, the opposite party no. 2 was to get the sale deed registered within one month. A copy of the said agreement to sell has been annexed as Annexure-2. Further it is stated that instead of getting the sale deed executed, the opposite party no. 2 sent a cheque dated 25.10.2008 which was refused by the applicant no. 1. In the meantime, the applicants got good value of their property i.e. Rs.43,10,000/- and executed registered sale deed in favour of the vendees, which is annexed as Annexure-4. The opposite party no. 2 had sent a notice dated 10.3.2010 for executing the sale deed in which it was

mentioned that at the time of executing the agreement to sell, the amount of Rs.50,000/- was given and remaining balance would be paid at the time of execution of the sale deed copy of the same is annexed as Annexure-5. Another notice dated 5.4.2010 was sent by opposite party no. 2 specifically mentioning that the remaining amount of Rs.15,75,000/- would be paid at the time of execution of the sale deed, copy of the same is annexed as Annexure-6. The opposite party no. 2 again sent notice dated 17.4.2010 and 8.5.2010 in which the balance amount was against mentioned as Rs.15,75,000/-. The applicant no. 1 sent a reply of the notice dated 10.3.2010 on 18.5.2010 through Devendra Kumar Kaushik, her advocate. After receipt of reply of the said notice, opposite party no. 2 filed civil suit no. 314 of 2011 for injunction against the applicants in the court of Civil Judge (S.D.), Meerut, copy of the same is annexed as Annexrure-7. Written statement was filed therein denying the allegation made in the plaint, copy of the same is annexed as Annexure-8. During pendency of the civil suit, opposite party no.2 got it amended by adding few facts. The trial court framed as many as 24 issues to be decided in the said suit and the same is still pending. It is further mentioned that the opposite party no. 2 without any rhyme or reason has lodged the first information report against the applicants on 16.11.2013.There was not even a whisper in the FIR regarding filing of the civil suit by opposite party no. 2 and allegations made in the FIR were different from the contents of notices sent by the opposite party no. 2 and the suit filed by him. The allegation of payment of Rs.6,00,000/- has been shown in the FIR whereas no such averment was made in the notices or in the suit, which itself goes to show that the FIR was lodged absolutely on the false and frivolous ground. The police has recorded the statement of the opposite party no. 2 who repeated the same version as given in the FIR and has also recorded the statement of witnesses of registered sale deed namely, Pramod Kumar and Pawan Kumar as well as the statement of Branch Manager of SBI and all the witnesses of unregistered agreement to sell namely, Pramod Tyagi, Om Prakash and the Secretary of Sahkari Samiti. The police also made a request to opposite party no.2 to hand over the original unregistered agreement but the same could not be produced by him despite repeated requests. The Investigating Officer contacted the Branch Manager of SBI who gave his report that a draft of Rs.4,00,000/ dated 25.10.2008 was got cancelled on 29.12.2009 by the informant and was deposited in the account of the opposite party no. 2. The police also recorded the second statement of the informant and several questions were put to him which were not replied satisfactorily. The police has also recorded the statement of purchaser of the plot in question namely, Dinesh Kumar, Smt. Vimla and Smt. Savita on 7.2.2014 who have stated that they had purchased the plot in question for adequate consideration. The statement of independent witness Jai Bhagwan was recorded who stated that Smt. Rekha executed sale deed only after lapse of time. On the basis of FIR, the police investigated the case and came across the notices, civil suit and various other things and ultimately came to the conclusion that no offence against the applicants was made out and submitted final report on 18.2.2014. The Superintendent of Police

(Crime) rejected the final report and again further investigation was ordered. The police again recorded third statement of the informant who leveled the allegation of taking Rs.6,50,000/- from the opposite party no. 2 by the applicant, which was never mentioned in any of the notices nor in the civil suit, which makes it evident that only in order to harass and humiliate the entire family of the applicants, the said false allegations have been made. The police has also recorded statement of his brother namely, Subhash Chandra and second statements of the witness of agreement to sell namely, Pramod Tyagi and Om Prakash. Police has also recorded the statement of witness Hari Mohan Gupta and second statement of Branch Manager, SBI on 19.5.2014. It has again recorded statement of Promod Singh, Secretary of the Society who stated that NOC was given to Smt. Rekha Gupta on 10.11.2009. The police had also recorded the statement of witness Pradeep Kumar son of Mangu Singh who had got prepared the demand draft and ultimately submitted charge sheet against the applicants on 12.10.2014 in the court of Judicial Magistrate, who has taken cognizance on 22.10.2014. It is further mentioned that as per prosecution only an unregistered agreement to sell was prepared which did not give any right, title or interest to the opposite party no. 2 over the property in dispute as the same was not binding upon the applicant no. 1. Since no right accrued to the opposite party no. 2, hence the applicants were free to execute the sale deed of the said plot to any other person. No illegality was committed by the applicants in the said sale being full owner of the said property. It is further mentioned that earlier the applicants had approached this Court and was granted stay against their arrest till submission of the police report vide order dated 13.5.2014. Further it is mentioned that this matter is of civil nature and the initiation of criminal proceedings is nothing but an abuse of process of court. Further, it is mentioned that no offence under sections 420, 467, 468, 471, 120B, 504 and 506 IPC has been made out against the applicants, hence criminal proceedings need to be quashed.

6. In rebuttal by filing a counter affidavit, the opposite party no. 2 has stated therein that plot no. A-82 area 856.75 sq. yards was purchased by Late Ved Prakash Gupta (husband of the applicant no. 1) in Takshila Colony from Takshila Sahkari Avas Samiti on 21.2.1987 through registered sale deed, pursuant to which his name was mutated thereon and after his death the applicant no. 1 and her sons who are applicant nos. 2 to 4 became its owner being legal heirs of the deceased. The applicant no. 1 on her own had proposed to sell the said plot on certain terms and conditions which led to executing an agreement dated 1.7.2008 between the parties duly signed by applicant no. 1 in the presence of the witnesses mentioned therein which is annexed as Annexure CA-1. Half portion of the said plot was to be purchased by his brother and while remaining half was agreed to be purchased by the opposite party no. 2 for a consideration of Rs.16,25,000/- only. At the time of execution of the agreement to sell, an amount of Rs.50,000/- as part payment of consideration was accepted by the applicant no. 1 and rest of the amount was agreed to be paid by the opposite party no. 2 at the time of execution of the sale deed. Therefore, right from the inception, the intention and motive of the accused-applicant no. 1 was not clear, as at the

time of execution of the agreement to sell dated 1.7.2008, no permission was ever sought by her from Takshila Sahkari Avas Samiti for execution of the sale deed, moreover, applicants were also not having succession certificate on the date of execution of the agreement to sell. According to the terms and conditions of the agreement, the opposite party no.2 requested the applicants for execution of the sale deed but in the absence of permission from the concerned Sahkari Avas Samiti, request of the opposite party no. 2 was turned down by the applicants. Moreover, the applicants demanded and accepted Rs.6,00,000/- in certain parts only on the ground for seeking permission from Takshila Sahkari Avas Samiti for executing the sale deed in favour of the opposite party no. 2. A demand draft of Rs.4,00,000/- was handed over to the applicant no. 1 on 25.10.2008 which was issued from the account of opposite party no. 2 maintained in the SBI, Khatauli, Muzaffar Nagar but the same was never put for clearance by her and after expiry of 14 months, the same was returned to the opposite party no. 2 which shows the intention of the applicants that they deliberately, with ill motive, after receipt of Rs.6,50,000/- from the opposite party no. 2, had not executed the sale deed of the plot in question. The opposite party no.2 facilitated the applicant no. 1 in terms of money by depositing Rs.3,94,200 in the office of the said Samiti on 7.11.2009 by way of requisite dues of the development and maintenance charges. Immediately, after receiving the outstanding dues, the Samiti granted permission for execution of the sale deed but even after no objection certificate was given by concerned Samiti, the applicants were not executing the sale deed as per agreement, hence opposite party no. 2 made a request to the applicant for execution of the same through registered notice dated 10.3.2010 wherein the date of execution of sale deed was mentioned as 25.3.2010. The applicant no. 1 communicated to the opposite party no. 2 that she was ready to execute the sale deed after 20 days from the time which was mentioned by the opposite party no. 2. After completion of 20 days, the opposite party no. 2 put his appearance from morning till evening along with all the documents and requisite fee for registration of sale deed as well as balance amount of payment of consideration in the office of Sub Registrar-I, Meerut. Copy of the same is annexed as Annexure CA-2. A legal notice dated 6.5.2010 was also got served by opposite party no. 2 upon the applicants to appear before the Office of Sub Registrar-I, Meerut for execution of sale deed, copy of which is annexed as Annexure CA-3. The said legal notice was replied by the applicants in which it was admitted by them that the agreement to sell was executed by them as well as money mentioned therein was received by them, copy of the same is annexed as Annexure CA-4. Opposite party no. 2 having no option left, filed a civil suit being civil suit no.314 of 2011 before Civil Judge (Senior Division), Meerut seeking prohibitory injunction against the applicants with further prayer that a direction be issued to the applicants to execute sale deed with respect to the said plot. A written statement was also filed from the side of the applicants and in paragraph no. 3 of which the applicant no. 1 and applicant no. 4 admitted that an agreement to sell was executed by them but the same was unregistered. During the pendency of the said suit, it transpired that in breach of the agreement, by way of

committing cheating and fraud with concealment of fact, the applicants executed a registered sale deed of the said plot on 6.1.2010 in favour of Smt. Vimla Devi, Dr. Dinesh Kumar and Smt. Savita. Thereafter, immediately the opposite party no. 2 moved an application for amendment which was allowed. The opposite party no. 2 is exercising his civil right for seeking part performance of the proposed sale deed of the plot in question in his favour through court as his matter is well covered under section 53-A of the Transfer of Property Act but at the same time it was also a criminal liability on the part of the applicants who after having received Rs.6,50,000/- and entered into an unregistered agreement, have fraudulently executed the sale deed of the same plot to some other persons by committing cheating, forgery on valuable security and forgery for the purposes of cheating by using a forged document. Therefore, there is no justification of quashing the proceedings.

7. Some more facts have been placed on record from the side of the applicants through rejoinder affidavit dated 04.09.2016 in which it is mentioned that it is admitted position that unregistered agreement to sell was executed by the applicant no. 1 on a Rs.100/- stamp paper in which though the names of Smt. Rekha Gupta and her sons Varun Gupta, Vaibhav Gupta and Rajat Gupta have been mentioned as party no.1 but the said unregistered agreement was only shown to be signed by Smt. Rekha Gupta and by no other person. The said agreement being unregistered, would not create any right, title or interest on the opposite party no. 2 which was executed on payment of Rs.50,000/- and the total settlement between the parties was Rs.16,25,000/-. It is further mentioned that opposite party no. 2 has annexed the certificate of appearance before the Sub Registrar, Meerut on 22.4.2010 and has also annexed notice dated 06.05.2010 and both these papers show that he admitted this fact that he had paid Rs.50,000/- while remaining amount of Rs.15,75,000/- was yet to be paid. Therefore, it is clear that except Rs.50,000/-, no further payment has been made in any form by the opposite party no. 2. Further, it is mentioned that the averments made in the plaint are totally different from that of the notices given to the applicants as nowhere was it mentioned in the notice that the opposite party no. 2 ever made payment of Rs.50,000/- but in suit it was alleged that the applicants were given cash amount of Rs.2,00,000/- and Rs.4,00,000/- which itself shows the falsehood in the prosecution story. Further, it is mentioned that execution of unregistered agreement to sell would not confer any right, title or interest upon opposite party no.2 and the applicants had legal rights to execute sale deed in favour of any other person and that matter is of civil nature and no criminal liability would arise. Allegation of making payment of Rs.2,00,000/- and Rs.4,00,000/- later on, is totally false which have been made only to pressurize the applicants as the said fact is totally missing from the application given to Sub Registrar and is also missing in various notices which have been annexed as Annexure CA-3 to the counter affidavit. The draft of Rs.4,00,000/- allegedly issued in the name of the applicant no. 1 was never presented in the bank and the same was returned to the opposite party no. 2 which itself is clear from the statement of Branch Manager, therefore, the charge-sheet filed against the

applicants is totally malafide and needed to be quashed. The matter being of civil nature, the amount of Rs.50,000/- allegedly paid by opposite party no. 2 under the terms and conditions of the agreement to sell could be recovered by filing civil suit which is still pending. It is simply a case of non-execution of sale deed and it should also not be ignored that after investigation initially final report was submitted but on the direction of superior officer, investigation was further made and Investigating Officer was left with no option but to submit charge sheet which has been submitted without any evidence on record. The present dispute is subjudice before the civil court.

8. Learned counsel for applicant has relied upon the judgment of Supreme Court in **Paramjeet Batra vs. State of Uttarakhand and others 2012 LawSuit (SC) 840** wherein it is held that civil transaction made also have a criminal texture. High Court must see whether civil matter is a cloak of Criminal offence. If a civil remedy is available and adopted by the complainant, the High Court should not hesitate to quash the proceedings to prevent the abuse of the process of the Court. In this case complaint attributed forgery, fabrication of documents and grabbing profit of running business by appellant appointed to be Manager of the Chicken Corner. The appellant was to receive Rs.25% of the net profit as salary. The appellant claimed tenancy of business premises by filing civil suit for injunction and obtained order of status quo. Possession was delivered by the appellant to the complainant who failed to appear and opposed the application u/s 482 Cr.P.C.. It was held that the continuation of criminal proceedings would be an abuse of process and hence they were quashed because civil court had observed that the documents produced by the appellant for claiming tenancy would have to be proved by evidence and hence status quo was directed till pendency of the suit. The complainant started criminal proceedings alleging that documents filed by the appellant in the civil suit were fabricated. It was held that the grievance of the complainant about forgery of the documents will be considered by the civil court and the appellant can deal with about such forgery in the said civil suit. The possession of the shop was handed over by the appellant to the complainant. In these circumstances, criminal proceedings if continued, were held to be an abuse of process of Court.

9. Learned counsel for the applicant also placed reliance on **AIR 1979 Supreme Court 850 Trilok Singh and others vs. Satya Deo Tripathi.** In this case a truck was purchased under hire purchase agreement and default was caused which led to seizure of truck by the financier. The purchaser launched criminal prosecution against financier. It was held that the dispute raised was of purely civil nature and criminal proceedings initiated were nothing but an abuse of the process of court which deserves to be quashed.

10. Learned counsel for the applicant has also placed reliance on **Kunstocom Electronics Pvt. Ltd. vs. GILT Pack Ltd., 2002 LAWSuit (SC) 112**. In this case question examined was whether objection ought to be raised at the time of framing of charge only. Answer was in the negative and it was held that there was no hard and fast rule that the objection as to cognizability of offence and maintainability of the complaint should be

allowed to be raised only at the time of framing of the charge. Such was not intention of the High Court in passing the order dated 15.5.1996. In any case, in Ashok Chaturvedi and others vs. Shitul H. Chanchani and another, (1998) 7 SCC 698 it was held that determination of the question as regards the propriety of the order of the Magistrate taking cognizance and issuing process need not necessarily wait till the stage of framing the charge.

11. Lastly the reliance has been placed by the applicant upon **Rajiv Thapar and others vs. Mandan Lal Kapoor, 2013 LawSuit (SC) 69** in which it has been held that the High Court can exercise powers under section 482 Cr.P.C. or Article 227 or suo moto to prevent abuse of process of law and can rely on material produced by accused if suspicion is shown as to allegations in complaint, accused may not be discharged. Care and caution should be shown while considering application to quash process as quashing of process results in negation of prosecution at initial stage.

12. From the citations which have been relied upon by the learned counsel for the applicant, it is evident that through these citations, learned counsel for applicant is trying to convey to the court that in the present case it being a civil matter, criminal proceedings would not lie. He has, during the argument, mainly emphasized that only Rs.50,000/- were paid to the accused-applicant no.1 by the opposite party no. 1 pursuant to unregistered agreement to sell having been executed by the accused applicant no. 1 in favour of opposite party no. 2 for sale of the property in question. Only remaining amount was to be paid at the time of execution of sale deed which has been mentioned above. It was argued that such kind of unregistered document does not confer any power upon the opposite party no. 2 to claim transfer of property because any such kind of deal whereunder immovable property would transfer from one hand to another has got to be registered document. Therefore, in the present case, the alleged agreement to sell which is said to have been executed by the accused-applicant in favour of opposite party no. 2 being document written on simply a stamp of Rs.100/- would not extend any right or title to get the said deal executed in favour of the opposite party no. 2. At the most, Rs.50,000/- which have been paid by the opposite party no. 2 to the applicant no. 1 can be claimed back through filing recovery suit and no criminal case could be initiated for recovery of said amount nor any case of cheating would lie for such kind of recovery. Further it is mentioned that the payment of Rs.2.00.000/- and Rs.4,00,000/- which is stated to have been made subsequently is also a false claim as no such transaction has taken place between the two sides and the same has only been stated in order to put pressure upon the accused-applicants. Since the alleged agreement to sell was not a valid and acceptable document, the accused-applicants were fully empowered to sell their land to any other person and accordingly, they have chosen to sell the same in favour of three other persons named above.

13. On the other hand learned counsel for the opposite party no. 2 has vehemently opposed the quashing of the proceedings saying that the intention of the accused-applicants of cheating opposite party no. 2 was there right from the beginning because an amount of Rs.50,000/- was admittedly taken at the time of execution of the agreement to sell

though it is an unregistered agreement but the same would certainly indicate that the accused-applicant no.1 had admitted to execute the sale deed of the said property in favour of the opposite party no. 2 otherwise the said amount of Rs.50,000/- would not have been accepted/taken by the accused-applicant no.1. The intention of the accused applicants right from the beginning was to cheat the opposite party no.. 2 because several notices were sent to the accused applicants to come to office of Sub Registrar for execution of the sale deed as the opposite party no. 2 was ready to pay the balance amount and remained present at the said office and despite sufficient notice having been given to the applicants, they did not appear for execution of the sale deed after taking the remaining amount, instead they have sold the said property in favour of third persons thereby it is apparent that the accused-applicants have cheated the opposite party no. 2.

14. Reliance may be placed by me on **S.G. Gupta vs. Ashutosh Gupta (2010) 6 SCC 562** in which it was held that positive assertion was made in complaint that assurance had been given by the petitioner (attorney of accused no. 1) to the complainant that property in question was free from all encumbrances and that the accused no.1 was the sole owner and that had not such a representation been made relating to status of ownership of property in question, complainant may not have entered into transaction at all. It was held that whether the petitioner was truly mistaken as regards information given by him is an important issue which needs to be decided in answering the charge made. Prima-facie case for going to trial, was thus, made out. Further, it is held that if at very initiation of negotiations it was evident that there was no intention to cheat, dispute would be of a civil nature. However, such a conclusion would depend on evidence to be led at the time of trial.

15. Another reliance may also be placed by me on **N. Devindrappa vs. State of Karnataka, (2007) 5 SCC 228,** in this case finding of fact by the courts below that appellant-accused dishonestly induced complainant to deliver him Rs.2000/- as advance in cash, as part-payment allegedly for sale of the plot of land, knowing fully that he was not the owner of the said plot. Evidence of complainant corroborated by bogus receipt issued by the accused bearing signatures of the accused and complainant and handwriting of the accused was testified by the handwriting expert. It was held that the issuance of bogus receipts by the accused given to complainant, amounts to cheating as also inducement to complainant of being provided a plot by the accused. Since property includes money, hence offence under section 420 IPC was made out. Further it is held that the case of the appellant that he had no intention to cheat the complainant and that the case was of civil nature, it was held that an act can result in both civil and criminal liability. Hence merely because the act of appellant had civil liability that does not mean that it cannot also have criminal liability.

16. The above two citations would suffice for me to emphasize that the present case could be covered under the above established proposition of law because in the present case liability of accused-applicant could be civil as well as criminal both. It is admitted case of the parties that the opposite party no. 2 had given Rs.50,000/- to the accused-

applicants for sale of the plot in question by the applicant in favour of opposite party no.2 and the remaining amount was to be paid subsequently. If the accused-applicant did not want to sell the said plot to the opposite party no. 2, they should not have received/accepted the said amount of Rs.50,000/-. It is also true that the agreement to sell which is stated to have been executed by the accused-applicant in favour of opposite party no..2 is not a registered document, hence on the civil side the claim to get the sale deed executed of the disputed plot would not be possible to make because of said document being unregistered one, as, for transfer of immovable property such kind of transaction is bound to be a registered document. In the present case, it is not a registered document but it cannot be denied that the accused-applicant has accepted Rs.50,000/- despite the fact that they did not have any intention to sell the said land to the opposite party no. 2 and did not return that money also. Therefore, it cannot be said that the offence would not be covered under the definition of cheating which is defined under section 419 IPC and which is punishable under section 420 IPC prima-facie. It is apparent that the accused-applicant instead of selling the said plot to the opposite party no.2, sold the same to other three persons on higher amount. Therefore,intention not to sell the said land to opposite party no. 2 was right from the beginning. Whatever other factual disputes are referred in the present case such as payment of Rs.6.00,000/- over and above of Rs.50,000/-, same has been paid or not, is a subject matter of evidence which would be seen only during the trial. In such conspectus, I consider it not appropriate to quash the proceedings under inherent jurisdiction of this Court, therefore, the application deserves to be dismissed and is accordingly dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.05.2019

BEFORE
THE HON'BLE RAHUL CHATURVEDI, J.

CIVIL MISC. WRIT PETITION No.38033 of 2013
(u/s - 482 Cr. P.C.)

Om Prakash ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Daya Shankar Mishra, Sri Chandrakesh Mishra.

Counsel for the Opposite Party:
A.G.A., Sri Raj Kumar.

A. Criminal Procedure Code, 1973 – Section 319 Cr.P.C - Objective - real culprit should not get away unpunished - Based on latin doctrine : *"litigantes ab cœtibus summa debet non putat de manu mali legem"* (Para 6)

Criminal Procedure Code, 1973 - U/s 319 Cr.P.C Court can proceed against non-accused only if it appears from evidence that a non accused person was also an active participant of that particular offence (Para 6).

B. Criminal Procedure Code, 1973 – Power under Section 319 Cr.P.C - can be exercised only during pendency of the inquiry or trial. Power /s 319 Cr.P.C not to be exercised after conclusion of trial – After judgment is delivered court could not fix a future date to exercise power under Section 319 Cr.P.C. (Para 33)

C. Criminal Procedure Code, 1973 – Section 319 Cr.P.C- Evidence- Trial Judge is duty bound to take into account the evidence collected by the Investigating Officer-during investigation while

exercising anddeciding the application under section 319 Cr.P.C. (Para 29)

D. Criminal Procedure Code, 1973 – Power under section 319 Cr.P.C to be exercised only where strong and cogent evidence is on record i.e. much stronger evidence than mere probability of complicity of a person.

Held: Where identity of person sought to be summoned under section 319 Cr.P.C. is doubtful, it is highly risky to ask a person, to face trial along with other co-accused persons – it is duty of trial Judge to establish the identity of a person/accused by at least perusing the case diary carefully - before exercising extra-ordinary powers under section 319 Cr.P.C. (Para 24)

Applicant - Om Prakash (non accused) was summoned by the trial court in exercise of power envisaged under section 319 Cr.P.C. to face the trial - Entire thrust in FIR that minor daughter of the informant, was enticed away by co-accused Prakash Rajbhar- In statements under section 161 & 164 Cr.P.C. of the victim girl - no whisper of the applicant Om Prakash nor he was named in the FIR anywhere. There was no charge sheet against the present applicant- Om Prakash - On application under section 319 Cr.P.C. by the informant- the applicant Jani alias Om Prakash S/o Lalchand was summoned to face trial along with other co-accused persons - Held - It was the duty of trial Judge to establish the identity of a person/accused as to whether the present applicant Om Prakash and Jani are one and same before exercising extra-ordinary powers under section 319 Cr.P.C. High Court quashed the summoning order. . (E-5)

Application allowed.

List of cases cited:

1. Hardeep Singh Vs. State of Punjab& Others, [(2014) 3 SCC 92]

2. Ramdhan Mali and another v. State of Rajasthan and another [Criminal Appeal No. 3. 1750 OF 2008] delivered on 10.01.2014 in

3. Brijendra Singh & Ors vs State Of Rajasthan (2017) 7 SCC 706]

4. Labhuji Amratji Thakor &Ors. Vs. State of Gujarat &ANR. in Criminal Appeal No.1349 of 2018 arising out of SLP (CRL.) No.6392 /2018 decided 13.11,2018

5. Periyasami and Ors. Vs. S. Nallasamy [Criminal Appeal No. 456 of 2019 arising out of S.L.P (Crl.) No. 208 of 2019 passed on March 14, 2019]

6. Sugreev Kumar vsThe State Of Punjab

7. Criminal Appeal No. 509 OF 2019 Arising Out of SLP (Crl.) No. 9687 of 2018) decided on 15 March, 2019

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Sri Daya Shankar Mishra, learned counsel for the applicant assisted by Sri Chandrakesh Mishra, Sri Raj Kumar, learned counsel for the private opposite party and learned AGA at length.

2. The order impugned dated 24.08.2013 passed by learned Additional Session Judge, Court No. 2, Mau under section 319 Cr.P.C. in Session Trial No. 196 of 2010 (State v. Sanny and others), under sections 363, 366, 376, 373. 373 IPC and 3, 4, 5, 6 and 7 ITP Act, P.S. Mau, District Mau is the core issue of the instant proceedings and it has been canvassed by learned counsel for the applicants that the same may be set aside.

3. On 09.04.2019 after hearing rival submissions of learned counsel, this Court was of the opinion that the instant application filed under section 482 Cr.P.C., deserves to be allowed and accordingly the application was allowed with a direction that the detailed reasons would follow shortly.

4. After efficaciously perusing the record, facts and circumstances of the case, submissions of the rival learned counsel for the contesting parties, the detailed reasons are mentioned herein below:

5. By means of the instant application filed under section 482 Cr.P.C., the applicant is assailing the veracity and validity of order dated 24.08.2013 passed by Additional Session Judge, Court No. 2, Mau passed in S.T. No. 196 of 2010 (State v. Sanny and another), under sections 363, 366, 376, 373, 372 IPC and 3,4,5,6 and 7 of the ITP Act (herein referred to "ITP Act"), P.S. Mau, District Mau whereby the applicant- Om Prakash S/o Lalchandra (non accused) and one Nisha D/o D/o Pratap Dhobi has been summoned by the trial court in exercise of power envisaged under section 319 Cr.P.C. to face the trial. Since the instant proceedings under section 482 Cr.P.C. is preferred by the applicant-Om Prakash, thus, the judgement confines to him only.

6. Before adjudicating the case it would be imperative to spell out the objectives and aims to understand section 319 Cr.P.C., which has also been vividly elaborated in catena of judgements passed by Hon'ble the Apex Court time and again. For ready reference, this Court feels it appropriate to peruse the provisions contained in section 319 Cr.P.C., for fair adjudication of the case on merits. The provisions of section 319 Cr.P.C., was enacted and incorporated to achieve the objective that, the real culprit should not get away unpunished. By virtue of these provisions, the Court is empowered to proceed against any person not shown as an accused, if it appears from evidence that a non accused person was also an active participant of that particular offence, then the courts are not powerless to summon that person and try together with other co-accused person. Courts are the sole repository of doing justice so that the rule of law should be upheld and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system, where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The legislation has empowered the courts by this additional power through the provisions of the aforesaid sections to fulfill the latin doctrine ***"litigantes ab cœtibus summa debet non putat de manu mali legem"*** (unscrupulous litigants should not get away from the clutches of law).

7. Keeping in view the controversy involved in the instant case in the light of above doctrine behind section 319 Cr.P.C., it would be pertinent to mention that, responding to the application under section 319 Cr.P.C. by the informant Basanti Devi (opposite party no. 2) the applicant Jani alias Om Prakash S/o Lalchand R/o Mohall Shivdaspur (Red Light are, P.S. Maduadeeh, District Varanasi and Nisha D/o Pratap Dhobi R/o Mohalla Munshipura, P.S. Kotwali, District Mau were summoned to face trial along with other co-accused persons vide order impugned dated 24.08.2013 under the aforesaid sections of the ITP Act.

8. Before proceeding further it would be pertinent to appreciate the admissions made by contesting parties which are as follows:

9. Opposite party no. 2 -Basanti Devi w/o Achchey Lal is said to have lodged the FIR through application under

section 156(3) Cr.P.C., mentioning that for the incident of 03.09.2006 in the evening hours i.e. around 18.00 hours and the FIR of the same was got registered on 04.11.2006 at about 17.45 hours wherein she disclosed the names of accused persons (I) Prakash Rajbhar S/o Jawahir Rajbhar (ii) Ajay S/o Ashok (iii) Nisha D/o unknown with the allegation of elopement of her daughter by the aforesaid named accused persons in the aforesaid offence. There is no reference of the name of the applicant.

(a) By bare reading of the FIR it is culled out that the entire thrust is made therein that at the said date and time, Lakshmi, 14 years minor daughter of the informant, was enticed away by co-accused Prakash Rajbhar to some unknown destination in front of the open eyes of the informant, herself and her elder daughter Baby and at that time. Astonishingly, they did not raise any resistance or objection. Even after considerable lapse of time the alleged victim girl could not be traced out, thereafter a search for her recovery started rolling and during this process they came across the informaton that this act of enticement was made by none other but her close associate Nisha and to this effect they filed an application of endorsement to Superintendent of Police on 08.09.2006 which went in vain.

(b) The alleged victim was eventually recovered on 29.04.2009 and her statement under section 164 Cr.P.C. was recorded. On 09.03.2010, thereafter, her statement was recorded under section 161 Cr.P.C. In her statement recorded under section 164 Cr.P.C. the alleged victim girl claimed that she is aged about 28 years. In her statements recorded in both the aforesaid sections, which are annexed as annexures 3 and 3-A along with the affidavit, she attributed the role of enticement to accused persons Ajay and Prakash and alleged that the aforesaid two offenders had outraged her modesty and have not only shown porn videos but also shot her obscene videos and thereafter she was taken to a distant brother-in-law (Jeeja) of the aforesaid Ajay, with whom she was not acquainted to. She further submits therein that the accused persons Ajay, Prakash, one Sanny and alleged Jeeja of Ajay took her in a Maruti Car to one Afzal Begum and sold in her hands at Maduadeeh. She stated that Sanny, Ajay and his aforesaid jeeja also ravished her modesty time and again and she was forced in human trafficking market. In her statement recorded under section 161 Cr.P.C., she made a insignificant deviation viz-a-viz; above statements recorded under section 164 Cr.P.C., wherein she added that in the human trafficking market she gave birth to a baby girl (who resembles with accused Ajay). In her statement recorded under section 164 Cr.P.C. She also added that all the aforesaid persons manhandled and sexually humiliated her besides ravishing her modesty. The manhandling and sexually humiliation suffered by all the four hooligans were missing in the statement recorded under section 161 Cr.P.C. It is an astonishing feature, after perusing both the statements of the alleged victim girl, that there is not even whisper of the present applicant Om Prakash nor he is named in the text of the FIR anywhere, therefore, there is no question of attributing any role to the present applicant in the heinous offence.

(c) After collection the material evidence on record and analyzing the

same, the police on 06.06.2010 and 08.02.2012 submitted two charge sheets i.e., one bearing number 120-A of 2007 and the other bearing no. 120-B of 2007 respectively. The earlier charge sheet was submitted against Sanny @ Dinesh Rajbhar, Rakesh Rajbhar, both sons of Jawahar and Ajays/o Ashok Ram under the aforesaid sections and in charge sheet number 120-B, Afzal Begum w/o Late Rehmat Ali was made accused but the fact remains that in both the charge sheets nowhere the present applicant has been made an accused.

10. Learned counsel for the applicant has drawn attention of the Court towards annexure 5-A sworn by none other but by the victim Laxmi Devi herself dated 03.02.2012 wherein she has taken "U" turn from her earlier stand by candidly mentioning that under the pressure exerted by the police she had taken the names of Afzal Begum, Sanny @ Dinesh Rajbhar, Rakesh Rajbhar Ajay and aforesaid jeeja of Ajay etc., and she completely denied that she was ever subjected to any sexual assault upon her by them. She also denied the factum of shoot of any obscene video of her by any of them. Relying upon the aforesaid affidavit of the alleged victim herself, the police on 13.03.2012 after recording her "Majeed Bayan" dropped the names of Ajay ka Jeeja and Janu alias Om Prakash and submitted charge sheet mentioning therein that since the victim herself does not want to proceed against the applicant, therefore, the Investigation Officer, after dropping the names of the Ajay ka Jeeja and Janu alias Om Prakash has closed the chapter of investigation.

11. In the counter affidavit too, though there was no denial to the aforesaid fact but it has been emphatically mentioned therein that the nick name of the present applicant Om Prakash, who is referred as Jani and not Janu. In paragraphs 13 of the counter affidavit it has been mentioned that annexure 5-A of the alleged victim is forged as she was compelled to sign over this affidavit.

12. Learned counsel for private opposite party submitted that the alleged victim had filed yet another affidavit on 03.02.2012 and denied the contents of her earlier affidavit.

13. But the fact remains that there is no charge sheet against the present applicant- Om Prakash. Since, the offences are exclusively triable by the court of Sessions and after committal of the case, charges were framed against the named accused persons by the learned Additional Session Judge and trial of the case started rolling.

14. Learned counsel for the applicant drew attention of the Court towards the testimony of P.W.-1- Basanti Devi as well as the alleged victim P.W.-2 Laxmi Devi (annexed as annexures 6 and 6 Ka) of the petition. In the testimony of P.W.- 1 Basanti Devi disclosed that in the year 2008 the victim came to her house, carrying a baby girl aged about half a month in her lap, who died thereafter. On her query to the victim, she disclosed that Ajay and Prakash after making her unconscious took her away in a car to some unknown destination and further answered to her queries that Ajay, Prakash, Sanny and Jani alias Om Prakash raped upon her and shot "dirty" pictures of her, thereafter she was sold to Afzal Begum from where she was thrown to the flesh peddler market.

However, The victim, P.W.-2 Laxmi Devi D/o Achchey Lal in her examination-in-chief recorded on 15.01.2013 revealed as under:

"निशा को मैं पहले से जानती हूं। मेरे घर आती–जाती थी। मेरी सहेली थी। मुझे दुकान पर लेकर जा रही थी रास्ते में अजय, प्रकाश, सनी और जानी नाम के आदमी मिले। मैं उनमें से अजय, प्रकाश और सनी को जानती थी। वे लोग मेरे घर के बगल में रहते थे। उपरोक्त चारो व्यक्ति मुझे दवाई सुंघाकर गाड़ी में लेकर चले गये। गाड़ी में निशा भी साथ में थी। उपरोक्त लोग मुझे मडुवाडीह बनारस में एक आदमी जिसका नाम जानी है के घर में रखे। इन लोगों ने वहा पर मेरे साथ गन्दा–गन्दा काम किया। गन्दा–गन्दा काम करने वालों में से अजय, प्रकाश, सनी और जानी थे। जानी का कोई और नाम नहीं है। केवल जानी नाम है। जानी को मै पहले से नही जानती थी। जब लेकर गए तब जाना। बुरे काम से मतलब गन्दा–गन्दा काम करना होता है। मुझसे रंडी पेशा करवाते थे। अजय, प्रकाश, सनी और जानी ने मेरी वीडियों फिल्म बनायी। अजय, प्रकाश, सनी और जानी ने अपना कपड़ा निकाल दिया था और मेरा कपडा भी फाड़ दिया था इसके बाद मेरे शरीर पर बुरा काम किया। उस समय निशा मेरे पास थी। जो ब्लू फिल्म मेरी बनी थी वह मैने देखी थी। ब्लू फिल्म दिखाकर अजय, प्रकाश, सनी और जानी ने मुझे धमकाया था कि अगर तुम भागी तो मार डालेगे।"

15. From a keen analysis of the aforesaid statement of the victim, it is borne out that the victim herself was candidly stating that besides the named persons in the FIR, there was an additional person named as "Jani" and the named persons have kept her at his residence. She further submits therein that there is no nick name or sir-name of Jani and she was not acquainted with Jani. It is strange that during the statement, the parentage of Jani was clandestined to ascertain the identity of this person.

16. Per contra, Sri Raj Kumar, learned counsel for private opposite party, while referring to his counter affidavit, submitted that as per class VI of the victim, the date of birth of the victim is 01.07.1991, therefore, on the date of incident, she was a minor. Though in her ossification test, age of the victim was computed as around 18+. There is a specific mention in the counter affidavit at paragraph 9 that Jani is the sirname of Om Prakash (applicant) and he is one and the same person, to whom the victim has referred in her testimony. Not only this, paragraph 10 of the counter affidavit also, while reiterating the same version of paragraph 9, it has been mentioned that there is no other name of Jani nor there is any other material in support of this proposition of Jani. This sirname of Om Prakash has been assailed by opposite party no. 2 from the examination-in-chief of the victim wherein it has been made crystal clear that the victim the soul, mind and body were immensely tortured,harassed and crushed by various persons but millions dollar question is yet to be answered as to who this Jani was? In her statement she candidly stated that there is no other nick name of Jani. She does not know the parentage of this Jani nor she was acquainted with this person during her life-time. Nor there was any test identification parade so that she may identify/ascertain the real culprit, who ravished her.

17. In the light of the aforesaid factual background the validity and veracity of the order impugned is to be adjudicated.

18. This Court has keenly gone through the entire impugned order dated 24.08.2013 passed by the Additional Session Judge verbatimly.

19. In paragraph 2 of the aforesaid order seems to have misquoted the

testimony of P.W.-2 by mentioning therein that she had disclosed the name of Jani alias Om Prakash s/o Om Prakash and Nisha d/o Pratap Dhobi as co-accused persons, which is an apparent case of misquoting the testimony of P.W.-2. P.W. -1 in her testimony narrated the sad saga of her daughter, mouthed by the victim herself. There is an apparent contrast between both the testimonies with regard to the identity of Jani and Om Prakash and whether they are one and the same person or of two different identities. Till the time this puzzle is resolved satisfactorily it would at higher risk to exercise power envisaged under the jurisdiction of section 319 Cr.P.C. by the court concerned. It is in the last but one paragraphs of the impugned judgement that without any material on record, the learned Additional Session Judge had his own wisdom mixed by interpreting as to this person Jani alias Om Prakash is one and the same person, which is factually incorrect proposition and not permissible under law.. In the examination-in-chief the victim girl has refuted that there is no other nick name of Jani which can be interpreted thereafter to be aliasing as Om Prakash but the learned Additional Session Judge has tried to raise castle over this defective premises.

20. Fact remains that the applicant is neither named in the FIR nor has been charge sheeted by the police and there is not even iota of his name in the entire case diary as to the fact that Jani and Om Prakash are one and same person. There is deep rooted identity crisis of this person concerned and on the basis of flimsy and blurred factual premises an innocent person (till date) cannot be dragged to face criminal prosecution for the aforesaid offence, which would axe the very objective of the provisions of Section 319 Cr.P.C.

21. In order to buttress his contention, learned counsel for the applicant has drawn attention of this Court towards paragraphs 95, 105 and 106 of the judgement of the Hon'ble Apex Court wherein it has followed the proposition annunciation in other cases while adjudicating the case of **Hardeep Singh Vs. State of Punjab & Others, [(2014) 3 SCC 92],** which are extracted herein below:

"....95. In Suresh v. State of Maharashtra, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962 and State of Maharashtra v. Priya Sharan Maharaj, AIR 1997 SC 2041, held as under:

"9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

.....

105. In Sohan Lal &Ors. v. State of Rajasthan, (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

.....

106. In Municipal Corporation of Delhi v. Ram Kishan Rohtagi &Ors., AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused."

22. The aforesaid paragraphs are with regard to the degree of satisfaction at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for summoning him under section 319 Cr.P.C.

23. In another case of **Sugreev Kumar vs The State Of Punjab [Criminal Appeal No. 509 OF 2019 Arising Out of SLP (Crl.) No. 9687 of 2018) decided on 15 March, 2019**, Hon'ble the Apex Court has casted embargo that section 319 Cr.P.C. is an extra-ordinary provision which would be invoked only on the basis of available material on record. It is being, a discretionary and an extraordinary power, which has to be exercised sparingly and diligently and only in the circumstance where strong and cogent evidence is on record. The prima facie opinion, which is to be found for exercise of power requires much stronger evidence than mere probability of complicity of a person. The test to be applied is the one which more prima facie case, as examined at the time of framing of charge but not of satisfaction to the extent that the evidence, if goes uncontroverted would lead conviction of the accused.

24. By applying this yardstick in the present case, where identity of a person is doubtful and there is no confidence generating material on record that Jani and Om Prakash are one and the same person or two different individuals and in the opinion of this Court, it is highly risky to ask a person, whose identity is at stake, to face trial along with other co-accused persons. During the entire investigation, a person like Om Prakash s/o Lalchand, nowhere came into the light frame and thus cannot be said to be involved, by any means, in the instant case. No identity parade was conducted to ascertain the identities of the accused persons and identify the real culprit/s. The victim, herself, has stated in her statement recorded at the relevant stages of trial that there is no other nick name of Jani, then the blanks cannot be filled without any confidence generating material.

25. T heir is yet another aspect of the issue underlining the facts, that the victim girl herself admits that she was thrown into the flesh market for almost one and a half year. She remained in a burrow of a badger during those disgusting days, where her body, mind and soul was debilitated rather shattered into pieces, emotions and feelings were crushed and

the poor girl ought to have acted like a chicken with its head cut-off, thus, presumably it was her state of mind where she could not utter a single word in certainty that it was the applicant- Om Prakash, who exploited her to the hilt by committing the nasty act with her. Therefore, under the aforesaid peculiar circumstances of the case, it would not be safe to use this extra-ordinary power for summoning the applicant.

26. Recently, yet in another judgement of Hon'ble the Apex Court delivered in the case of **Periyasami and Ors. Vs. S. Nallasamy [Criminal Appeal No. 456 of 2019 arising out of S.L.P (Crl.) No. 208 of 2019 passed on March 14, 2019] wherein relevant paragraph 15 of the aforesaid judgement is extracted herein below**:

"15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity."

27. Perusal of the aforesaid paragraph categorically clears the dust on the mirror by mentioning that mere disclosing name of any person cannot be construed to be strong, cogent evidence to make them to stand trial for the offence under section 319 Cr.P.C., to summon any non-accused person.

28. It is mind boggling that girl is being enticed away right in front of her mother and sister by some unknown person and there was no resistance or objection, what-so-ever by her sibling i.e. mother or her own sister on the fateful day and that too after considerable delay, the mother of the victim moved an application under section 156 (3) Cr.P.C. for lodging an FIR against three persons (wherein the present applicant was not named/referred). In both the statements recorded under sections 161 and 164 Cr.P.C., the victim girl has not even whispered the name of the applicant-Om Prakash whereas she referred the name of one Jani categorically specifying that there is no nick name of Jani, which compelled the Investigating Agency to drop the name of applicant-Om Prakash and closing the entire investigation. In the aforesaid circumstance, it was binding duty of the learned trial Judge to establish the identity of a person/accused as to whether the present applicant Om Prakash and Jani areone and same before exercising his extra-ordinary powers under section 319 Cr.P.C. at least peruse the case diary carefully while exercising his extra-ordinary power under section 319 Cr.P.C., which falls within the definition of evidence as in the case of **Brijendra Singh & Ors vs State Of Rajasthan (2017) 7 SCC 706]**. Relevant portion of the aforesaid case is extracted herein below:

".....Thus, the "evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief.

However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether "much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time). What is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material...."

29. Thus the trial Judge was duty bound to follow the aforesaid principles of law enunciated in the case of Brijendra Singh (Supra) and he ought to have taken into account the evidence collected by the Investigating Officer of the case during investigation while exercising and deciding the application under section 319 Cr.P.C. in the instant case.

29. It appears that the learned Additional Session Judge has solely and blindly followed the testimonies of P.Ws.-1 and 2 only over ruling all other materials collected by the Investigating Officer, which has lead him to a wrong conclusion in passing the order impugned.

30. Besides this, the trial Judge ought to have recorded his only satisfaction as to the sufficiency of material on record while exercising his extra-ordinary power in summoning a non-accused person- Om Prakash (the applicant) to face trial with other accused persons. Thus, after carefully perusing the impugned order dated 24.08.2013 and comparing the same with the ratio laid down in the cases of (i) **Hardeep Singh (Supra) (ii) Sugreev Kumar (Supra) (iii) Periyasami and Ors. (Supra) (iv) Brijendra Singh (Supra) and (v) Labhuji Amratji Thakor &Ors. Vs. State of Gujarat&ANR. decided 13.11,2018 in Criminal Appeal No.1349 of 2018** arising out of SLP (CRL.) No.6392 /2018, I have no hesitation to hold that the order-in-question is well short of the level of satisfaction required for invoking the powers under section 319 Cr.P.C.

31. Normally under such circumstances, the matter may be remanded for a fresh look into the matter in the light of the aforesaid ration laid down by the Apex Court but at this juncture when in his rejoinder affidavit, learned counsel for the applicant has annexed RA-1 to the petition, which is copy of the judgement and order dated 30.07.2016 passed in S.T. Nos. 196 of 2019 (State of U.P. v. Sanny alias Dinesh Rajbhar) and 88 of 2012 (State of U.P. v. Afzal Begum) passed by the Additional Session Judge/FTC No. 1, Mau respectively, wherein the accused persons Sanny alias Dinesh Rajbhar and Afzal Begum were acquitted for the offence under sections under sections 363, 366, 376, 373, 108/376, 372, 373 IPC and 3, 4, 5, 6 and 7 ITP Act on the basis of benefit of doubt whereas the judgement with regard to rest of the accused persons has already been delivered, acquitting them from all the charges in which they have been charged for, thus, it would be an exercise in futility or only for academic interest without any tangible result.

32. In support of the aforesaid annexure of the rejoinder affidavit,

learned counsel for the applicant has drawn attention of this Court towards the issue of power to proceed against other persons appearing to be guilty appearing to be quilty of offence by quoting section 319 Cr.P.C. itself. For ready reference, it would be beneficial to go through it once again and the same runs as follows:

" Section 319 in The Code Of Criminal Procedure, 1973

319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

33. Learned counsel for the applicant laid his emphasis that since the aforesaid Session Trials have ended in acquittal of accused persons Sanny alias Dinesh Rajbhar and Afzal Begum and the present applicant applicant has been summoned under section 319 Cr.P.C. and the provision of this section can only be exercised during pendency of the trial, as the trial has already been concluded in the matter, therefore, the order impugned becomes functus officio. Thus the order impugned itself does not sustain and is liable to be rectified. To buttress his submission, learned counsel for the applicant has relied upon the judgement and order dated 08.03.2011 passed in Criminal Revision No. 1440 of 2011 (Ajay v. State of U.P.) by coordinate Bench of this Court wherein aggrieved by summoning order dated 11.02.2011 passed under section 319 Cr.P.C., by the court below, the revisionist had knocked door of this Court by submitting therein that power under Section 319 Cr.P.C, as the enacted statute ordains, can be exercised only during pendency of the trial. If the trial is concluded, no power under the aforesaid section can be wielded/utilized by the trial Judge. He submits that after the date when judgment was delivered, the court became functus officio and, therefore, the court could not have fixed a future date to exercise power under Section 319 Cr.P.C. The conclusion drawn by the aforesaid coordinate court is as follows:

"I have perused the impugned judgement and order. While judgmenting S.S.T. No.374 of 2008 State Vs. Navneet and others for the aforementioned offences, the trial Judge convicted all the

accused persons for charges under Sections 294, 147, 148, 452, 323/149, 324/149, 504 I.P.C. and 3 (1) (X) SC/ST Act. While sentencing the aforesaid accused persons for the aforesaid offences, the trial Judge directed that record in respect of the revisionist Ajay be separated and for issuing process, 21.2.2011 was fixed. This order was passed on 11.2.2011. As the record reveals that on 11.2.2011, the trial Judge judgmented the aforesaid Special Session Trial, therefore, after judgmenting the case, the trial Judge became functus officio. He could not have taken any proceedings in respect of other person wielding power under section 319 Cr.P.C, which could have been utilized only during commencement of the trial. After conclusion of the case, no court can utilize power under Section 319 Cr.P.C. and start afresh trial in respect of separate accused.

Phraseology of Section 319 Cr.P.C. further indicates that power under Section 319 Cr.P.C. can be utilized to add any person as an accused who is not already facing trial, only during pendency of the inquiry or trial. That section further ordains that in the event the trial Judge harbingers intention to add any accused, he should have stayed the trial and take up trial in respect of newly added accused simultaneously including examination of the witnesses afresh."

34. Here it would be pertinent to peruse the principles of law enunciated by the Apex Court in the case of Ramdhan Mali and another v. State of Rajasthan and another delivered on 10.01.2014 in Criminal Appeal No. 1750 OF 2008 along with other petitions, which re-emphasises the provisions of section 319 Cr.P.C. Relevant portion of the aforesaid judgement and order are extracted herein below:

"37. Even the word "course" occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word "course" therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry upto the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time; duration and not a fixed point of time."

38. In a somewhat similar manner, it has been attributed to word "course" the meaning of being a gradual and continuous flow advanced by journey or passage from one place to another with reference to period of time when the movement is in progress. "

35. Comparing the facts and situations of the instant case with the aforementioned authorities, it is apparent that instant application filed under section 482 Cr.P.C. was filed in the year 2013 and coordinate Bench of this Court vide order dated 28.03.2013 kept in abeyance the proceedings of the case and during this period, the judgement of S.T. No. 196 of 2010 (State v. Sanny and another), under sections 363, 366, 376, 373, 372 IPC and 3,4,5,6 and 7 of the ITP Act, P.S. Mau, District Mau by Additional Session Judge, Court No. 2,

Mau was pronounced vide order dated 30.07.2017 in favour of the accused persons by acquitting them, therefore, after pronouncement of the judgement in the case the aforesaid S.T. No. 196 of 2010 became functus officio and could not be reopened afresh as contemplated under section 319 (4) Cr.P.C., as referred to above.

36. Therefore, there is a practical embargo because now S.T. No. 196 of 2010 (State v. Sanny and another) is not itself existing and the entire exercise being conducted under section 319 Cr.P.C. by the learned trial Judge would yield no result rather it would be a sore in the eyes of law.

37. Thus, assessing over all fact and circumstances of the case and comparing the guidelines laid down by the Apex Court in the cases of Hardeep Singh (Supra), Sugreev Kumar (Supra), Periyasami and Ors. (Supra) and Brijendra Singh (Supra), this Court has got no hesitation in quashing the order dated dated 24.08.2013 passed by Additional Session Judge, Court No. 2, Mau passed in S.T. No. 196 of 2010 (State v. Sanny and another), under sections 363, 366, 376, 373, 372 IPC and 3,4,5,6 and 7 of the ITP Act, P.S. Mau, District Mau.

38. The present application filed under section 482 Cr.P.C. is, accordingly, allowed

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE
THE HON'BLE SANJAY KUMAR SINGH, J.

CIVIL MISC. WRIT PETITION No.28758 of 2019

(u/s -482 Cr. P.C.)

Kaleem & Ors ...Applicants
Versus
State of U.P. & Anr. ... Opposite Parties

Counsel for the Applicants:
Sri Atul Kumar

Counsel for the Opposite Parties:
A.G.A.

A. Section 482 Cr.P.C. - quashing of criminal proceedings – in Sexual Offence / Rape cases-solely on the basis of compromise - Not permissible - as it is a serious offence against the society and same would embolden the perpetrators of such crimes and encourage commission of such offences.
Held: Sexual Offence constitute altogether different class of crime and cannot be treated at par with matrimonial offence, being a dehumanizing act, unlawful intrusion of the right of privacy and sanctity of a female, offending her self-esteem and dignity. (Para 13)

B. Document that is not part of Case Diary cannot be taken into consideration by High Court while exercising inherent jurisdiction under Section 482 Cr.P.C
Held: Appreciation of document, which is not part of the case diary is a function of the trial court at the appropriate stage. Its genuineness cannot be adjudicated and compromise cannot be taken into consideration by High Court u/s 482 CrPC. (Para 14 & 15)

Victim Raped by brother-in-law/'Jija' of the husband on nuptial night – Quashing of the charge-sheet, cognizance order under Sections 376, 504, 506 IPC and ¾ D.P. Act – on ground of alleged compromise – Refused. It was not a simple case of matrimonial dispute, but aggravated form of cruelty, because bride (victim) was forcibly raped by Jija of her husband and thereafter by her husband on her first night of marriage in barbarian manner in her matrimonial home on account of non-fulfillment of demand of dowry. Court refused

to let off the accused on the basis of alleged compromise. (Para 15, 16)

Application dismissed.

List of Cases Cited:-

1. State of Madhya Pradesh Vs. Laxmi Narayan and others AIR 2019 SC 1296 followed

2. Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra and others AIR 2019 SC 327

3. Asha and another Vs. State of U.P. and another 2018 (6) ADJ 45

4. Vineet Kumar and others Vs. State of U.P. and another 2017 (13) SCC 369 (E-5)

(Delivered by Hon'ble SanjayKumar Singh, J.)

1. Heard Sri Atul Kumar, learned counsel for the applicants and Sri Virendra Kumar Maurya, learned Additional Government Advocate assisted by Sri Prashant Kumar Singh, learned Brief holder for the State/opposite party no.1. Perused the record with the assistance of learned counsel for the parties.

2. The applicants have preferred this application for invoking inherent jurisdiction under Section 482 Cr.P.C. of this Court to quash the impugned charge-sheet dated 19.05.2019 arising out of case crime no. 0065 of 2019, cognizance order dated 01.07.2019 and proceedings of Case No. 1247/9 of 2019 (State Vs. Kaleem and others), under Sections 376, 504, 506 IPC and 3/4 D.P. Act against the applicant no.4 and under Sections 504, 506 IPC and 3/4 D.P. Act against the applicant nos. 1 to 3, Police Station Meerapur, District Muzaffar Nagar pending before Additional Chief Judicial Magistrate, Court No.3, Muzaffar Nagar.

3. Filtering out unnecessary details, basic facts of the case in brief are that the applicant no.1 (Kaleem) is husband, applicant no.2 (Mobeen) is father-in-law, applicant no.3 (Smt. Sayada @ Bhoori) is mother-in-law of victim Sabnam. On 10.03.2019, Mohd. Iqbal (brother of victim) lodged First Information Report regarding an incident dated 6.3.2019 against the accused-applicants registered as Case Crime No. 0065 of 2019, under Sections 376D, 506, 504 IPC and 3/4 D.P. Act at Police Station Meerapur, District Muzaffar Nagar alleging inter-alia that marriage of his younger sister (victim Sabnam) was solemnized on 06.03.2019 with the applicant no.1. In the marriage, about a sum of Rs. seven lakh were spent by his family members, but the accused-applicants were not satisfied and started demanding rupees fifty thousand in cash and one Alto Car at the time of marriage. Anyhow, *"bidai"* ceremony was performed and Sabnam was sent to her matrimonial house, but on the nuptial night (first night of marriage) the accused-applicants entered into the room of victim Sabnam and started taunting/abusing for not fulfilment of their demand of dowry by her family members. On resisting by the victim Sabnam, they in abrasive tone threatened to see her. Thereafter, Daood (*brother-in-law/Jija* of the husband of victim) forcibly committed rape on victim in the first night of her marriage and therewith Kaleem (husband) following Daood also committed rape on victim. It is further alleged that after the aforesaid atrocities, she became unconscious. On the next day in morning, brother of victim received an information from unknown person that his sister in not well. On such information, informant (brother of the victim) alongwith his other family members reached at the matrimonial

house of the victim and she was brought to VashisthaHospital situated in Almaspur Chaupala, Muzaffar Nagar in a bad condition for her treatment. Seeing the crowed collected at the hospital, the accused persons ran away. Victim on gaining consciousness also told that her mother-in-law with intention to kill her choked her neck from *Dupatta.*

4. The applicants have filed the statement under Section 161 Cr.P.C. of the informant (brother of the victim), in which he has reiterated the version of the FIR. Victim Sabnam in her statements under Section 161 Cr.P.C. as well as under Section 164 Cr.P.C. also supported the prosecution case making allegations as mentioned in the FIR. Statement under Section 164 Cr.P.C. of victim is being reproduced herein-below:-

"बयान 164 सीआरपीसी पीडिता शबनम पत्नी कलीम नि0 किथौड़ा थाना मीरापुर मु0नगर व पुत्री फैय्याज नि0 248 केवलपुरी थाना सिविल लाइन मुजफ्फरनगर उम्र 27 वर्ष द्वारा सशपथ ब्यान किया कि मेरी शादी दिनांक 06.03.2019 को कलीम के साथ हुई थी शादी में मेरे माता पिता ने करीब 7 लाख रूपये खर्च किये थे। परन्तु कलीम उसके पिता मोबिन उसकी मा सायदा व बहनोई दाऊद शादी में दिये गये सामान से खुश नहीं थे और विदाई के टाईम 50 हजार रूपये नकद व गाड़ी की मांग करने लगे। मेरे घर वालों ने बहुत समझाया, यह लोग मुझे विदा करके ले गये। जब मैं ससुराल पहुंची रात को मेरे पति, सास, ससुर व नन्दोई मेरे कमरे में घुस आये आते ही इन लोगो ने मुझे दहेज का ताना मारा मेरी सायदा गले में दुपट्टा डालकर मारने का प्रयास किया मेरे सास, ससुर कमरे के बाहर चले गये। मेरे नन्दोई दाऊद ने मेरे हाथ बांध दिये पहले दाऊद ने मेरे साथ बलात्कार किया फिर कलीम ने बलात्कार किया गया। मै बेहोश हो गयी मेरे घरवालो ने इन लोगों को फौन किया पर इन लोगो ने उठाया नही। इसलिये मेरे घरवाले दूसरे दिन ससुराल पहुंच गये और मेरी हालत देखकर मुझे हास्पिटल ले गये। मेरा जेवर, कपडा सब सामान ससुराल में ही है मै अपनी मर्जी से बयान दे रही हूं। सुनकर तस्दीक किया। प्रमाणित किया जाता है कि यह वयान पीड़िता के शब्दो में मेरे द्वारा स्वंय अंकित किया गया है। ।CJ (SD) 2 मधु गुप्ता दिनांक 02.04.2019 मुजफ्फरनगरं "

5. On 15.03.2019, victim Sabnam was medically examined, where her statement was also recorded by the doctor concerned. The brief statement of the victim as mentioned in the column of "description of incident in the words of narrator" in the medical examination report dated 15.03.2019 is reproduced herein-below:-

" शादी की रात को पहले ससुर एवं सास आये जिन्होने दहेज के लिए डाटा तथा उसके बाद आदमी एवं नन्दोई ने जवरदस्ती करने की कोशिश करके बलात्कार किया जवरदस्ती दोनो हाथ बांध दिए थे। उसके बाद इसे खून जाने लगा तथा प्राइवेट डाक्टर के यहॉ भर्ती करके टांके लगवाये"

6. The Investigating Officer after investigation submitted charge-sheet dated 19.0.2019 against the accused Daood under Sections 376, 504, 506 I.P.C. and Section ¾ of Dowry Prohibition Act and against remaining other co-accused under Sections 504, 506 I.P.C. and Section ¾ of Dowry Prohibition Act mentioning that since accused Kaleem is husband of victim, therefore, rape committed by him, as per prosecution case will not come under the category of rape, on which, the Magistrate concerned took cognizance on 01.07.2019.

7. Record indicates that in the present case, earlier the victim was impleaded as opposite party no.2, but later before filing this application her name was scored out as opposite party no.2 by pen and mentioned as applicant no.5. Alongwith application, a joint affidavit of accused-applicant no.1 Kaleem and victim Sabnam has been filed and in the said affidavit the name of victim has find place as opposite party no.2.

8. It is submitted by learned counsel for the applicants that:-

(i) The applicants have been falsely implicated.

(ii) The allegations levelled against the accused-applicants in the FIR as well as in the statements of informant and victim are false and concocted.

(iii) The statement of the victim under Section 164 Cr.P.C. dated 02.04.2019 was recorded under the influence of her family members.

(iv) Now, the dispute between the parties concerned has amicably settled outside the Court and compromise deed dated 9.7.2019 has also been prepared. The affidavit of victim Sabnam and said compromise deed dated 9.7.2019 have been appended as Annexure No.6 to the application.

(v)It is also submitted that the applicant no.1 and victim is living together as husband and wife, therefore, the impugned charge-sheet and entire aforesaid impugned criminal proceedings against the applicants are liable to be quashed.

(vi) Learned counsel for the applicants in support of his submissions placed reliance on the following judgments:-

(a) Asha and another Vs. State of U.P. and another 2018 (6) ADJ 45.

(b) Vineet Kumar and others Vs. State of U.P. and another 2017 (13) SCC 369.

(c) Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra and others AIR 2019 SC 327.

9. Per contra, learned Additional Government Advocate has vehemently opposed the prayer of the applicants and refuting the submissions of learned counsel for the applicants submitted that:-

(i) The offence under Section 376 IPC is a serious offence against the society, therefore, the parties cannot be permitted to make compromise being non-compoundable offence.

(ii) It is also submitted that the alleged compromise deed dated 9.7.2019 has been prepared after submission of charge-sheet dated 19.05.2019 against the accused persons.

(iii) The said affidavit of compromise deed dated 9.7.2019 are not part of the case diary, therefore, the same cannot be taken into consideration at this stage.

(iv) It is also submitted that since the incident took place on the first night of marriage of the victim, therefore, it cannot be said that the accused persons have been falsely implicated.

(v) It is vehemently urged that since it is not a simple case of matrimonial dispute, but a serious matter where victim has been raped by her brother-in-law (Jija of husband of the victim) on wedding night of her marriage as per allegations levelled by the victim in the present case, therefore, by saying that it is a matrimonial dispute, the applicant no.4 (Daood) cannot be let off at this stage from the offence committed by him only on the basis of alleged compromise. As such the present application is misconceived and is liable to be dismissed.

(vi) Learned Additional Government Advocate in support of his submissions placed reliance on the judgment of Apex Court in case of State of Madhya Pradesh Vs. Laxmi Narayan and others AIR 2019 SC 1296.

10. After having heard the arguments of learned counsel for the parties concerned, before delving into the

matter, it is apposite to deal the judgments cited on behalf of the parties.

Firstly, I shall deal the judgments relied upon on behalf of the applicants.

(a) In the matter of **Asha and another Vs. State of U.P. and another 2018 (6) ADJ 45**, the facts of the case was that father of the victim lodged FIR that accused Anand Kumar has enticed away her daughter aged about 15 years. After investigation, charge-sheet was submitted against accused Anand Kumar under Sections 363, 366, 376 I.P.C. and ¾ POCSO Act. Criminal Misc. Application under Section 482 Cr.P.C. was moved by the victim and accused on the ground that they are husband and wife and victim is residing with her husband. Father of the victim has lodged the false and fabricated FIR, because victim on her own free will and volition went in the company of accused. The victim after running away from her house married with accused at Arya Samaj Mandir. The Investigating Officer in an arbitrary manner without doing fair investigation submitted charge-sheet. On the said facts that before lodging First Information Report, parties have already married with consent of each other and they are major. They are living peacefully as husband and wife, the High Court took a view that offence of rape or kidnapping or abduction has not been committed at all, therefore, criminal proceedings was quashed.

(b) In the matter of **Vineet Kumar and others Vs. State of U.P. and another 2017 (13) SCC 369,** the facts of the case was that accused has made several transactions with the complainant, her husband and son in the month of May, 2015. Accused gave Rs. 9 lakh to the husband and son of the complainant for business purpose and agreement dated 29.05.2015 was signed by the husband of the complainant and one of the accused acknowledging the payment of Rs. 6 lakh 60 thousand in cash and Rs. 2 lakh 40 thousand by cheque. Another agreement between the complainant and one of the accused was entered into on 01.06.2015 wherein it was acknowledged that complainant and her husband had taken Rs. 7 lakh 50 thousand in cash from the accused. Third agreement was entered into between the son of complainant and one of the accused on 31.08.2015 wherein son of complainant acknowledged that his parents have taken an amount of Rs. 14 lakh 50 thousand. Complainant and her husband gave cheque of Rs. 6 lakh 50 thousand to the accused for recovery of amount given by the accused. Later on, one of the accused filed complaint under Section 138 of Negotiable Instrument Act against husband and son of the complainant. Thereafter, on 30.10.2015 complainant filed an application under Section 156 (3) Cr.P.C. against all three accused alleging commission of offence under section 376(d), 323 and 452 IPC. During investigation, complainant refused to her internal examination and husband also denied for medical examination of his wife, as much time had been elapsed. The Investigating Officer after investigation submitted final report as the allegations were found false. The police also submitted report for initiating the proceedings under section 182 Cr.P.C. against the complainant. The complainant moved protest petition, which was allowed by the Magistrate concerned on 28.05.2016. On the said facts an Application under Section 482 Cr.P.C. was preferred before the High Court, which was allowed setting aside the order dated 28.05.2016 directing the Magistrate to pass fresh order.

The Magistrate again vide order dated 03.08.2016 summoned the accused. Revision was filed before the Session Judge against the order dated 03.08.2016, which was dismissed vide order dated 22.10.2016. Accused again filed an Application under Section 482 Cr.P.C. to quash the order dated 03.08.2016, which was refused by the High Court. Aggrieved by the order of the High Court, accused approached the Apex Court by filing S.L.P., which has been allowed and criminal proceedings against the accused was quashed in the light of guideline laid down under the category no.7 as innumerated in case of State of Haryana and others Vs. Bhajan Lal and others 1992 SCC (Cr.) 426 considering that criminal proceedings is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

(c) In the matter of **Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra and others AIR 2019 SC 327**, the facts of the case was that FIR was registered on 06.12.2000 against accused-appellant under Sections 376(2)(b), 420 read with Section 34 of the Indian Penal Code and under Section 3(1)(x) of the SC/ST Act. In the said case, accused-appellant was serving as a medical officer in the PrimaryHealthCenter and complainant was working as Assistant Nurse in the same health center. Both accused and complainant on account of having love affair started residing together. They were in relationship with each other and they resided some time at her house and some time at the house of the appellant. When the complainant came to know that accused-appellant has married with some other women, then she lodged complaint. The Apex Court on the said fact has held that there is clear distinction between rape and consensual sex. It was also held that if the allegations made in complaint are taken at their face value and accepted in their entirety, they do not make out a case of rape against accused-appellant, therefore, complaint registered under Section 376(2)(b) cannot be sustained. On the said observation, charge-sheet dated 14.06.2001 filed in the said case was quashed by the Apex Court.

Now Court proceed to deal with the judgment relied upon by the prosecution.

(a) Three judge Bench of the Apex Court recently on 5.3.2019 in the matter of **State of Madhya Pradesh Vs. Laxmi Narayan and others AIR 2019 SC 1296** has ruled that the criminal proceedings for the offence of "rape" cannot be quashed merely on the basis of compromise made between the victim and offender. The guideline laid down by the Apex Court in para 13 of the said judgment is reproduced herein-below:-

"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family

disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc., which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongstthemselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

11. In view of aforesaid discussions, it is apparent that the judgments relied upon on behalf of the accused-applicants are not helpful to the applicants as the aforesaid cases are distinguishable on the facts, as such the same are not applicable in the present case. Here it is apposite to mention that even one additional or different fact may make big difference between the conclusions in two cases and blindly placing reliance on a decision is never proper. It is trite law that each case depends on its own facts and a close similarity between one case and another is

not enough because even a single significant detail may alter the entire aspect. Every case has to be decided on its own facts and no hard and fast rule can be laid down as regards the cases, which deserve quashing by the High Court in exercise of power u/s 482 of the Code of Criminal Procedure. If, considering the special facts of a case, the court decides to quash the charge-sheet on the basis of compromise in a particular case, that ipso facto does not justify quashing of the charge-sheet in every other case involving the commission of an offence punishable under the same provision of law or with equal or even lesser punishment. The nature of the offence than in fact is more important than the punishment prescribed for it.

12. In **Bodhi Sattwa Gautam Vs. Subhra Chakraborty, AIR 1996 SC 922**, the Hon'ble Supreme Court observed, inter alia, as under:-

"Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life.

Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not play things for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.

Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects."

13. Sexual offences constitute an altogether different class of crime which is the result of a perverse mind. By their very nature these crimes cannot be treated at par with matrimonial offence. Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right of privacy and sanctity of a female and is a serious blow to her supreme honor offending her self-esteem and dignity. Allowing quashing of charge-sheet, pursuant to a compromise, will, in such cases, only embolden the perpetrators of

such crimes, which otherwise are on the increase, in society. If the accused in such a case is an affluent person and the prosecutrix comes from a socially or economically weaker strata of the society, quashing in such a case would only encourage commission of such offences, as the accused, using his money power or otherwise, may be able to induce the prosecutrix/victim to enter in to settlement with him and then seek quashing of criminal proceedings, on the strength of that settlement.

14. The present case, in hand, is not a simple case of matrimonial dispute, but it is aggravated form of cruelty, because as per the prosecution case bride (victim) has been forcibly raped by Jija of her husband and thereafter by her husband on her first night of marriage in barbarian manner in her matrimonial home on account of non fulfillment of demand of dowry, which is a serious offence, which suffocate the breath of life and sully the reputation of the victim. The rape is non-compoundable offence and it is an offence against the society, therefore, it is not a matter to be left for the parties to make compromise and settle the issue outside the Court. Though except the offence under Section 376 I.P.C. other sections of I.P.C. are compoundable, but it is not necessary that in all such cases, the consent given by the victim for compromising the case is a genuine consent. Possibility of giving consent under compelling circumstances against the wishes of the victim cannot be ruled out. There is every possibility that victim might have been pressurized by the accused persons by different means compelling her to opt for a compromise. The Court cannot always be assured that the consent given by the victim is a genuine consent. The act and conduct of the accused-applicants in the present case are against the civilized norms. Such offences have serious impact on society and are distinct from other matrimonial offences, where parties have resolved their dispute and because of compromise between the victim and offender, possibility of conviction is remote and bleak. Genuineness of the compromise, which is not a part of the case diary or the prosecution case, cannot be adjudicated at this stage in the present application, which cannot be more appropriately gone into by the trial court at the appropriate stage.

15. In the light of above discussion and after elaborate and wholesome treatment of the issues as laid down by the Apex Court recently in case of Laxmi Narain (supra), I do not find any merit in the present application. The relief as sought by the accused-applicants cannot be granted under the facts and circumstances of the case. This Court is of the view that it is well settled that the appreciation of any foreign document, which is not part of the case diary is a function of the trial court at the appropriate stage. It is also settled by the Apex Court in catena of judgments that the power under Section 482 Cr.P.C. at pre-trial stage should not be used in a routine manner, but it has to be used sparingly, only in such a appropriate cases, where uncontroverted allegations made in FIR or charge-sheet and the evidence relied in support of same do not disclose the commission of any offence against the accused. Genuineness or otherwise of the allegation cannot be even determined at this pre-trial stage.

16. In view of above, the impugned criminal proceeding under the facts of this

case cannot be said to be abuse of the process of the Court. There is no good ground to invoke inherent power under Section 482 Cr.P.C. by this Court. Hence, criminal proceedings against the applicants is not liable to be quashed. As a fallout and consequence of above discussion, the relief as sought by the applicants through this application is **refused.**

17. The instant application lacks merit and is, accordingly, **dismissed.**

18. Office is directed to communicate this order to the concerned court below within two weeks.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2019

BEFORE
THE HON'BLE SANJAY KUMAR SINGH J.

CIVIL MISC. WRIT PETITION No. 27720 of 2019
(u/s - 482 Cr. P.C.)

Alok Jaiswal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Manvendra Nath Singh

Counsel for the Opposite Parties:
A.G.A., Sri Mainsh Jaiswal.

A. Section 482 Cr.P.C. - Matrimonial dispute - opposite party no. 2 who is the wife of the applicant lodged an FIR u/s 498A, 323, 308, 342, 504, 506, 406 Indian Penal Code and 3/4 Dowry Prohibition Act, 1961-settlement between parties- applicant adhered to the condition of the term and condition of the settlement - no useful purpose to allow criminal prosecution- application allowed in terms of compromise.

Chronological list of Cases Cited: -

1. (1988) 1 SCC 692 Madhavrao Jiwajirao Scindia and others Vs. Sambhaji-rao Chandrojirao Angre and others

2. (2003) 4 SCC 675 B. S. Joshi and others Vs. State of Haryana and another

3. (1977) 2 SCC 699 State of Karnataka Vs. L. Muniswamy

4. AIR 2004 SC 261 Smt. Swati Verma Vs. Rajan Verma and others

5. (2017) 9 SCC 641 Parbatbhai Aahir @ Oarbatbhai Vs. State of Gujrat

6. AIR 2019 SC 1296 State of Madhya Pradesh Vs. Laxmi Narayan and others (E-10)

(Delivered by Hon'ble Sanjay Kumar Singh, J.)

1. Heard Sri Manvendra Nath Singh, learned counsel for the applicants, Sri Birendra Kumar Singh, learned Additional Government Advocate assisted by Sri Prashant Kumar Singh, learned Brief holder for the State/opposite party no.1 and Sri Manish Jaiswal, learned counsel for the opposite party no.2 and perused the record with the assistance of learned counsel for the parties.

2. This application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the charge-sheet no. 34 of 2018 dated 23.07.2018 arising out of Case Crime No. 0005 of 2017 as well as cognizance order dated 05.04.2019 and proceedings of case no.8333 of 2018 (State Vs. Alok Jaiswal and others), under Sections 498A, 323, 504, 506, 406 IPC and 3/4 D.P. Act, Police Station Mahila Thana, District - Allahabad pending in the court of 18th Additional Chief Judicial Magistrate, Allahabad.

3. Filtering out unnecessary details, the basic facts, in brief, which are necessary to dispose of the case are encapsulated as under: -

The applicant no.1 is husband and applicant no.2 is brother-in-law (*Jeth)* of the opposite party no.2 Sonali Jaiswal. The marriage of applicant no.1 was solemnized on 14.2.2013 with opposite party no.2, but their marriage was not successful, as a result thereof, the opposite party no.2 lodged FIR dated 22.1.2017 against the applicants, her father-in-law and sister-in-law making various allegations of beating, harassment and torture adopting different mods-operandi, on account of non-fulfillment of demand of dowry, etc. The Investigating Officer after investigation submitted charge-sheet dated 23.7.2018, on which, the Magistrate concerned took cognizance on 25.9.2018. The said cognizance order dated 25.9.2018 was challenged by the applicants through an application under Section 482 Cr.P.C. No. 773 of 2019, which was allowed by order dated 10.1.2019 of the co-ordinate Bench of this Court and cognizance order dated 25.9.2018 was quashed on the ground that the same was passed on a printed proforma without application of judicial mind and without considering any material brought on record by the Investigating Officer alongwith charge-sheet. By order dated 10.1.2019, liberty was also given to the Magistrate concerned to pass fresh order in accordance with law. Thereafter, A.C.J.M., Court No.18, Allahabad again passed the order dated 5.4.2019 taking cognizance of the offence and summoned the applicants afresh under Sections 498A, 323, 308, 342, 504, 506, 406 I.P.C. and ¾ Dowry Prohibition Act to face trial. In the aforesaid background, the instant application has been preferred by the applicants.

4. On the previous hearing of this case on 25.7.2019, learned counsel for the applicants and opposite party no.2 informed the Court that now the parties concerned are willing to make settlement in the matter. On the said submissions and on the request on behalf of applicants, time was granted to the applicants to make arrangement of payment to settle the dispute amicably.

5. In the aforesaid background, today a joint affidavit dated 5.8.2019 of the applicants and opposite party no.2 has been filed by contending that now parties concerned have settled their matrimonial dispute outside the Court and they have no grievance against each other. The contents of terms and conditions of settlement as mentioned in paragraph nos. 4, 5, 6, 7, 8, 9 and 10 of the joint affidavit dated 5.8.2019 are reproduced herein-below:-

"4. That it is submitted that it has been agreed by the opposite party no.2/Smt. Sonali Jaiswal that she will receive an amount of Rs. 22,00,000/- (Twenty Two Lakhs) from the applicant no.1, and in pursuance thereof, she will withdraw all the cases including the present case filed by her against the applicants and other family members.

5. That it is submitted that the applicant no.1, as well as opposite party no.2/Sonali Jaiswal also pledge not to prosecute each other or family members with regard to present matrimonial dispute between them, and both the parties shall also withdraw all the cases pending against each other (if any).

6. That it is submitted that the opposite party no.2/Smt. Sonali Jaiswal also agreed to withdraw all the cases which she filed against applicants and their family members, the detail of them are as under:-

(i) Present case i.e. Case Crime No.005 of 2017 under sections 498A, 323, 504, 506, 406 IPC and Section ¾ D.P. Act, Police Station Mahila Thana, District Allahabad.

(ii) Case No. 489 of 2017 (Sonali Jaiswal Vs. Alok Jaiswal) under section 12/14 of Domestic Violence Act.

(iii) Case No. 659 of 2018 under Section 125 Cr.P.C.

7. That the opposite party no.2 has pledged to withdraw all the aforesaid cases, and further agreed not to prosecute the applicants or their family members in respect of present matrimonial proceedings/dispute.

8. That the applicant no.1/Alok Jaiswal shall pay amount of Rs. 10 Lakhs on 08.08.2019 in the shape of two demand draft, each demand draft of Rs. 5 Lakhs.

The details of which are as under:-

(i) Demand draft No.251357 of Rs. 5 Lakhs drawn on 31.07.2019 at Bank of Baroda, Branch office Mughal Sarain.

(ii) Demand Draft No. 251358 of Rs. 5 Lakhs drawn on 31.07.2019 at Bank of Baroda, Branch Office, Mughal Sarain.

The Photo state copies of demand drafts are being filed herewith and collectively marked as Annexure No.1 to this Affidavit.

9. That both the aforesaid bank drafts shall be paid to Smt. Sonali Jaiswal and rest of the amount i.e. Rs. 12 Lakhs (Twelve Lakhs) shall be paid by applicant no.1 to opposite party no.2/Sonali Jaiswal after filing of the case under Section 13-B of Hindu Marriage Act before Family Court, Allahabad. The said amount of Rs. 12 Lakhs shall be deposited before the learned Family Court during the proceedings of case under Section 13-B of Hindu Marriage Act. It is made clear that the rest of the amount of Rs. 12 Lakhs will be paid by the applicant no.1, Alok Jaiswal to Smt. Sonali Jaiswal during the proceedings of case under Section 13-B of the Hindu Marriage Act.

10. That in view of the aforesaid facts, it is submitted that the present joint affidavit be taken on record and the applicant under Section 482 Cr.P.C. may be decided in the light of the facts mentioned above."

6. Learned counsel for the applicants pursuant to aforesaid settlement produced two demand drafts of total amount of Rs. 10 lakhs (demand draft nos. 251357 of Rs. 5 lakhs dated 31.07.2019 and 251358 of Rs. 5 lakhs dated 31.07.2019 of Bank of Baroda in the name of Smt. Sonali Jaiswal) and handed over the aforesaid drafts of Rs. 10 lakhs to Sri Manish Jaiswal, learned counsel appearing on behalf of the opposite party no.2 before this Court. Photocopy of the said demand drafts have also been brought on record as Annexure No.1 to the joint affidavit dated 5.8.2019.

7. Learned counsels appearing on behalf of the applicants and opposite party

no.2 also submitted at the Bar that the parties concerned shall comply with the other terms and conditions of settlement, as mentioned in the joint affidavit dated 5.8.2019 in its letter and spirit. Sri Manish Jaiswal, learned counsel for the opposite party no.2 further submits that now opposite party no.2 has no grievance against the applicants and she has no objection in quashing the impugned criminal proceedings against the applicants.

8. After having heard the arguments of learned counsel for the parties, this Court feels it appropriate to refer some relevant judgments of the Apex Court, wherein the Apex Court has laid down the guideline for quashing of criminal proceedings on the basis of compromise and amicable settlement of matrimonial dispute between the parties concerned, which are as follows:-

8.1 The Apex Court in **Madhavrao Jiwajirao Scindia and others V. Sambhaji-rao Chandrojirao Angre and others** held that while exercising inherent power of quashing under Section 482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the Court, chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court, may, while taking into consideration the special facts of a case also quash the proceedings.

8.2 The observations of the Apex Court in **G. V. Rao Vs. L.H.V. Prasad and others** are very apt for determining the approach required to be kept in view, in matrimonial dispute by the Courts, it was said that there has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly escalate which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about re-approachment are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a Court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different Courts.

8.3 The scope and ambit of the power conferred on the High court by Section 482 Cr.P.C., read with Articles 226 and 227 of the Constitution of India, in the particular context of prayer for quashing criminal proceedings, was examined by the Supreme Court in **B.S. Joshi and others. Vs. State of Haryana and another** against the backdrop of a catena of earlier decisions. It was a criminal case arising out of marital discord. Noting, with reference to the decision in **State of Karnakata Vs. L Muniswamy** that in exercise of this "inherent" and "wholesome power", the

touchstone is as to whether "the ends of justice so require", it was observed thus :

"10. ... that in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice and that the ends of justice are higher than the ends of mere law though justice had got to be administered according to laws made by the legislature. ...that the compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction." (emphasis supplied)

It was further noted :-

"What would happen to the trial of the case where the wife does not support the imputations made in the FIR of the type in question. As earlier noticed, now she has filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be either for the reason that she has resolved disputes with her husband and his other family members and as a result thereof she has again started living with her husband with whom she earlier had differences or she has willingly parted company and is living happily on her own or has married someone else on the earlier marriage having been dissolved by divorce on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would it then be proper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences? The answer clearly has to be in the "negative". It would, however, be a differentmatter if the High Court on facts declines the prayer for quashing for any valid reasons including lack of bona fides". (emphasis supplied)

8.4 The Apex Court in another decision in case of **Smt Swati Verma Vs. Rajan Verma and others** where similar to the present case, the dispute including the criminal and divorce litigation between the sparring spouses had been decided on the basis of a compromise and the husband had paid Rs. 6 lakhs to his wife for the settlement, the apex Court had quashed the criminal proceedings under Section 498A and 406 IPC before the CJM, rendering the application under section 482 Cr.P.C before the Allahabad High Court infructuous. It had also granted the decree of divorce, rendering the divorce suit pending before the ADJ at Delhi infructuous, In that case in paragraph 7 the Hon'ble Supreme Court had observed:

"7. Having perused the records placed before us we are satisfied that the marriage between the parties has broken down irretrievably and with a view to restore good relationship and to put a quietus to all litigations between the parties and not to leave any room for future litigation, so that they may live peacefully hereafter, and on the request of the parties, in exercise of the power vested in this Court under Article 142 of the Constitution of India, we allow the application for divorce by mutual consent filed before us under Section 13B of Hindu

Marriage Act and declare that the marriage solemnized between the consenting parties on 13th June, 2001 at Delhi is hereby dissolved, and they are granted a decree of divorce by mutual consent."

8.5 The Apex Court in case of **Parbatbhai Aahir @ Parbatbhai Vs. State of Gujarat** has also laid down the criteria for exercise of the jurisdiction under Section 482 Cr.P.C. by observing that:-

"15. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and

(ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

8.6 The Apex Court recently in a judgment dated 5.3.2019 rendered by a Bench of three Hon'ble Judges in case of **State of Madhya Pradesh Vs. Laxmi Narayan and others** considering previous judgments and section 320 Cr.P.C. has laid down guideline for exercising the jurisdiction under Section 482 Cr.P.C. in case of settlement of dispute between the accused and complainant. The para 13 of the said judgment is reproduced herein-below:-

"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc., which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury

sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

9. The object of criminal law is primarily to visit the offender with certain consequences. He may be made to suffer punishment or by paying compensation to the victim, but the law at the same time also provides that it may not be necessary in every criminal offence to mete out punishment, particularly, if the victim wants to bury the hatchet. If the offender and victim want to move on in a matrimonial cases, they may be allowed to compound the offences in terms of settlement. Considering the facts and circumstances of the case, as on date in the light of dictum and guideline laid down by the Apex Court as mentioned above, I think the interests of justice would be met, if the prayer of parties is acceded to and the criminal proceedings and other litigation between the parties is brought to an end.

On making settlement between the parties in a matrimonial dispute, the chance of ultimate conviction is bleak and therefore, no useful purpose is likely to be served by allowing a criminal prosecution against the applicants to continue.

10. As a fallout and consequence of above discussions, the impugned charge-sheet dated 23.07.2018 arising out of Case Crime No. 0005 of 2017, cognizance order dated 05.04.2019 and entire proceedings of case no.8333 of 2018 (State Vs. Alok Jaiswal and others), under Sections 498A, 323, 504, 506, 406 IPC and 3/4 D.P. Act, Police Station Mahila Thana, District -Allahabad pending in the court of 18th Additional Chief Judicial Magistrate, Allahabad against the applicants are hereby **quashed.**

11. The instant application under Section 482 Cr.P.C. is **allowed** in terms of compromise as mentioned above.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

CIVIL MISC. WRIT PETITION No. 33417 of 2017
(u/s -482 Cr. P.C.)

Manoj Singh ...Applicant
Versus
State of U.P. &Anr. ...Opposite Parties

Counsel for the Applicant:
Sarita Mishra

Counsel for the Opposite Parties:
A.G.A.

A. Section 138 Negotiable Instrument Act, 1881- dishonour of cheque issued by a sole proprietorship firm - not arrayed as party in complaint case - no need to array sole proprietary concern separately – application challenging complaint dismissed (Para 20& 23)

B. Section 141 of Negotiable Instrument Act, 1881 - sole proprietary concern – is only a trade name – it is neither a natural nor a juristic person - not required to be arrayed as party accused – Supreme Court decision in Aneeta Haada distinguished

The relevance to array both the juristic person i.e., company or partnership firm and natural person i.e., directors or partners of the company or firm so as to the directors and partners make be held vicariously liable for the wrongful act of the company or firm. However, to the contrary, the sole proprietary concern is the trade name of the business of the person who conducts it. No two person/entity exist. Therefore, it is not necessary to array the sole proprietorship concern as an accused party to the case. (Para 14 & 15)

C. Explanation (a) to Section 141 of Negotiable Instrument Act, 1881- whether sole proprietary concern falls within the meaning of the term 'Company' or 'Firm' used in the provision - not body corporate as not artificially incorporated under general or special statute - cannot be said to be an association of individuals because at least two individuals form it - sole proprietary concern remains the identified to the individual who owns it - it does not have separate/independent legal existence

There is a legal fiction created in law which separates the entity from the person who created it as in case of company or partnership Firm. But on the other hand in case of a sole proprietary concern it remains one. The trade name does not constitute an entity different from its owner – the sole proprietor. Second, the partner to a firm has been artificially equated to a director of a company. The director or partners have vicarious liability towards the artificial person. Therefore, the artificial person i.e., the company or the firm and natural persons i.e., the partners or directors both are impleaded as an accused person in any complaint. On the other hand, this principle is not applicable to sole proprietary concern.

Chronological List of Case Cited: -

1. (1998) 5 SCC 567 Ashok Transport Agency Vs. Awadhesh Kumar

2. (2015) 1 SCC 617 Bhagwati Vanaspati Traders Vs. Supt. Of Post Offices,

3. (2007) 5 SCC 103 Raghu Lakshminarayanan Vs. Fine Tubes

4. 1992 (74) Company Cases 749 Sri Sivaskthi Industries Vs. Arihant Metal Corporation

5. 1994 (80) Company Cases 656 P. Muthuraman Vs. Padmavathi Finance (Regd)

6. 2002 (111) Company Cases 400 S.K. Real Estates and Another Vs. Ahmed Meera

7. (2014) 6 SCC (Cri) Aneeta Handa Vs Godfather Travels and Tours Private limited and Anr.,

8. Application u/s 482 No. 31101 of 2013 Hintendra Kishan Lal Jain Vs State of U.P. &Anr.(Application u/s 482 No. 31101 of 2013)

9. (1970) 3 SCC 491 State of Madras s. C.V. Parekh and Anr. (E-10)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard learned counsel for the parties.

2. The present 482 Cr.P.C. application has been filed to quash the judgment and order dated 27.07.2017

passed by Additional Sessions Judge, Court No.5, Allahabad in Criminal Revision No.345/2016 (Manoj Singh Vs. Shakeel Ahmad) as well as order dated 20.07.2016 passed by Additional Chief Judicial Magistrate, Court No.5, Allahabad in Complaint Case No.485 of 2014, under Section 138 Negotiable Instrument Act, P.S- Jhunsi, District-Allahabad.

3. Learned counsel for the applicant submits, the complaint is wholly incompetent since the cheque (giving rise to the complaint) was issued by the 'company' M/s Manoj Rice Mill that was not impleaded as an accused person (in the complaint). Reliance has been placed on Section 141 of the Negotiable Instrument Act, 1881 (hereinafter referred to as the Act). The issue is stated to be covered by a Single Judge decision of this Court in the **Application u/s 482 No. 31101 of 2013 (Hitendra Kishan Lal Jain Vs. State of U.P. &Anr.), decided on 13.12.2017**.

4. That case involved default/dishonour of a cheque issued by a proprietorship firm. After referring to Section 141 of the Act, and relying in decision of the Supreme Court in the case of **Aneeta Haada Vs. Godfather Travels and Tours Private Limited and Anr., (2014) 6 SCC(Cri) 845,** the learned Single Judge observed:-

"Since cheques in question were belonging to a Firm and vide explanation appended to Section 141 of the Negotiable Instrument Act, firms or other association of individual are also included in the word 'Company'. Hon'ble Supreme Court in the case of Aneeta Hada (supra) has clearly held that if cheque is issued by a Firm or Company, the Firm / Company must be arrayed as an accused. Same view has been expressed by the Hon'ble Supreme Court in the cases relied upon by the learned counsel for the applicant that until and unless Company or Firm is arrayed as an accused, director or other officials of the Company / Firm cannot be prosecuted / punished.

.....

.....Thus, on the sole ground of non-arraigning of the Firm as an accused in the complaint, the submissions raised by the learned counsel for the applicant that complaint proceedings are an abuse of process of law is acceptable. It is also pertinent to mention here that it will be immaterial whether the Firm running in the name and style of 'New Arihant Trading' is a proprietorship Firm or registered Firm."

5. Shri Madan Mohan Srivastava, learned counsel for the opposite party no. 2 and Sri Ankit Srivastava, learned AGA, on the other hand submit, the position in law is otherwise. The provision of Section 141 of the Act would not apply in the case of a sole proprietorship concern and that it would be restricted to a duly incorporated company or a partnership firm or an association of persons only.

6. Having heard learned counsel for the parties and having perused the record, in the first place there is no dispute to the fact that the applicant was running a sole proprietary concern in the name M/s Manoj Rice Mill. It was neither a partnership firm nor a company nor any other association of persons. Then, the provision of Section 141 of the Act reads:-

"141. Offences by companies.-

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

7. A plain reading of the provision makes it clear, if the person committing the offence is a "company", in that event every natural person responsible for such commission as also the artificial person namely the company shall be deemed to be guilty of the offence and be liable to be proceeded against and punished accordingly. Also, certain other natural persons may be held guilty, if so proved.

8. By way of the Explanation (a) attached to that provision of law, the term 'company' (specifically for the purpose of Section 141 of the Act), has been defined to mean a body corporate or a firm or any other association of individuals. In this statutory context, it calls for examination whether a sole proprietary concern, qualifies or falls within the meaning of the term 'company' or a 'firm' used in that provision.

9. There can be no doubt as to the meaning to be attributed to a "body corporate". That has to be an entity artificially incorporated, either by a special statute enacted to incorporate such corporations or under a general statute such as the Companies Act whereunder public and private companies are commonly incorporated, or a duly constituted entity given such status under a statute such as co-operative societies, local authorities etc. constituted under different enactments. However, it can never be understood to include a proprietorship firm that is neither incorporated nor constituted by or under any statute.

10. As to the meaning to be attributed to the words "association of

individuals", the same has to be understood as an entity created by the free will of more than one individual, for furtherance of a common object or purpose. The use of the plural form of the word 'individual' itself leaves no room for any doubt in that regard. Then, for any 'association' of individuals to arise, there have to exist at least two individuals to form it. A single individual may never form an association with himself.

11. Thus, the phrase "association of individuals" necessarily requires such entity to be constituted by two or more individuals i.e. natural persons. On the contrary a sole-proprietorship concern, by very description does not allow for ownership to be shared or be joint and it defines, restricts and dictates the ownership to remain with one person only. Thus, "associations of individuals" are absolutely opposed to sole-proprietorship concerns, in that sense and aspect.

12. A 'partnership' on the other hand is a relationship formed between persons who willfully form such relationship with each other. Individually, in the context of that relationship, they are called 'partners' and collectively, they are called the 'firm', while the name in which they set up and conduct their business/activity (under such relationship), is called their 'firm name'.

13. While a partnership results in the collective identity of a firm coming into existence, a proprietorship is nothing more than a cloak or a trade name acquired by an individual or a person for the purpose of conducting a particular activity. With or without such trade name, it (sole proprietary concern) remains identified to the individual who owns it. It does not bring to life any new or other legal identity or entity. No rights or liabilities arise or are incurred, by any person (whether natural or artificial), except that otherwise attach to the natural person who owns it. Thus it is only a 'concern' of the individual who owns it. The trade name remains the shadow of the natural person or a mere projection or an identity that springs from and vanishes with the individual. It has no independent existence or continuity.

14. In the context of an offence under section 138 of the Act, by virtue of Explanation (b) to section 141 of the Act, only a partner of a 'firm' has been artificially equated to a 'director' of a 'company'. Its a legal fiction created in a penal statute. It must be confined to the limited to the purpose for which it has been created. Thus a partner of a 'firm' entails the same vicarious liability towards his 'firm' as 'director' does towards his 'company', though a partnership is not an artificial person. So also, upon being thus equated, the partnership 'firm' and its partner/s has/have to be impleaded as an accused person in any criminal complaint, that may be filed alleging offence committed by the firm. However, there is no indication in the statute to stretch that legal fiction to a sole proprietary concern.

15. Besides, in the case of a sole proprietary concern, there are no two persons in existence. Therefore, no vicarious liability may ever arise on any other person. The identity of the sole proprietor and that of his 'concern' remain one, even though the sole proprietor may adopt a trade name different from his own, for such 'concern'. Thus, even

otherwise, conceptually, the principle contained in section 141 of the Act is not applicable to a sole-proprietary concern.

16. In the case of **Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567,** it has been held :

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case." (emphasis supplied)

17. In **Bhagwati Vanaspati Traders v. Supt. of Post Offices, (2015) 1 SCC 617**, it has been held:

"11. We find merit in the second contention advanced at the hands of the learned counsel for the appellant. It is indeed true, that the NSC was purchased in the name of M/s Bhagwati Vanaspati Traders. It is also equally true, that M/s Bhagwati Vanaspati Traders is a sole proprietorship concern of B.K. Garg, and as such, the irregularity committed while issuing the NSC in the name of M/s Bhagwati Vanaspati Traders, could have easily been corrected by substituting the name of M/s BhagwatiVanaspati Traders with that of B.K. Garg. For, in a sole proprietorship concern an individual uses a fictional trade name, in place of his own name".

(emphasis supplied)

18. Directly relevant to the question raised in the present proceedings, in**Raghu Lakshminarayanan v. Fine Tubes, (2007) 5 SCC 103,** it was observed:

"8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the

provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act.

10. It is interesting to note that the term "Director" has been defined. It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a company, the question of there being a Director or his being vicariously liable, therefore, would not arise.

11.....
12.....
13.....

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a "company" or a "partnership firm" as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a company incorporated under the Companies Act or a firm within the meaning of the provisions of Section 4 of the Partnership Act".

(emphasis supplied)

19. The Madras High Court, in **Sri Sivasakthi Industries Vs. Arihant Metal Corporation 1992 (74) Company Cases 749, P. Muthuraman Vs. Padmavathi Finance (Regd) 1994 (80) Company Cases 656** and again in **S.K. Real Estates and Another Vs. Ahmed Meeran 2002 (111) Company Cases 400** has consistently held that a sole proprietorship is neither a firm nor a company nor an association of individuals, under section 141 of the Act.

20. In contrast, in **Aneeta Haada** (supra), there existed a duly incorporated company whose cheque signed by its authorized signatory (Aneeta Haada), had been dishonored giving rise to the criminal complaint alleging commission of offence under Section 138 of the Act. The Supreme Court held, in the case of offence under Section 138 of the Act being committed by a company/juristic person, it would be imperative to first arraign the company (juristic person) as an accused person. The other category of offenders i.e. natural person/s may be arraigned only on the touchstone of vicarious liability.

21. That three judge decision of the Supreme Court is based on and follows the earlier three judge decision of that Court in**St. of Madras Vs C.V. Parekh and Anr. (1970) 3 SCC 491,** the principle laid down and applied being, in the case of an offence being committed by a juristic person, the occasion to proceed against the person authorized by such person would arise only if the latter is first arraigned as an accused person and held guilty.

22. Plainly, there is no ratio laid down, that in case of a sole-proprietary concern, both the business concern and the sole proprietor would be liable to be prosecuted or be impleaded as accused person in the criminal complaint. To that extent, the decision of the learned single judge in **Hitendra Kishan Lal Jain**(supra), is not based on a correct reading of **Aneeta Haada (supra).**

23. The above principle enunciated in **Aneeta Haada (supra) or C.V. Parekh(supra)** has no bearing in the case of a sole-proprietary concern. Neither there exist two persons/accused, nor there exists any person other than the sole-proprietor whose actions may constitute ingredients of an offence under section 138 of the Act. He is the person engaged in the conduct of his business/'concern' and he is the person who issues/signs the cheque, whose dishonour is the primary ingredient of the offence.

24. While I would otherwise have been bound to refer the matter to the larger bench in view of my disagreement with **Hitendra Kishan Lal Jain (supra)**, however, in view of further fact that the position in law stands clearly enunciated by authoritative pronouncements of the Supreme Court in the case of **Ashok Transport Agency v. Awadhesh Kumar (supra)** and **Bhagwati Vanaspati Traders v. Supt. of Post Offices (supra)** as followed and directly applied to section 141 of the Act in **Raghu Lakshminarayanan v. Fine Tubes (supra)**, which decisions had not been placed and therefore not considered in **Hitendra Kishan Lal Jain (supra)**, it appears that that decision of the learned single judge, is contrary to the binding law laid down by the Supreme Court. Also, it has been rendered per incuriam. Being bound by the law laid down by the Supreme Court, there is no requirement to refer the question to a larger bench of the Court.

25. Accordingly, there is no defect in the complaint lodged against the applicant, in his capacity as the sole proprietor of the concern M/s Manoj Rice Mill. There was no requirement to implead his sole proprietary concern as an accused person nor there was any need to additionally implead the applicant by his trade name.

26. The present application lacks merit and is accordingly **dismissed**.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

CIVIL MISC. WRIT PETITION No.13549 of 2014
(u/s -482 Cr. P.C.)

Jai Prakash Rai &Ors. ...Applicants
Versus
State of U.P.&Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ali Hasan, Sri Istiyaq Ali.

Counsel for the Opposite Parties:
A.G.A., Sri Daya Shanker

A. Section 482 Cr.P.C - complaint alleging offence under sections 323, 504, 506, 427 IPC - Statement of complainant recorded under sections 200 Cr.P.C. Two daughters of complainant examined under Section 202 Cr.P.C - both gave identical statements. Trial court summoned the accused applicants. *Held*- it cannot be denied that on the basis of statements, offences prima facie made out.
Application dismissed

List of Cases Cited: -

1. Chilakamarthi Venkateshwarlu and another vs State of Andhra Pradesh and another, 2019 SCC Online SC 948

2. Zandu Pharmaceuticals Work Ltd Vs Mohd. Sharful Haque, (2005) 1 SCC 122

3. Dinesh Singh and others vs State of UP and another, 2008 lawsuit (All) 686 (E-5)

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Ali Hasan, learned counsel for applicants, Sri Daya Shanker, learned counsel for the opposite party no. 2, Sri G.P. Singh, learned A.G.A. appearing for State and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the criminal proceedings in Criminal Complaint Case No. 254 of 2013 (Leelawati vs. Jai Prakash) under sections 323, 504, 506, 427 IPC, Police Station Kerakat, District Jaunpur pending in the Court of Additional Chief Judicial Magistrate-II, Jaunpur including the summoning order dated 28.10.2013 and also a prayer is made to stay the proceedings in this case till the disposal of this application.

3. To understand the dispute better it would be appropriate to refer here the facts in brief of the case which are as follows. The opposite party no. 2 who is wife of the accused applicant no. 2 made a complaint before the Additional Chief Judicial Magistrate II, Jaunpur stating therein that 2 daughters were born out of their wedlock but no son which led to the annoyance to her husband, who kept Shakuntala daughter of Basantu/Applicant no. 3 with him and was issuing threats to the opposite party no. 2 that he would not give his property to the opposite party no. 2 and her 2 daughters namely Mamta and Babita rather the same would be written in favour of Shakuntala and regarding this the Opposite Party no. 2 has filed a suit no. 1219 of 2011, Lilawati vs Somaru. Getting annoyed due to this, the applicant no. 1 Jai Prakash Rai alias Kailash Nath, who is a man of gunda character and is involved in an offence under sections 302 IPC and is notorious for spreading terror at his instance Somaru and Shakuntala after getting bulldozer called, razed to the ground the kachcha house of the opposite party no. 2 and had stolen away her household goods. When the opposite party no. 2 resisted, all the above named three accused abused her badly and threatened opposite party no. 2 and her daughters to run away failing which they would also be done to death by using bulldozer and saying all this the opposite party no. 2 was beaten badly and when her daughter reached there to save, they were also beaten. Hearing the commotion Habibullah and various other persons of the village also reached there who intervened and witnessed the occurrence. The accused then left the place gaving

threats uttering " madarchod agar koi karyavahi karegi to jan se mar kar khatm kar denge". Saving her life from the terrorism of the accused the opposite party no. 2 came to the police station Kerakat to lodge a written report which was given there, but the police did not register the same nor was she sent for medical examination nor police went to the spot and feeling frustrated the opposite party no. 2 sent a registered complaint to the Superintendent Police but when no action was taken by them, she presented the complaint dated 29/09/2013 before the court to summon the accused and punish them. The statement of the opposite party no. 2 was recorded under sections 200 Cr. P.C. in which she has stated that her entire house was demolished by the applicant nos 1 to 3. Both her daughters had been married. Her husband had kept daughter of Basantu. Her husband consumes liquor and abuses. He has written agricultural land in the name of applicant no. 3/Shakuntala. Both the daughters Mamta and Babita live with her while Shakuntala is wife of Ram Khelawan. All the three accused would get opposite party no. 2 and her daughters killed and had abused all of them regarding which a complaint was made at the police station but no action was taken. There is one bigha of land in the name of her husband, out of which half used to be sown by her while the other half by Shakuntala. As on date, the said land was being cultivated by the accused while she herself was meeting her expenditure by doing labourer's work. The entire land is in the name of her husband. The two daughters namely, Mamta and Babita have been examined under Section 202 Cr. P.C. by the trial court and both of them have given identical statements stating that their father had got annoyed with their mother and had threatened that all his movable and immovable property would be given to Shakuntala daughter of Basantu, by which their mother became perturbed and had filed an Original Suit in the court of Civil Judge Junior Division, Shahganj, Jaunpur. Due to this their father Somaru became angry and on 19/03/2013 atabout 10 AM Jai Prakash alias Kailash Nath/applicant no. 1 called a bulldozer and started demolishing the kachcha house of opposite party no. 2 which was resisted by her, whereafter all the three accused started beating their mother by fists and kicks, abused her badly and when both the daughters raised alarm, hearing the same Habibullah and other persons of the village reached there and had seen the occurrence, who intervened into this matter. Accused had taken away the household articles of their mother and had issued threats while leaving the place that in case any action was taken against them they all would be eliminated.

4. After having considered the evidence cited above, the trial court has summoned the accused applicants to face trial under sections 323, 504, 506 and 427 IPC by the impugned order which is prayed to be quashed in the present proceedings.

5. By way of filing affidavit in support of the present application, it has been submitted from the side of the applicant that it was wrong submission on the part of the opposite party no. 2 that she had just two daughters, in fact three daughters were born out of the wedlock of opposite party no. 2 and the accused applicant no. 2 . The two daughters namely, Mamta and Babita had been married but unfortunately the third daughter namely Shakuntala/accused no.

3 was a poor lady who was residing with the accused applicant no. 2, her father and used to take his care and as a result of that a registered will deed was executed in her favour on 01/08/2007, true copy of which has been annexed as Annexure no. 6 to the affidavit. The opposite party no. 2 filed original suit no. 1219 of 2011, Smt. Lilawati vs Somaru for permanent injunction against the applicant no. 2, a true copy of the plaint dated 25/10/2011 has been annexed as Annexure 7 to the affidavit. The Opposite Party no. 2 has also instituted another original suit no. 840 of 2013 Smt. Lilawati and another vs Somaru and another, for cancellation of sale deed dated 11/04/2013 which was executed by the applicant no. 2 in favour of the applicant no. 3, true copy of which is annexed as annexure no. 8 to the affidavit. The applicant no. 2 is very old person aged about 72 years who is on death bed. He is not even able to walk and perform his daily routine but for the help and care taken by his daughter i.e. applicant no. 3 which led him to execute the will deed in her favour and the same has antagonised the complainant/opposite party no. 2, who is his wife who has ill intention and has filed two original suits mentioned above. From the material evidence on record no prima facie case is made out under the above-mentioned sections and hence the proceedings are liable to be quashed being malicious prosecution of the applicants in the light of law laid down in Bhajan Lal's case.

6. Per contra in counter affidavit the opposite party no. 2 has denied the facts pleaded by the applicants and has stated that a forged will deed has been executed in favour of the accused applicant no. 3/Shakuntala by the applicant no. 2. With respect to the facts averred in paragraph 10 of the affidavit, it is mentioned that the reply of the same shall be given at the stage of argument and has further stated that the applicants have beaten the opposite party no. 2 and her daughters who had witnessed the said incident and the case is made out under the above-mentioned sections.

7. Rejoinder affidavit has also been filed from the side of the applicants reiterating therein the same facts which have been mentioned in the affidavit.

8. The learned counsel for the applicants vehemently argued that only with a view to pressurising the accused applicants, this false case has been lodged against them by the opposite party no. 2 so that pressure may be exerted in the two original suits which have been filed by opposite party no. 2 against the applicant no. 2, hence it would fall in the category of malicious prosecution as per settled principle of law laid down in Bhajan Lal's case and therefore the proceedings need to be quashed against the applicants.

9. On the contrary the learned counsel the opposite party no. 2 has vehemently defended the summoning order relying upon the judgment and order dated 29/02/2008 delivered by a learned single Judge of this court in Dinesh Singh and others vs State of UP and another, 2008 lawsuit (All) 686 in which in a case under sections 494/109 IPC following was held in Para 14 of the judgment:

"[14] This Court while exercising the inherent jurisdiction cannot examine the question of sufficiency of evidence for conviction of the offence of bigamy. In paragraph 8 of the rejoinder affidavit filed by Ram Chandra Singh, the

applicant No. 2 it has been stated that there is no evidence that marriage of Dinesh Singh was legally solemnized with another lady. The applicant No. 2 is the father of Dinesh Singh, the applicant No. 1, husband of sister of opposite party No. 2. the averments made in paragraph 8 of the rejoinder affidavit amount to admission of solemnization of second marriage. However, the validity of the marriage has been challenged. The accusations made in complaint and evidence of complainant and witnesses are prima-facie sufficient for proving the performance of marriage of Dinesh Singh applicant No. 1 with Santosh Kumar during the life-time of his first wife, the sister of opposite party No. 2. The decisions relied on behalf of the applicants in relation to celebration of marriage with proper ceremonies were pronounced in criminal appeals directed against the judgments and order of conviction and sentence. The present case is at the threshold. On thorough scrutiny of the material brought on record there was sufficient evidence to proceed against the applicants for the offence under Section 494/109 I.P.C. and the Magistrate concerned committed no illegality by summoning the applicants. Consequently, the application deserves dismissal."

10. It is apparent from the above citation that the fact of the second marriage was denied from the side of the accused but it was held that the decisions relied on by the applicants in relation to celebration of marriage with proper ceremonies were pronounced in criminal appeals directed against the judgement and order of conviction and sentence while in the present case the matter was at the threshold. Further it was held that the inherent jurisdiction could not be exercised in order to examine the question of sufficiency of evidence of conviction of the offence of bigamy and it was held that there was sufficient evidence to proceed against the applicants for offences under sections 494/109 IPC.

11. In the present case the opposite party no. 2 has claimed that the accused applicant no. 2 is her husband who was annoyed with her because she could not bear any male child and hence he kept a lady called Shakuntala daughter of Basantu who is made accused no. 3 in this case by her and had threatened her that his entire property would be given to Shakuntala and not to the daughters of the opposite party no. 2 or to the opposite party no. 2 herself. He actually went on to carry out that threat by executing a will deed in favour of Shakuntala in respect of land belonging to applicant no. 2 over which opposite party no. 2 claims her right along with her two daughters being legal heirs of the applicant no. 2. And it is further stated that when the opposite party no. 2 filed original suits which have been cited above, this led to further annoyance to the applicant no. 2 who along with Shakuntala and accused applicant no. 1, who is a notorious criminal have razed to the ground kachcha house of the opposite party no. 2 and the household goods had been stolen away by them and at the time of this occurrence resistance was offered by the opposite party no. 2 which resulted in her being beaten by the accused applicants and when her two daughters came to her rescue they were also beaten, abused and were threatened to be killed. On the other hand the applicant's version is that the accused no. 3/Shakuntala is the third daughter of the opposite party no. 2 and of her husband Somaru i.e. applicant no. 2, who is a poor lady who is looking after applicant no. 2, he being 72 years old person, who cannot attend to his daily routine and is lying on death bed because of which he has

executed a registered will deed in her favour in respect of the property belonging to him. This has led to the annoyance of the opposite party no. 2 and her two daughters because of which the opposite party no. 2 has filed two original suits against the applicant no. 2 in order to get the said will deed cancelled as well as for permanent injunction. It is in order to create pressure in those original suits that the present false criminal case has been initiated against the applicants by the opposite party no. 2 and her two daughters only. This case is nothing but a counterblast and is a malicious prosecution which ought to be quashed in accordance with the principle of law laid down in para-102 of the Bhajan Lal's case as per Condition no. 7 which says that where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the same could be quashed.

12. I can take assistance of the law laid down by the Hon'ble Apex court in **Chilakamarthi Venkateshwarlu and another vs State of Andhra Pradesh and another, 2019 SCC Online SC 948,** in which the appeal was preferred against the judgment and order dated 30/08/2018 passed by the High Court of Judicature at Hyderabad dismissing the Criminal Petition No. 9225 of 2018 filed by the appellant under sections 482 of the Criminal Procedure Code to quash the criminal proceedings in PRC no. 2 of 2018 pending against the appellants in the court of Additional Judicial First-Class Magistrate, Narsapar, West Godavari District for the offences punishable under sections 307, 323, 427, 447 and 506 (2) read with Section 34 of the Indian Penal Code. The appellants and the respondent no. 2,, being the *de facto* complainant, were pretty close relatives and were embroiled in Partition Suit. The appellant no. 2 had also filed a criminal complaint against the *de facto* complainant and others under sections 120 B, 420, 463, 464, 466, 467, 468, 469, 470 and 471 of the IPC. The appellants' case was that the de facto complainant had falsely implicated the appellants as a counterblast to the Criminal Complaint No. 518 of 2012 filed by the appellant no. 2. The case of the de facto complainant was that an attempt to cause injuries on the head was made, which was a vital organ, which could have resulted in causing death of the de facto complainant. The High Court found that the allegations in the complaint attracted the offences, punishable under the sections mentioned in the complaint and rejected the contention of the appellants that the complaint was lodged as a counterblast observing that the complaint of the second appellant was filed on 28/09/2012, whereas the instant complaint was filed on 21st July, 2015, that is after almost 3 years. The case of the appellants was that the appellant no. 1, who was working as lecturer at Hyderabad had been falsely implicated, therefore whether the appellant no. 1 was at Hyderabad when the alleged incident took place, or whether he was falsely implicated, was a question of fact which had to be decided in the trial by adducing evidence. Therefore it was held the High Court rightly concluded that it was open to the appellants to adduce evidence to show that the appellants and/or one of them was not present at the time of the alleged offence. It was further held that the pleanary inherent jurisdiction of the court under sections 482 Cr. P.C. may be exercised to give effect to an order under the Code; to prevent abuse of process of

the court; and to otherwise secure the ends of justice. The inherent jurisdiction, though wide and expansive, has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself, that is, to make orders as may be necessary to give effect to any order under the Code, to prevent the abuse of process of any court or to otherwise secure the ends of justice. For the Interference under Section 482, three conditions are to be fulfilled. The injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief. In exercising jurisdiction under sections 482 it is not permissible for the court to act as if it were a trial court. The court is only to be prima facie satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the court can evaluate materials and documents on record, but it cannot assess the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. The High Court should not, in exercise of jurisdiction under Section 482, embark upon an enquiry into whether the evidence is reliable or not, or whether on a reasonable appreciation of evidence the allegations are not sustainable, for this is the function of the trial Judge. This proposition finds support from the judgment of Apex Court in **Zandu Pharmaceuticals Work Ltd Vs Mohd. Sharful Haque, (2005) 1 SCC 122**. It was further held in this case that the High Court had rightly refused to quash the criminal complaint observing that it can excise power under Section 482 of the Cr. P.C. only in rare cases. The power to quash the proceedings is generally exercised when there is no material to proceed against the petitioners even if the allegations in the complaint are prima facie accepted as true. The High Court in effect found, and rightly, that the allegations in the complaint coupled with the statements recorded by the learned Magistrate had the necessary ingredients of the offences under sections 307, 323, 427, 447 and 506 (2) read with Section 34 of the IPC. Therefore this case was not found to be fit case to quash the criminal proceedings.

13. In the light of above cited law I would like to analyse the facts of the present case. There is dispute of the fact that whether accused applicant no. 3 was third daughter of the accused applicant no. 2 and the opposite party no. 2 born out of their wedlock or whether the accused applicant no. 3 was daughter of some Basantu as was stated by the opposite party no. 2 who was kept by the applicant no. 2 when he got annoyed from the opposite party no. 2 because she did not bear any male child. The main dispute appears to be between the two sides that the opposite party no. 2 and her daughters were deprived by the accused applicant no. 2 of his property as the will of his property had been executed in favour of Shakuntala/accused applicant no. 3. It is also stated from the side of the complainant/opposite party no. 2 that when she filed the original suit to get the said will deed cancelled and to seek injunction, feeling annoyed by that, all the accused together had beaten up accused and threatened to kill opposite party no. 2 and her two daughters and the kachcha house of the opposite party no. 2, in which she was living, was also razed to

the ground by them and the household goods were stolen away. These averments have been supported by the complainant as well as her 2 daughters in their statements mentioned above, therefore it cannot be denied that on the basis of those statements the offences as mentioned above would be prima facie made out. If these allegations are taken to be true, certainly the offences of the above-mentioned sections would be made out. It cannot be held at this stage that merely because the injuries have not been found to have been caused to the opposite party no. 2, offence under Section 323 would not be held to be made out, the opposite party no. 2 has clearly stated that she approached the police but the police did not send her for medical examination. It does not appear that any grave injustice would be caused to the accused if this prosecution is allowed to continue. It does not fall in the case of rare case in which jurisdiction of 482 Cr. P.C. would need to be invoked. The theory of counterblast cannot be allowed to be pleaded in the present case from the side of the applicants. Therefore I do not see any justification in quashing the proceedings in the present case. Accordingly this application deserves to be dismissed and is dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

CIVIL MISC. WRIT PETITION No. 24545 of 2019
(u/s -482 Cr. P.C.)

Mukesh Sharma ...Applicant
Versus
State of U.P &Anr. ...Opposite Parties

Counsel for the Applicant:
Sri J.B.Singh

Counsel for the Opposite Parties:
A.G.A., Sri Deepak Dubey, Sri Siddarth Shankar Mishra.

A. Section 233(3) Cr.P.C – Accused- right to summon defence witnesses - Trial – is sacrosanct fundamental right - Request to summon defence witness can be turned down only if the Judge considers that it is for vexation or delay or for defeating the ends of justice - Court is required to record its plausible reason for refusing the request of the accused to summon a defence witness. (Para 9)

B. Constitution of India – Article 20(3)– Right to Silence-Article 20(3) constitutes right to silence of accused which has various facets: One is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. (Para 13)

Accused moved application under Section 233 Cr.P.C. to summon defence witnesses to prove his plea of alibi – Trial Judge rejected application holding that application was moved merely to delay the trial as plea of alibi was set up by the accused for the first time and was never made part of investigation or discharge was claimed on its basis or stated a word about leading defence evidence in respect of alibi under Section 313 Cr.P.C.-Held-Rejection of application on the ground that no plea of alibi was suggested to any of the prosecution witnesses nor disclosed it in his statement recorded under Section 313 Cr.P.C., is illegal as the accused was not obligated to make any such suggestion as even if accused has suggested any plea of alibi the prosecution could not have led any evidence in rebuttal thereof, when the prosecution evidence was being recorded.

Application allowed.

List of Cases Cited:-

1. State of Orissa Versus Debendra Nath Padhi, 2004(8) Supreme Court Cases 568 followed

2. Ram Naresh and others Versus State of Chhattishgarh (2012)2 Supreme Court Cases (Cri) 382

3. Natasha Singh Versus CBI, (2013) 5 S.C.C.74 (E-5)

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri J.B. Singh, learned counsel for the applicant, Sri Deepak Dubey and Sri Siddhartha Shankar Mishra, learned counsels for opposite party no. 2 as well as learned A.G.A. and perused the material placed on record.

2. Instant application has been filed with the prayer to quash the impugned order dated 30.1.2019 and 14.06.2019 passed by Additional District and Sessions Judge, Hapur in Session Trial No.253 of 2016 (State Versus Ankush and others) bearing Case Crime No.408 of 2014 under Sections 147, 148, 149, 302, 120-B I.P.C. and 7 Criminal Law Amendment Act, Police Station Hapur Nagar, District Hapur and further direct learned trial judge to summon the witness i.e. record keeper / Officer of (Immigration Department), Indira Gandhi International Airport, New Delhi along with record as mentioned in the application moved by the applicant under Section 233(2) Cr.P.C.

3. The factual background, in short, giving rise to present petition is that according to prosecution the F.I.R. was lodged by opposite party no.2 against six accused persons including the applicant registered under aforesaid case crime number and sections on 13.07.2014 at 1.15 p.m. It is alleged that the applicant and his associates on account of enmity over family property dispute on 13.07.2014 at 11.45 a.m. surrounded informant's son in front of his house and all the accused resorted to indiscriminate firing due to which he succumbed to the injuries subsequently. After investigation charge-sheet was laid and the case was committed to the court of sessions. It is pertinent to mention here that the applicant is in jail since 5.12.2014. The applicant moved his bail application in which he has taken specific plea that aforesaid incident took place at about 11.45 a.m. on 13.07.2014 near the house of the deceased but in fact the applicant was not present in India at the time and date of the incident and was present in Nepal. In fact, the applicant along with his brother, Sanjay had gone to Kathmandu on 12.07.2014 by Indigo No.6E31 and the flight departed at 11.25 a.m. on 12.07.2014, the copy of Boarding Passes and air tickets were also appended along with the bail application. It was also stated that the applicant and co-accused, Sanjay came back from Kathmandu to New Delhi by Indigo Flight No.6E34, departure time 8.10. p.m. on 13.07.2014 and the applicant was travelling in the said Flight on Seat No.47. The copies of the air tickets and the Boarding Passes and relevant documents were also appended along with bail application. It was also stated that during 12.07.2014 and 13.07.2014, he and co-accused,Sanjay stayed in Shiv Shanker Hotel Jaybageshwar Pashupati Nath, Kathmandu, Nepal. Copy of the receipt of said hotel was also appended with the bail application. Therefore, a specific plea of alibi was taken that it was impossible for the applicant to be present at the place of occurrence on 13.07.2014 at about 11.45 a.m. by no stretch of imagination.

4. The case was committed to the court of sessions. After the closure of prosecution evidence, the statement of the applicant and other accused was recorded under Section 313 Cr.P.C. on 12.11.2018. In reply to a specific question as to whether the applicant wants to lead any defence evidence, to which his answer was in affirmative (th gakWaa++). Thereafter, the case was fixed for defence evidence. Insofar as the applicant is concerned, he moved an application 28Ga under Section 233 Cr.P.C. to summon the witnesses mentioned in the application to prove his plea of alibi that he was travelling from New Delhi to Kathmadu and Kathmandu to New Delhi in Indigo Flight No.6E31 and 6E34 on 12.07.2014 and 13.07.2014. In its proof, tickets and boarding passes were also appended with the application. Besides it, in support of plea of alibi papers regarding stay of the applicant in Shiv Shanker Hotel Jaybageshwar Pashupati Nath, Kathmandu, Nepal were also filed, especially the cash receipts. The prayer for summoning following was made:

1. Record keeper/concerned OfficerIndiraGandhiInternationalAirport, New Delhi along with record of Indigo Flight Nos. 6E31 dated 12.07.2014 and 6E34 dated 13.07.2014.

2. Record to prove that the applicant had travelled on the aforesaid boarding passes in respect of aforesaid flights.

3. Manager, Shiv Shanker Hotel Jaybageshwar Pashupati Nath, Kathmandu, Nepal along with copy of the record of cash receipt dated 13.07.2014.

5. The said application was strongly opposed by the learned Additional Government Counsel (criminal) as well as learned counsel for the informant on the ground that the application was moved by the applicant to prove his defence plea of alibi for the purpose of vexation, causing delay in disposal of the trial and for defeating the ends of justice. Therefore, the same may be rejected. It was also objected that plea of alibi taken by the applicant is an afterthought one in order to get himself acquitted whereas this plea of alibi was neither disclosed by him to the Investigating Officer nor at the time of framing of charge that on the basis of plea of alibi, he may be discharged nor any such suggestion was given to any witness that he was present in Kathmandu at the time of the incident and lastly even in statement under Section 313 Cr.P.C. the applicant has not stated anything about plea of alibi. Therefore, the application moved for defence evidence is liable to be rejected.

6. Learned trial judge vide order dated 30.1.2019 on the aforesaid objections raised by Additional Government Counsel (criminal) as well as learned counsel for the informant, rejected the application under Section 233 Cr.P.C. He has quoted Section 233 (3) Cr.P.C. and has recorded that it appears that this plea of alibi is being set up by the applicant for the first time and was never made part of investigation or discharge was claimed on its basis or stated a word about leading defence evidence in respect of alibi under Section 313 Cr.P.C. that at the time of incident he was in Nepal. On this ground he recorded that it appears that this application has been moved merely to delay the trial.

7. Learned counsel for the applicant has submitted that the incident took place in the year 2014 and charge-sheet was filed on 3.09.2014. The case was thereafter committed to the court of sessions and it remained pending for more than three years for recording of

prosecution evidence and the statement of the applicant and other accused under Section 313 Cr.P.C. was recorded on 12.11.2018 and the order dated 30.1.2019 could not be challenged by the applicant as he is languishing in jail since 5.12.2014. However, another application under Section 233(2) Cr.P.C. was moved on behalf of the applicant for summoning aforesaid witnesses to prove his plea of alibi. The opposite party no.2 again filed objections to the said application. Opposite party no.2/informant moved two transfer applications before Sessions Judge on 12.3.2019 and 4.4.2019. The second application i.e. 54Kha moved on behalf of the applicant for leading defence evidence to establish plea of alibi has again been rejected by the trial judge vide impugned order dated 14.06.2019 more or less on the same ground as the same was rejected by earlier order dated 30.1.2019. Learned counsel for the applicant has assailed both the impugned orders on the ground that learned trial judge has not applied his judicial mind and has not passed impugned orders in the light of true scope and ambit of provisions of Section 233(2)Cr.P.C. and has merely recorded that application to lead defence evidence has been made for the purpose of vexation, delay and defeating the ends of justice and without giving any plausible reason rejected the same.

8. One of the grounds for rejecting the application for summoning of the witnesses, Manager, Shiv Shanker Hotel Jaybageshwar Pashupati Nath, Kathmandu, Nepal is that the said witness resides in a foreign country and if he is summoned it shall take considerable time to examine him which will delay the trial. I may record that the reasons given by the learned Judge are apparently preposterous. There are various pronouncements that the statement of the such witnesses can be recorded through Video Conferencing and if the accused is ready to bear the expenses of the Manager of the Hotel to prove that the applicant had stayed in the hotel on 12.07.2014 and 13.07. 2014. There is no reason not to issue summon to him. However, the Court can always issue process/summons through embassy of Nepal to the said witness and as such no Visa or immigration formality is to be adopted in view of Treaty in this behalf between our country and Nepal.

9. Before dealing with the reasoning given by the trial judge for rejecting the applications of the applicant for leading defence evidence, it is to be understood as to what is the scope of Section 233 (3) Cr.P.C. A bare reading of sub-section (3) of Section 233 Cr.P.C. would reveal that if the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Moreover, the court is required to record its reasoning for refusing the request to summon a defence witness. A bare perusal of the Section 233(3) Cr.P.C. would reveal that except on those grounds the request cannot be turned down on any ground. It is also well settled that the trial court cannot deny an accused the right to summon witnesses, he /she has cited to examine them as defence witnesses which is his sacrosanct fundamental right.

10. The Hon'ble Apex Court in the case of ***Natasha Singh Versus***

CBI,(2013) 5 S.C.C.74 has held that "fair trial entails the interests of the accused, the victim and of the society and, therefore, includes the grant of fair and proper opportunities to the person concerned and the same must be ensured as this is the Constitutional as well as human right."

11. Learned counsel for the applicant has submitted that the applicant has a fundamental and legal right to place on record all evidences in respect of defence to prove his innocence and plea of alibi which he has to establish to the hilt and if he fails to prove this plea of alibi this would be additional circumstance/which can be read along with proven prosecution evidence to be read against the accused to record his conviction. He has further stated that it is well settled that if no acquittal is passed under Section 232 Cr.P.C., the court has to call upon the accused to enter on his defence. Admittedly, in this case, no acquittal has been passed under Section 232 Cr.P.C. Therefore, the provisions of Section 233(3) Cr.P.C. are fully attracted. The accused has a right to be provided an opportunity to adduce any evidence in support of his defence. This right of the accused is a very valuable right which cannot be curtailed in any way. Therefore, a heavy duty is cast upon the Court to see as to whether or not the defence evidence sought to be summoned, is necessary for defending the charge levelled against the accused. If it is so, the trial judge has to summon the defence witnesses and has to adopt a reasonable approach in such a matter and should not reject the prayer for summoning defence evidence except on the grounds provided in sub-section (3) of Section 233 of the Code.

12. The important question of law that arises for determination in the present is as to whether it is incumbent on the part of accused to spell out his defence including the plea of alibi at the stage of investigation, framing of charge while prosecution evidence is being recorded and at the stage of recording of statement under Section 313 Cr.P.C..

13. In order to answer aforesaid issues, the Court cannot lose sight of Article 20(3) which constitutes right to silence of accused which has various facets: One is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. Right to silence to an accused came to be included in Universal Declaration of Human Rights, 1948, Article 11.1 thereof reads:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. "

14. The Law Commission in its 180th report on Article 20(3) of the Constitution of India considered the scope of right of silence, in view of some developments in United Kingdom, Austrailia, USA and other countries diluting the right to silence of the accused at the stage of interrogation and in criminal trial proceedings. The Commission was of the opinion that the right is protected by Articles 20(3) and 21 of the Constitution and Sections 161(2), 313 (3) and 315 of the Code of Criminal

Procedure, 1973. If the changes made in U.K. or those proposed in Australia are introduced in India, such changes will be ultra vires of Articles 20(3) and 21 of the Constitution of India. Therefore, no dilution of the existing right to silence need be made nor can be made.

15. Besides it, there is no standard mechanism for disclosing an alibi in our country as is mandated in Canada, USA, Austrailia which have stringent "alibi notice-laws". The accused for tactical reasons, or may be because of some mistrust of the police in our country may not divulge or disclose the information to the police during investigation and also not disclose in advance in trial. The requirements of an alibi are strict that a false alibi or deliberate lie could be used as some evidence of guilt against the accused. Indeed, in the country where right of silence has been diluted by "alibi notice-laws" the accused is obligated to inform the police in prescribed form about his plea of alibi so that the same is properly interrogated by Investigating Agency. However, in our country more often than not even if the accused discloses the plea of alibi in advance, the same is never properly investigated/verified in an impartial manner for any reason whatsoever, maybe incompetence or lack of investigative skills or for any other extraneous consideration.

16. I may record that an accused person does not have to disclose, his defence including alibi, and the consequence of failure to disclose an alibi in a timely manner at the time of investigation and trial judge may draw an adverse inference that it has been fabricated, provided the accused fails to prove the same by standards as required under Section 103 of Indian Evidence Act and if the evidence of alibi is found to be fabricated, this may be used as circumstantial evidence to draw an inference or "consciousness" of guilt. Nevertheless, the alibi that is merely disbelieved or rejected cannot serve to corroborate or complement the prosecution's case, let alone permit an inference of guilt by the accused.

17. This facet of disclosure of plea of alibi at the earliest may also be looked into from a different angle. Nevertheless, even if the defence has notified the prosecution his intention to present an alibi, the prosecution has to wait until the accused has presented the evidence before it seeks to establish that it was fake and/or fabricated. The reason for this is prosecution cannot rebut a evidence not called unless he is afforded opportunity to lead defence evidence and accused is called upon to lead evidence as provided under Section 233 (3)Cr.P.C. the accused is under no duty to advance any particular defence.

18. In the light of aforesaid discussion made hereinabove, I find that our Constitution itself provided right to silence to the accused and he is also permitted to take inconsistent pleas, rejection of application by the learned judge vide impugned orders on the ground that no such plea of alibi was suggested to any of the prosecution witnesses nor disclosed it in his statement recorded under Section 313 Cr.P.C., is illegal. In my opinion, the accused was not obligated to make any such suggestion as even if he has suggested any plea of alibi the prosecution could not have led any evidence in rebuttal thereof, when the prosecution evidence was being recorded.

The prosecution shall have ample opportunity to cross examine the defence witnesses at length in order to discard the evidence of alibi of the applicant when defence witnesses are examined. However, I may record that the plea of alibi was taken by the applicant in his bail application before the Sessions Judge, Ghaziabad on 23.1.2015 and learned Sessions Judge while rejecting the bail application on 23.1.2015 has recorded that "अभियुक्त मुकेश शर्मा के विद्वान अधिवक्ता द्वारा यह भी तर्क दिया गया है कि वह घटना की तिथि पर काठमांडू गया हुआ था Plea of alibi कोइस स्तर पर नहीं देखा जा सकता है क्योंकि वह साक्ष्यका विषय है।"

19. As already noted that the applicant is languishing in jail since 5.12.2014 and he was nothing to gain by delaying trial as prosecution evidence has already been recorded and if the valuable right of the applicant of bringing plea of alibi on record by him by examining the witnesses is denied to him it shall derail fair trial and the applicant can never prove his innocence if at all he is convicted by the trial court. I may further record that finding of the trial judge that applicant did not disclose plea of alibi under Section 313 Cr.P.C. is not sustainable inasmuch as he has stated that he would lead defence evidence.

20. Per contra, learned A.G.A. as well as learned counsel for the informant has stated that impugned orders passed by the Sessions Judge are wholly legal and justified and the defence plea of alibi by the applicant has been raised at a belated stage after fabrication of documents and it squarely falls within those three presumptions on the basis of which the trial judge is empowered to reject the application for leading defence evidence.

21. One of the reasons assigned by the trial judge is that the accused did not file any discharge application under Section 227 Cr.P.C. on the basis of plea of alibi. In this behalf, I may refer to the judgement of Apex Court, rendered in the case of ***State of Orissa Versus Debendra Nath Padhi, 2004(8) Supreme Court Cases 568*** which is quoted below:

" .....Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record

of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

22. Learned counsel for the opposite party has placed reliance on the judgement rendered in the case of ***Ram Naresh and others Versus State of Chhattishgarh (2012) 2 Supreme Court Cases (Cri) 382*** in which plea of alibi was rejected as the defences witnesses produced by the accused were related and argued that plea of alibi was rejected by the apex court as the same was not disclosed by the accused during investigation and arrest.

23. I have carefully and consciously gone through the aforesaid judgement wherein the apex court has discarded the testimony of the defence witnesses on the ground that one of them was wife of the accused and she was highly interested and during investigation she did not inform the police that her husband was present in their house and not at the place of occurrence. However, paras 49 and 50 of the said judgement lend support to the reasons recorded by me hereinabove which are quoted below:

"49. In terms of Section 313 Cr.P.C., the accused has the freedom to maintain silence during the investigation as well as before the Court. The accused may choose to maintain silence or complete denial even when his statement under Section 313 Cr.P.C. is being recorded, of course, the Court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law.

50. Right to fair trial, presumption of innocence unless proven guilty and proof by the prosecution of its case beyond any reasonable doubt are the fundamentals of our criminal jurisprudence. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in relation to any of these protections substantially. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused."

24. In the light of aforesaid, impugned order dated 30.1.2019 and 14.06.2019 passed by Additional District and Sessions Judge, Hapur in Session Trial No.253 of 2016 (State Versus Ankush and others) bearing Case Crime No.408 of 2014 under Sections 147, 148, 149, 302, 120-B I.P.C. and 7 Criminal Law Amendment Act, Police Station Hapur Nagar, District Hapur are quashed. However, the applicant may apply for issuing any process for compelling the attendance or production of any document from the defence witnesses as mentioned in the earlier applications only within two weeks from today. The trial judge shall pass appropriate order in this behalf and shall afford due opportunity to defence, of which the accused shall not take an undue advantage causing further delay in deciding the trial which is pending since 2015 and the applicant is in jail since 5.12.2014. Learned trial judge shall expedite the trial without granting undue adjournments to either side and decide the same within four months from the date of

production of a certified copy of this order.

25. The application under Section 482 Cr.P.C. stands allowed, accordingly.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.07.2019

BEFORE
THE HON'BLE RAJIV JOSHI J.

CIVIL MISC. WRIT PETITION No. 24336 of 2019
(u/s -482 Cr. P.C.)

Dhananjay ...Applicant
Versus
State of U.P &Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Dinesh Rai

Counsel for the Opposite Parties:
A.G.A.

A. Section 210(2) Cr.P.C. - Bar on parallel proceedings of same offence- right to file a complaint under different section of law cannot be taken away- police report submitted - cognizance not taken by the magistrate

Held:- Mere submission of police report under Section 173 not sufficient unless cognizance of any offence on such report is taken against the accused in the complaint case.(E-10)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Dinesh Rai, learned counsel for the applicant and learned A.G.A. for the State-respondents.

2. The applicant in the instant petition under section 482 Cr.P.C. is aggrieved by the summoning order dated 30.1.2019 passed by Ist Additional Session Judge, Ballia, in Complaint Case No. 74 of 2018 (Shiv Bachan Vs. Dhananjay), by which while taking cognizance of the offences under Sections 354, 323, I.P.C and Section 7/8 Protection of Children from Sexual Offences Act 2012, the learned Addl. Session Judge, has summoned the applicant thereunder.

3. It reflects from the record that the grand-father of victim Km. Sarika filed a complaint (registered as Complaint Case No. 74 of 2018) against the applicant under Sections 354, 323, I.P.C and Section 7/8 of the Act, 2012 alleging that his grand daughter has been molested by the applicant who is minor being aged about 17 years. Learned Addl. Sessions Judge after recording the statement of complainant under Section 200 Cr. P.C.and the witnesses under Section 202 Cr.P.C, has summoned the applicant as indicated above.

4. Learned counsel for the applicant has assailed the impugned summoning order as well as the proceedings in the aforesaid complaint case, on the following grounds:

(a) that earlier a first information report being Case Crime No. 100 of 2018 has been lodged by the victim herself against the applicant on 31.8.2018 and her statement under Section 161 Cr. P.C. was also recorded wherein she stated her age to be about 19 years. And just after 11 days of lodging the aforesaid F.I.R, the grand-father of the victim has filed the impugned complaint on 12.9.2018 mentioning the victim to be a minor and a different version of the incident.

(b) that in Case Crime No. 100 of 2018 lodged by the victim herself, charge-sheet has already been submitted against the applicant under Sections 354 & 323 I.P.C., and

(c) that parallel proceedings in respect of the same incident/offence is barred in view of various decisions of the Apex Court as well as sub section (2) of section 210,Cr.P.C., contending that a report under section 173 has already been made by the investigating police officer under Section 173 Cr.P.C..

5. On the above grounds, counsel for the applicant prays that the impugned summoning order and the entire proceedings, are liable to be quashed.

6. On the other hand learned A.G.A. submits that the Addl. Sessions Judge has rightly exercised the power while summoning the applicant and the charge-sheet has been filed in the F.I.R. lodged by the victim under Section 354 & 323 I.P.C. only and not under Section 7/8 of the Act,2012.

7. I have considered the rival submissions so raised by the parties and perused the record.

8. It is admitted by the parties that charge sheet has been submitted against the accused-applicant under Section 354, 323, I.P.C on the F.I.R. lodged by the victim namely Km. Sarika.

9. In order to appreciate the controversy in hand, it is relevant to have a glance upon section 210, Cr.P.C., which is a beneficial piece of legislation to the accused, object of which is to ensure that cognizance of the same offence is not taken more than once and the accused is not subjected to different criminal proceedings in respect of the same offence. The Section 210 Cr.P.C. is quoted as under:

"***210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.-***

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

10. Since report under section 173 in the matter of F.I.R. lodged by the victim has been submitted, therefore, sub section (2) of section 210 becomes attracted in the present case. But it may be pointed out here that mere submission of the report under section 173 is not sufficient but cognizance of any offence on such report is also necessary to have been taken against any person who is an accused in the complaint case. It is not the

case of the applicant that on the report submitted under section 173 in the F.I.R. lodged by the victim, cognizance had already been taken prior to taking cognizance and passing of the impugned summoning order.

11. What flows from section 210, Cr.P.C. is that right of a complainant to agitate the matter through a complaint cannot be taken away by filing of a charge sheet by the investigating officer under a different section of law. And the right of the Magistrate to summon the accused under some other sections in the complaint than under which the accused has been chargesheeted is fully secured by the Code of Criminal Procedure and at the same time protecting the accused also from parallel proceedings in regard to the same offence, by making the provision in sub section (2) that the Magistrate shall try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

12. Perusal of the order of the court below dated 18.12.2018 in the ordersheet of the complaint case appended as annexure-8, shows that record of the matter arising out of the FIR lodged had been directed to be summoned by the trial court.

13. In view of the above, the submission of the learned counsel that applicant is being subjected to two different proceedings in regard to the same offence, has no substance.

14. As regards the submission regarding different age of the victim as given in the complaint & F.I.R. as well as change in the version of incident, is concerned, suffice it to say these aspects are to be determined during trial on the basis of the evidence of the parties and not at this stage.

15. As a result of above discussion, there appears to be no illegality or infirmity in the order impugned and the prayer to quash the impugned summoning order and the proceedings, is refused.

16. The present petition stands disposed of, leaving it open for the applicant to make application for discharge on the grounds available to him within three weeks from today. In case any such application is moved, the same shall be considered and decided by the court below in accordance with law expeditiously preferably within a period of three months from the date of its presentation along with certified copy of this order.

17. For the period of three months or till the decision taken by the concerned Magistrate on the aforesaid application whichever is earlier, no coercive action shall be taken against applicant in the aforesaid proceedings.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

CIVIL MISC. WRIT PETITION No.29111 of 2019
(u/s -482 Cr. P.C.)

Vinod Agarwal &Anr. ...Applicants
Versus
State of U.P. &Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ajay Kumar Mishra, Sri Meraj Ahmad Khan.

Counsel for the Opposite Parties:
A.G.A., Sri Krishna Dutt Tiwari

A. Section 313 Cr.P.C.- Examination of Accused- application filed to recall the P.W. 1 to cross examine as some question left to be asked

Held:- Ground to recall P.W. -1 was not mentioned in the application. It was rightly observed by the Trial Court that the proceedings of the instant complaint case is pending since 2010 and witness has already been examined in 2017, the application filed by the applicant is to delay the proceedings.(Para 15)

B. Criminal Revision - against the rejection of application filed under Section 313 Cr.P.C. - not maintainable- summoning or refusing to summon the witness under Section 311 Cr.P.C. is an interlocutory order within the meaning of Section 379(2) Cr.P.C. - dismissed

The Court relied upon the distinction drawn by the Apex Court between interlocutory and intermediary order, the former does not affect any existing rights finally or to the disadvantage of either extremes while an intermediate order can touch upon the rights of the parties. Since the reason for recalling the witness for cross-examination does not affect the right of the applicant therefore application under Section 311 of Cr.P.C. is an interlocutory order and no revision against such order is maintainable in view of the bar under Section 397(2) Cr.P.C.

Chronological list of Cases Cited:
1. 2011 (3) JIC 628 (All) (FB) Munna Singh @ Shivaji Singh & others Vs. State of U.P. and Anr.

2. 2011 (75) ACC 388 Ajay Dixit Vs. State of U.P. &Anr.

3. 2010 (71) AC 892 Ram Shankar Yadav Vs. State of U.P.

4. Criminal Appeal No. 486-487 of 2019 Sethuraman Vs. Rajamanickam

5. 2013 Law Suit (SC) 520 Mohit @ Sonu and anther Vs. State of U.P. and Anr. (E-10)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Meraj Ahmad Khan, learned counsel for the applicants, Sri Krishna Dutt Tiwari on behalf of the opposite party no. 2 and learned A.G.A. for the State.

2. The present application under Section 482 Cr.P.C. has been filed for quashing the impugned order dated 05.04.2019 passed by Presiding Officer, Additional Court, Moradabad in Complaint Case No. 190 of 2015 (Vikas Agarwal Vs. Vinod Kumar Agarwal) as well as order dated 18.06.2019 passed by Session Judge, Moradabad in Criminal Revision No. 114 of 2019 (Vikas Agarwal and another Vs. State of U.P.), under Section 138 N.I. Act, Police Station Gal Shaheed, District Moradabad.

3. It reflects from the record that the complainant-opposite party no. 2 filed a complaint on 28.10.2010 against the applicants for dishonouring of cheque, under section 138 of the Negotiable Instrument Act, in which the accused applicants were summoned vide order dated 30.11.2010. After summoning of the accused, his statement was recorded on 28.08.2012 and the examination-in-chief of the complainant was recorded on 17.01.2014. The witnesses of the complainant were cross-examined on 05.12.2017 & 06.12.2017. Subsequently, date was fixed for recording of the statement of the accused applicants under Section 313 Cr.P.C. but the accused did not appear before the court concerned for the purpose and sought adjournment of the case on one pretext or the other.

4. Recently in the year 2019 itself, an application (date of the application is not mentioned) for recalling P.W.-1 was filed on behalf of the accused applicants on the ground that some important questions were left to be asked while cross-examining the said witness, hence the said witnesses be recalled for further cross-examination. The Magistrate after considering the objection filed to the said application as well as the materials available on record, has specifically recorded a finding to the effect that the applicants are delaying the matter since 2010 on one pretext or the other and it has not been mentioned in the application as to what important points/questions were left to be asked from the P.W.-1 while cross-examining him.

5. It is further recorded by the Trial Court that apart from the present case, four other complaints for dishonouring of the cheques between the parties, are pending. The Magistrate has also recorded that on the direction of this Court, the advocate Mediator was appointed and on agreement of both the parties, a settlement was made but the said settlement has not been adhered to with by the applicants and accordingly the Magistrate rejected the said application vide impugned order dated 5.4.2019. The copy of the order of this Court as well as the settlement have not been annexed by the applicants alongwith this application. The relevant extract of the order of the Trial Court is quoted hereunder:

पत्रावली के अवलोकन से यह बात भी स्पष्ट है कि पत्रावली में माननीय उच्च न्यायलय के दिशा–दिर्नेश में पक्षकारों की सहमति से एडवोकेट मीडियटर भी नियुक्त किया गया तथा पक्षकारों की सहमति से एक मसौदा तैयार कर माननीय उच्च न्यायालय के समक्ष पेश किया गया था लेकिन उसका भी अनुपालन विपक्षीगण/अभियुक्तगण द्वारा नहीं किया गया। इसके अलवा मामले को शीघ्र निस्तारण के लिए माननीय उच्च न्यायालय द्वारा आदेशित किया गया लेकिन अभियुक्त के द्वारा अपेक्षित सहयोग न किये जाने की वजह से पत्रावली का निस्तारण नही हो सका है तथा पत्रावली एक लम्बे समय से बयान अंतर्गत धारा 313 द0प्र0सं0 में विचाराधीन है इससे भी यह बात स्पष्ट हो जाती है कि इनका उददेश्य वाद की कार्यवाही को बिलम्बित ही करना है। जहां तक प्रार्थीगण/अभियुक्तगण की ओर से प्रस्तुत की गयी उपरोक्त नजीरों का प्रश्न है तो उनके तथ्य प्रश्नगत मामले के तथ्यों से भिन्न है तथा परिवादी से उनके विद्वान अधिवक्तागण द्वारा परिवाद वाद के तथ्यों की बावत विस्तारपूर्वक जिरह की जा चुकी है। ऐसी स्थिति में परिवादी को प्रतिपरीक्षा के लिए तलब किया जाना न्यायोचित नही होगा। अतः प्रार्थीगण/अभियुक्तगण की ओर से दिया गया प्रार्थनापत्र उपरोक्त निरस्त किया जाता है। पत्रावली दिनांक 16.04.2019 को वास्ते बयान अंतर्गत धारा 313 द0प्र0सं0 पेश हो।

6. After rejection of the application by the Magistrate, Revision No. 114 of 2019 was filed by the applicants against the said order, which too was dismissed by learned Sessions Judge vide impugned order dated 18.6.2019 as not maintainable on the ground that order summoning or refusing to summon the witness under section 311,Cr.P.C. is an interlocutory order within the meaning of Section 397 (2) Cr.P.C.

7. The order passed by the Magistrate rejecting the application under Section 311 Cr.P.C. for recalling the witnesses as well as the revisional order are impugned in the present application.

8. Learned counsel for the applicants submits that the revision has wrongly been rejected by the Revisional Court as the order rejecting the application 311 Cr.P.C. is not an interlocutory order but the intermediary order against which the revision is maintainable. In support of his contention he has relied upon Full Bench judgment of this Court in Case of **Munna Singh @ Shivaji Singh & others Vs. States of U.P. another 2011 (3) JIC 628**

(ALL) (FB). Placing reliance upon paragraph 33 onwards of the said Full Bench decision, submission of the learned counsel is that an order passed under Section 311 Cr.P.C. is an intermediary order by which the right of the accused applicants have been affected and therefore the order is revisable.

9.On the other hand, learned counsel for the opposite party no. 2 as well as learned A.G.A. have placed reliance upon the judgement of the Apex Court in Case of **Mohit @ Sonu and another Vs. State of U.P. and another, 2013 Law Suit (SC) 520**, and submitted that the application filed by the accused applicants for recalling the witness under Section 311 Cr.P.C. is without any foundation and even from the application it is apparent that the important questions which remained to be left for cross-examination from PW-1, have not been mentioned therein.

10. It is further contended by the learned counsel for the opposite party that the application under section 311,Cr.P.C. has been moved by the accused applicants only with a view to delay the trial and not for any other purpose, specific findings regarding which has already been recorded by the Trial Court in the order impugned.

11. Learned counsel for the opposite parties further contended that the rejection of application under Section 311 Cr.P.C. is not a final order but it is an interlocutory order and even the said order cannot said to be an intermediary order as no right of the accused applicants have been affected by the said order, even in the original application, it is not stated that on what grounds the applicants wanted to recall the witnesses.

12. In support of his contention, the learned counsel for the opposite party has placed the reliance on judgement of this Court in the cases of **Ajay Dixit Vs. State of U.P. & another 2011 (75) ACC 388 , Ram Shankar Yadav Vs. State of U.P. 2010 (71) ACC 892** and the judgement of the Apex Court in **Criminal Appeal No. 486-487 of 2009 Sethuraman Vs. Rajamanickam.**

13. I have considered the rival arguments so advanced by the learned counsel for the parties and perused the record.

14. In the application filed by the accused applicants under Section 311 Cr.P.C. for recalling of P.W.-1, the grounds for recall have not been mentioned. Only this much is mentioned therein that some important questions were left for cross-examination from the said witness. As observed by the Trial Court, the proceedings of the complaint case for dishonouring of cheque is pending since 2010 and the witnesses of complainant have already been cross-examined in 2017 and since 2017 the matter is pending for recording of statement of the accused applicants under Section 313 Cr.P.C. which have been avoided by the accused applicants on one pretext or the other. The relevant findings in this regard as recorded by the Magistrate have already been quoted hereinabove.

15. So far as the question regarding the maintainability of the revision is concerned, it is stated that as per the judgement cited by the counsel for the

applicants, the distinction between the two, interlocutory and intermediary would be that the former does not bring about any consequence of moment and is an aid in the performance of the final act. It does not affect any existing rights finally or to the disadvantage of either extremes. An intermediate order can touch upon the rights of the parties or be an order of moment so as to affect any of the rival parties by its operation. Such an order affecting the rights of a person or tending to militate against either of the parties even at the subordinate stage can be termed as an intermediate or an intermediary order. In this regard, relevant paragraph nos. 33 and 40 of the judgement of Full Bench decision in case of **Munna Singh (Supra)**, are reproduced hereunder:

"33. The distinction between the two, interlocutory and intermediary would be that the former does not bring about any consequence of moment and is an aid in the performance of the final Act. It does not affect any existing rights finally or to the disadvantage of either extremes. An intermediate order can touch upon the rights of the parties or be an order of moment so as to affect any of the rival parties by its operation. Such an order affecting the rights of a person or tending to militate against either of the parties even at the subordinate stage can be termed as an intermediate or an intermediary order.

40. The difficulty again is that can such a list of illustrations be catalogued so as to confine the revisional jurisdiction in relation to such intermediate orders. Our obvious answer is in the light of what has been said in the case of Mohan Lal's case (supra) by the Apex Court that the determination of such an issue as to whether a revision would be maintainable or not would in turn depend upon the nature of the order and the circumstances in which it came to be passed. Thus it would depend on the facts and circumstances of each separate individual case where the revising authority will have to examine as to whether the Magistrate has proceeded to exercise his judicious discretion well within his jurisdiction or has travelled beyond the same, keeping in view the various shades of litigation in such matters where the Apex Court and this Court has held that an intermediate order, which is not necessarily an interlocutory order, could be subjected to revision. An order not conclusive of the main dispute between the parties, but conclusive of the subordinate matters with which it deals is not a purely interlocutory order even though it may not finally adjudicate the main dispute between the parties. In our opinion therefore, a revision would not be barred under sub Section (1) of Section 397 of the Code if the orders impugned before the revising authority fall within the tests indicated hereinabove".

16. Similar view has also been taken by the Apex Court as in decision relied upon by the learned counsel for the applicants and there can be no dispute about it.

17. However, here in the present case, the order impugned rejecting the application under Section 311 Cr.P.C. does not affect any right of the accused persons as the applicants have failed to make out any case or ground for recalling the complainant witness P.W.-1. The application filed by the accused applicant appears to be totally incompetent as the necessary ingredients for recalling the witness under Section 311 Cr.P.C. are missing therein. The said application has

been moved with oblique motive just to delay the proceedings of the complaint case as observed by the Magistrate in its order while rejecting the application.

18. The Apex Court as well as this Court in the cases mentioned above i.e. **Ajay Dikshit (Supra)** has specifically held that the order rejecting the application under Section 311 Cr.P.C. is an interlocutory order and no revision against the said order is maintainable, in view of the bar under Section 397 (2) Cr.P.C. In this regard, paragraph no. 4 of the decision of the Apex Court in **Sethuraman case (supra)** is relevant which reads as under:

"4. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e., one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgement is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed."

19. Taking into consideration the entire facts and circumstances of the case as well as the law enunciated in the decisions of the Apex Court and this Court as indicated above coupled with the fact that present complaint proceedings are pending for the last more than nine years, in the considered opinion of this Court, I do not find any illegality or infirmity in the orders impugned passed by the Revisional Court and the Trial Court.

20. The application lacks merit and, is accordingly, dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.04.2019

BEFORE
THE HON'BLE KARUNA NAND BAJPAEE, J.

CIVIL MISC. WRIT PETITION No.3239 of 2005
(u/s -482 Cr. P.C.)

Tej Singh &Ors. ...Applicants
Versus
State of U.P&Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mohd. Israr, Sri Amit, Sri Krishna Kapoor.

Counsel for the Opposite Parties:
A.G.A.

A. U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - A single criminal case can be basis to impose the Gangsters Act - object of the offence or the motive behind it crucial - nature of allegations is more relevant

than number the number of cases registered against a particular accused
U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 -Section 2 (b)- "Gang" – if offence under Chapter XVI, XVII, XXII IPC is committed with the object or motive of disturbing public order or gaining any undue temporal, pecuniary or material advantage or wrongful economic gain then only accused liable to face Gangsters Act. (Para 5)

B. U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - merely because some grave crime is committed - does not make accused liable to face Gangsters Act unless there was object to gain any undue temporal, pecuniary, material or other similar kind of advantage for himself or for any other person indulged in anti-social activities. (Para 7)

U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Crimes arising out of some trivial personal dispute - Not make a good ground to impose Gangsters Act (Para 5). Accused-facing allegations of having committed murder-but there was no motive of making any wrongful economic gains. No material on the basis of which it may be held that the prime object behind committing the crime in question was so as to disturb the public order. Or committed with the object of gaining any undue temporal, pecuniary, material or other similar kind of advantage for itself or for any other person indulged in anti-social activities.

C. U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986- Section 2 (b)- "Gang"–'other advantage'- meaning- preceding words 'temporal, pecuniary and material' constitute a genus and the words 'other advantage' has to be read as an species of the same. (Para 8)

Charge sheet and the consequent proceedings quashed. Application allowed

List of cases cited:-

1. Assistant Collector of Central Excise, Guntur vs. Ramdev Tobacco Company, 1991 AIR (SC) 506 followed (E-5)

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application under Section 482 of Cr.P.C. has been moved by the applicants seeking quashing of the charge sheet dated 02.6.2002 and all subsequent proceedings initiated against them in S.S.T. No. 14 of 2003, State of U.P. vs. Tej Singh and others, under Section 3(1) U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986.

2. Heard learned counsel for the applicants.

3. Submission of learned counsel for the applicants is that an F.I.R. was lodged against the applicants as Case Crime No. 220 of 2001 under Sections 147,148, 149, 324, 323, 307, 302 I.P.C. P.S.- Mandawar, Distict- Bijnor. This F.I.R. is annexure no. 1 to the present application. Further submission is that it is this solitary case which was made the basis to impose Gangsters Act and such a course is bad in the eyes of law. The perusal of the same would show that the same was lodged against about 20 persons who were alleged to have made assault and resorted to firing also that eventually resulted in the death of two persons. There is also a cross case registered against the other side as Case Crime No. 220A of 2001, under Sections 147, 323, 324 I.P.C., in the police station Mandawar, District- Bijnor. Submission is that perusal of the F.I.R. would show that though it was a grave crime but it was nonetheless a regular kind of crime that unfortunately keeps taking place between the parties. The motive of personal hostility, feud, village factionalism,

local disputes are most of the times in the background of commission of such offence. According to the counsel it is certainly not a crime which may be said to have been committed either to make undue economic gain or to perpetrate some terror or to continue any such criminal activities which is, by and large, detrimental to the safety and security of the society. Counsel has gone to the extent of arguing that Gangsters Act in the present case has been imposed only on the basis of a single aforesaid case that has been registered against the applicants which is an illegal misuse of the Act and can not survive the scrutiny of law. Submission of learned counsel for the applicants is that actually it is a case of such nature during the trial of which the plea of self defense has to be necessarily decided by the Court. Contention is that when the trials of two cases shall be completed it is also quite probable that the court may come to the conclusion that the incident in question took place in the exercise of self defense or may be, the court would hold that the incident took place in which the accused persons simply exceeded their right of private defense and they were never rank aggressOrs. In that eventuality imposition of the case Gangster Act does not appear to be a justified exercise. Submission of learned counsel is that therefore in such circumstances it shall result in the abuse of court's process if the single case of aforesaid kind is made the basis to impose Gangsters Act as the ingredients of the offence shall not be born out and thus in such circumstances, the impugned proceedings deserve to be quashed.

4. Heard learned A.G.A. and perused the record.

5. This Court has the occasion to go through the F.I.R. of the murder case that was registered against the applicants and it has also gone through the cross version that was registered against the other side. This Court does not find itself in agreement with the submissions made by learned counsel that a single case cannot constitute a legitimate basis to impose the Gangsters Act. But it is of the considered view that it is not the number of cases registered against a particular accused which is so relevant as the nature of allegations made in the F.I.R. of the criminal case or cases registered against the accused on which shall depend whether the offence under the Gangsters Act is made out or not. A man may be involved in more than one cases but all those cases may be of such nature which may arise out of some trivial personal dispute over some drainage problem or over some connected boundary wall dispute or over some rival competing civil claim on some piece of land and the relationship of the two parties may deteriorate to the extent that they may get involved in some squabble, quarrels or sometimes even in making criminal assaults upon each other. Such kind of crimes are somewhat of a regular kind and nature. They do not make a good ground to impose Gangsters Act. The definition as has been provided in the Act and the ingredients which are required to be fulfilled before imposition of Gangster Act are on a different footing as is clear from the perusal of the definition of Gangster Act itself.

*"**2. Definitions**.- In this Act,-*

(a) "Code" means the Code of Criminal Procedure, 1973 (Act No. 2 of 1974);

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or

show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in antisocial activities, namely:

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U. P. Excise Act, 1910 (U. P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course ;

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether bef6.ore or after the commission of such activities or harbours any person who has indulged in such activities ;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code (Act No. 45 of 1860), or any other law for the time being in force, and includes any person who lawfully assist the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, grand-daughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested ;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes."

6. A careful perusal of the definition of "Gangster" and "Gang" would not fail to indicate that if an offence punishable under Chapter XVI, Chapter XVII and Chapter XXII of Indian Penal Code is committed with the object of disturbing public order or with the object of gaining any undue temporal, pecuniary or material advantage, such activity on the part of accused can make him liable to face the imposition of Gangsters Act in question. He may commit such kind of act just once and may face a single F.I.R. or he may commit such kind of offences many times and may face more than one F.I.Rs. in that connection. It is not the number of F.I.Rs. which is relevant as it is significant to assess whether the crime committed by the accused was inspired and prompted with the motive of gaining any undue temporal, pecuniary or material advantage or not. It is the object of the offence or the motive behind it which is of crucial significance in order to adjudge whether the provisions of Gangsters Act in question can be brought into application in a given case or not.

7. After having perused the record, this Court finds itself in agreement with the submissions made by the learned counsel for the applicants that though the accused are facing the allegations of having committed murder but they cannot be said to have committed the crime because they were gangsters. There was no motive of making any wrongful economic gains. This Court also does not see any material on the basis of which it may be held that the prime object behind committing the crime in question was so as to disturb the public order. Whenever some grave crime is committed it always leads to a consequential result of some kind of disturbance in society. Such normal disturbance in society and disturbing the public order or creating panic or terror are different species. Ordinary law and order problems can not be clubbed with phenomenon of break of public order. The crime in question does not appear to have been committed with the object of gaining any undue temporal,

pecuniary, material or other similar kind of advantage for itself or for any other person indulged in anti-social activities.

8. Here in this context it may also be seen that in the definition of 'gang' as provided under Section -2(b) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as Act) reference to the words 'gaining any undue temporal, pecuniary, material or other advantage' for himself or any other person has been given. One might argue that the words 'other advantage' is an all inclusive term and all kinds and categories of advantages will come under its title, and therefore, there is hardly any need to see the facts of the case with a fine class in order to find whether the object of the gang is or was of gaining undue temporal, pecuniary and material advantage or not. If the violence or offence committed was inspired to get any kind of advantage for himself or for any other person, the letter of definition as provided by the Act shall stand satisfied. But in the considered opinion of this Court such kind of approach will lead to complete misinterpretation of the Statute. If the Legislature in its wisdom has used a number of qualifying words with regard to Anti Social Activity as has been referred to and contemplated in the Act, then its whole purpose shall stand defeated by providing such an all sweeping meaning to the words 'other advantage' as has been used in the definition. If the term 'other advantage' was meant to include all advantages or was meant to include any kind of advantage whatsoever where was the need to use different other defining words like 'temporal, pecuniary and material' which immediately precede the words 'or other advantage' ! It is self evident that the use of the preceding words have a qualifying effect and must be seen lending its complexion to the subsequently used words 'other advantage'. The words 'other advantage' has got to be seen in the context and perspective and with reference to the preceding aforesaid words and must be understood in the same light. Just as a man is often known by the company he keeps, the import of words in Statute also are often to be seen and understood by the company of the words in which they appear. In this regard this Court deems it appropriate to keep in perspective the rule of 'Ejusdem Generis' in order to correctly appreciate the scope and the actual ambit of the general words which follow the aforesaid specific words used in the Statute. The Court is of the view that the aforesaid preceding words 'temporal, pecuniary and material' are constituting a genus and the words 'other advantage' has to be read as an species of the same. Though ordinarily the general words must be provided to bear their natural and larger meaning but they have to be confined Ejusdem generis to the class of things previously enumerated by certain specific words because it is not difficult to see clearly the intention of the Statute which it spells out by using a specific class and category of qualifying words. This Court sees reasons and therefore feels persuaded to limit the scope of the meaning of the general words 'other advantage' because if we provide to it a larger all embracing meaning it is likely to lead to absurd and unforeseen results. The general expression has to be read contemplating to imply the things of the same kind which have been referred to by the preceding specific class of things constituting a genus. If we do not adhere to this rule and do not impute specific complexion to the general words in the

light of the preceding words the blatant misuse and plain absurdity to which it shall lead is that the administrative executives and the police would feel free to impose the provisions of this Act upon anybody and everybody who is facing the charge of committing any sort of offence or any breach of law howsoever trivial it be because hardly any violence or threat or show of violence or intimidation or coercion is done without having the object of gaining some kind of advantage himself or for any other person. The word 'advantage' has an all sweeping natural meaning and may include material and psychological both kinds of advantages. In that view of the matter the use of the words 'other advantage' will bring in its mischief everything under the sun. It is therefore very expediently needed to read these words in right perspective and read them Ejusdem generis with the things or words previously enumerated by the Statute. In order to substantiate its view this Court finds strength from the pronouncement given by the Apex Court in the case of **Assistant Collector of Central Excise, Guntur vs. Ramdev Tobacco Company, 1991 AIR (SC) 506.** In this case the principle of Ejusdem generis was expatiated upon at some length and was also brought into application while giving interpretation to the issues involved in the case with which it was dealing. It would be profitable to extract the relevant portion of the pronouncement which reads as under :

"5. But the question is whether the issuance of a show cause notice and the initiation of the consequential adjudication proceedings can be described as `other legal proceedings' within the meaning of sub-section (2) of section 40 of the Act? If the said departmental action falls within the expression `other legal proceeding' there can be no doubt that the action would be barred as the same indisputably was initiated six months after the accrual of the cause action. So the crucial question is whether the issuance of the show cause notice dated August 30, 1972 and the passing of the impugned order in adjudication proceedings emanating therefrom constitutes `other legal proceeding' within the meaning of section 40 (2) of the Act to fall within the mischief of that sub-section which bars such proceedings if commenced after a period of six months from the accrual of the cause of action. The learned Additional Solicitor General submitted that the expression `other legal proceeding' must be read ejusdem generis with the preceding expressions `suit' and `prosecution' and if so read it becomes crystal clear that the department's action cannot come within the purview of `other legal proceeding'. How valid is this contention is the question which we are called upon to answer in the present appeal.

6. The rule of ejusdem generis is generally invoked where the scope and ambit of the general words which follow certain specific words (which have some common characteristic and constitute a genus) is required to be determined. By the application of this rule the scope and ambit of the general words which follow certain specific words constituting a genus is restricted to things ejusdem generis with those preceding them, unless the context otherwise requires. General words must ordinarily bear their natural and larger meaning and need not be confined ejusdem generis to things previously enumerated unless the language of the statute spells out an intention to that effect. Courtshave also

limited the scope of the general words in cases where a larger meaning is likely to lead to absurd and unforeseen results. To put it differently, the general expression has to be read to comprehend things of the same kind as those referred to by the preceding specific things constituting a genus, unless of course from the language of the statute it can be inferred that the general words were not intended to be so limited and no absurdity or unintended and unforeseen complication is likely to result if they are allowed to take their natural meaning. The cardinal rule of interpretation is to allow the general words to take their natural wide meaning unless the language of the statute gives a different indication or such meaning is likely to lead to absurd results in which case their meaning can be restricted by the application of this rule and they may be required to fall in line with the specific things designated by the preceding words. But unless there is genus which can be comprehended from the preceding words, there can be no question of invoking this rule. Nor can this rule have any application where the general words precede specific words.

7. There can be little doubt that the words `other legal proceeding' are wide enough to include adjudication and penalty proceedings under the Act. Even the learned Additional Solicitor General did not contend to the contrary but what he said was that since this wide expression is preceded by particular words of a certain genus, namely, words indicating reference to proceedings taken in courts only, the wide words must be limited to things ejusdem generis and must take colour from the preceding words and should, therefore, receive a limited meaning to exclude proceedings of the type in question. There can be no doubt that `suit' or `prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one. The use of the expression `instituted' in section 40 (2) strengthens this belief. Since this sub-section has been construed by this Court in Raju's case (supra) not to be confined in its application to only Government servants but to extend to others including the assessees and since the words `for anything done or ordered to be done under this Act' are found to be comprehensive enough to include acts of non-compliance or omissions to do what the Act and the Rule enjoin, the limitation prescribed by section 40(2) would undoubtedly hit the adjudication and penalty proceedings unless the expression `other legal proceeding' is read ejusdem generis to limit its ambit to legal proceedings initiated in a court of law.

8. The scope of section 40(2) as it stood before its amendment pursuant to Raju's case came up for consideration before a DivisionBench of the Madhya Pradesh High Court inUniversal Cables Ltd. v. Union of India, [1977 Tax LR 1825]: 1977 ELT (J92) wherein the question raised for determination was whether penalty proceedings taken under Rule 173Q for the infraction of Rule 173C with a view to evading payment of duty fell within the expression `other legal proceeding' used in the said sub- section. The High Court conceded that the expression when read in isolation is wide enough to include any proceeding taken in accordance with law, whether so taken in a court of law or before any authority or tribunal but when read with the preceding words `suit' or `prosecution' it must be

given a restricted meaning. This is how the High Court expressed itself at page J 106 (at page 1838 of Tax. L.R.):

"Now the language ofsection 40(2) is: `no suit, prosecution or other legal proceeding shall be instituted'. `Suit' and `prosecution' which precede the expression `other legal proceeding' can be taken only in a Court of Law".

After stating the expanse of the ejusdem generis rule, as explained inAmar Chandra v. Excise Collector, Tripura, AIR. 1972 SC 1863 at 1868 (Sutherland, Volume 2 pages 399-400) the High Court observed that there was no indication in the said sub-section or elsewhere in the Act that the said general words were intended to receive their wide meaning and were not to be construed in a limited sense with the aid of the ejusdem generis rule. A departmental proceeding like penalty proceedings were, therefore, placed outside the scope of the said sub-section. This view was quoted with approval by a learned Single Judge of the Bombay High Court in C.C. Industries & Others v. H.N. Ray, 1980 ELT 442 at 453. These two cases, therefore, clearly support the view canvassed before us by the learned Additional Solicitor General.

9. We have given our careful consideration to the submission made on behalf of the appellant, reinforced by the view expressed in the aforesaid two decisions. In considering the scope of the expression `other legal proceeding' we have confined ourselves to the language of sub-section (2) of section 40 of the Act before its amendment by Act 22 of 1973 and should not be understood to express any view on the amended provision. On careful consideration we are in respectful agreement with the view expressed in the aforesaid decisions that the wide expression `other legal proceeding' must be read ejusdem generis with the preceding words `suit' and `prosecution' as they constitute a genus. In this view of the matter we must uphold the contention of the learned Additional Solicitor General that the penalty and adjudicationproceedings in question did not fall within the expression `other legal proceeding' employed in section 40(2) of the Act as it stood prior to its amendment by Act 22 of 1973 and therefore, the said proceedings were not subject to the limitation prescribed by the said sub-section."

9. Illumined by the aforesaid view adopted by the Hon'ble Supreme Court this Court sees good reason to hold that the use of phrase 'other advantage' as it finds place in the Act must take its hue from the accompanying words which immediately precede the same and which have a qualifying effect.

10. The definition as has been provided in the Gangster Act is very exhaustive and has very wide contours. While dealing with the issues involved in the case of Gangster Act, the court has to be cautious and should not stretch it too much or to the extent where any kind of crime committed by anybody or all kinds of offences committed by anybody would make him a "gangster". In fact it is a question of fact and the court will have to see it as per the allegations made in each individual case whether the nature of crime committed was such on the basis of which an accused can be brought under the bracket of the definition of the gangster or not. There cannot be a over generalized formula on this point and the Court has to satisfy itself on a subjective basis as well as on the objective basis as per the allegations and the

circumstances as they may appear from the nature of crime said to have been committed by a particular accused and see for itself whether he can be brought within the mischief of the Act or not. In the present case this Court is of the considered opinion that the nature of crime committed, the background in which it was committed, the motive and the object which appears to have been behind this incident were such, which fall far short of bringing the case under the category where the provisions of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 could be successfully attributed or imposed.

11. In such view of the matter, the charge sheet under the said act and the consequent proceedings thereof stand quashed.

12. The application stands allowed.

13. A copy of this order be certified to the lower court forthwith.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.04.2019

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

CIVIL MISC. WRIT PETITION No.35628of 2018
(u/s -482 Cr. P.C.)

Hanif Malik ...Applicant
Versus
State of U.P. &Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Chandrakesh Mishra, Sri Daya Shankar Mishra.

Counsel for the Opposite Parties:
A.G.A., Sri Krishna Dutt Tiwari.

A. Section 190 Cr.P.C. – Dowry death. FIR lodged. Final report submitted by police -Application u/s 156(3) filed - treated protest petition as complaint case - Magistrate duly examined the postmortem report, statement of witnesses - disagreed with the final report - found that death of victim not caused by injury.

Held:- Section 190(1) Cr.P.C. gives an unequivocal expression and impression that the Magistrate is competent to take cognizance upon " information received from any person other than a police officer" therefore cognizance of case in shape of the protest petition falls under clause (c) of Section 190(1) Cr.P.C. The Magistrate was of the view that the material produced can be scrutinized in better way on the judicial side and to meet the ends of justice treated protest petition as complaint thereby rightly exercising power under Section 190(1) Cr.P.C.

Application u/s 482 Cr.P.C. dismissed
(E-10)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Daya Shankar Mishra, learned counsel for the applicant, Sri K.D. Tiwari, learned counsel for opposite party nos.2 to 6, Sri Om Narain Tripathi, learned A.G.A.-I assisted by Sri Bhanu Pratap, Brief Holder for the State and perused the material brought on record.

2. By way of the instant application, the applicant has sought for quashment of the order dated 08.06.2018 passed by the Chief Judicial Magistrate, Bijnor, in Misc. F.R. Case No.411 of 2017 whereby final report submitted by the police in Case Crime No.70 of 2017 under Sections 498A, 304B I.P.C. and 3/4 Dowry Prohibition Act, Police Station Shivalakala, District Bijnor was treated as

complaint case on the protest of the complainant - applicant.

3. Contention raised on behalf of the applicant is confined to the ambit that from bare perusal of the observation/analysis of the order impugned in the instant application, it is reflective of fact that the Magistrate concerned was not satisfied with submission of the final report as such, has categorically observed that he disagrees with the final report. In that event, the Magistrate was bound to proceed further and could have taken cognizance of the case, instead, he treated the protest petition filed by the applicant as complaint which under circumstances was unfair, unreasonable, unjust and illegal.

4. Per contra, learned A.G.A. has submitted that in this case, the powers qua conditions requisite for initiation of the proceeding have been specifically laid down in Section 190 (1) (a) (b) and (c) Cr.P.C. There are three modes provided; one cannot stick with only one mode of taking cognizance which should be exercised and no other alternative shall be resorted to in a particular situation.

5. Here disagreeing with the final report does not mean that the material is sufficient to proceed as per evidence collected by the Investigating Officer against the accused for prosecuting them and for ensuring fair trial but the Magistrate concerned was of the view that scrutiny and analysis of facts and evidence can be done in better way by the court (concerned) itself, therefore, the Magistrate exercised powers vested in him under Section 190 (1) (c) Cr.P.C. in order to ensure substantial justice to the applicant but the applicant unnecessarily kept on insisting that in the event of disagreeing with the final report would mean that cognizance should be taken straightway of the offence in question under Section 190 (1) (a) Cr.P.C. is by no means fair plea.

6. Considered the rival submissions as well.

7. Before expressing final opinion, it would be better if background of the case is taken into consideration at this stage. As per protest petition filed by the applicant, the marriage of the deceased Reena was solemnized with opposite party no.2 - Kamal Hasan on 03.12.2015, the husband and in-laws of the deceased were not satisfied with the dowry given at the time of marriage, therefore, they demanded additional dowry in the shape of one car and Rs.2,00,000/- cash and they used to beat the applicant's daughter - (deceased). The applicant also tried to pacify her daughter, the husband and in-laws but to no avail. Eight months prior to the death of the applicant's daughter, serious injuries were caused on the head of the deceased and due to which she was suffering from illness and suffered injuries in her mind as well.

8. On 01.12.2016, the applicant's daughter - deceased was severely beaten by opposite party nos.2 to 6 due to which she was aborted and gave birth to a stillborn child on 03.12.2016. The applicant visited the house of in-laws of his daughter on 13.02.2017 whereupon the applicant's daughter described about the aforesaid developments and told fact of stillborn child. Since the physical condition of the applicant's daughter had badly deteriorated, he took his daughter with him (to his house). She was admitted

to the hospital in Moradabad in badly deteriorated condition, thereafter she was taken to Loknayak Hospital Delhi where she was got admitted on 26.02.2017, whereafter, she died on 07.03.2017 in the hospital on account of injuries being caused to her previously on her head. The applicant went to lodge the report at Police Station Shivalakala, District Bijnor on 09.03.2017 but the same was neither written nor lodged at the Police Station concerned. The applicant then presented application to the Superintendent of Police, Bijnor on 15.03.2017 but no action was taken.

9. The applicant being placed under compelling circumstances has moved an application under Section 156(3) Cr.P.C. which was directed to be registered and investigated into by the police whereupon the case was registered at Case Crime No.70 of 2017, under Sections 498A, 304B I.P.C. and 3/4 Dowry Prohibition Act, at Police Station Shivalakala, District Bijnor on 24.04.2017. The case was investigated into and final report was submitted by the Investigating Officer in this case.

10. In the wake of above fact situation, contention raised on behalf of the applicant is to the ambit that post mortem examination report specifies 28 stitches on the head of the deceased, extending in an area of 12 cm x 8 cm which shows that the death of the deceased Reena was 'unnatural' and it occurred on account of injuries being caused to the deceased by the aforesaid opposite parties.

11. Next contended that under facts and circumstances of the case, proper investigation was not made, statement of only certain witnesses and nearby residents were recorded and final report no.411 of 2017 was filed which culminated into Case No.2605 of 2018 Hanif Vs. Kamal Hasan and others. Notice was issued to the applicant and he filed a detailed protest petition whereby the Magistrate after observing that in view of the post mortem examination report and statement given to the S.D.M. by the complainant at the time of conduction of the post mortem examination, the incident of assault/injury being caused to the deceased by opposite party nos.2 to 6 was found to be incorrect.

12. The point raised on behalf of the complainant-applicant for consideration basically relates to taking of cognizance of the case on the police report itself.

13. Learned counsel for the applicant has vehemently submitted that once the Magistrate was not in agreement with the submission of the final report then he could have proceeded straightway and could have taken cognizance of the offence and nothing precluded him from adopting that course of action, but the Magistrate, all of sudden, came out with another version and treated the protest petition as complaint which under facts and circumstances of this particular case is ex-facie illegal and not sustainable in the eye of law.

14. The contention so raised is rejected, for specific reason that it is nowhere provided in the Code of Criminal Procedure, 1973 that once a Magistrate while disagreeing with the final report should invariably take cognizance of the offence on the police report itself by exercising powers vested in him under Section 190 (1) (a) Cr.P.C. but it is

always open to the Magistrate exercising powers vested in him by law while taking cognizance of offence as provided under sub-sections (a) (b) (c) of Section 190 (1) Cr.P.C.

15. Here the point in question is that the material collected during course of the investigation did not justify taking cognizance of the case as the material was not sufficient for proceeding further. However, considering averments made in the protest petition, the Magistrate was of the view that the material produced can be scrutinized in better way on the judicial side and, with that view in mind, in order to secure ends of justice, considered the protest petition as complaint and thus exercised powers vested in him under Section 190 (1) (c) Cr.P.C., which Section is very much extracted hereinbelow for ready reference;

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may taken cognizance of any offence.

(a) .....

(b) .....

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

16. Bare reading of the aforesaid sub-section (c) of Section 190 (1) Cr.P.C. gives unequivocal expression and impression that the Magistrate is competent to take cognizance upon "information received from any person other than a police officer". Therefore, cognizance of case in shape of the protest petition falls under this category (190 (1) (c) Cr.P.C.). Entirety of the facts and circumstances of this case in hand when taken as a whole reflects that the substantial justice has been tried to be done to the applicant and it is up to the complainant-applicant to cooperate with the Court and the prosecution in order to unravel the truth.

17. For the reasons aforesaid, I do not find any infirmity or illegality in the order impugned dated 08.06.2018 passed by the Chief Judicial Magistrate, Bijnor, in Misc. F.R. Case No.411 of 2017 whereby the protest petition has been converted into complaint case and accordingly cognizance has been taken against opposite party nos.2 to 6.

18. Consequently, the instant application being devoid of merit is dismissed.

19. It is made clear that observation made in this order shall have no bearing on the merits of the case and shall not prejudice the trial court while deciding the case on merits.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Civil Misc. Writ Petition No.23921 of 2019 (u/s -482 Cr. P.C.)

Rohit &Ors. ...Applicants
Versus
State of U.P. .....Opposite Party

Counsel for the Applicants:
Sri Pramod Shukla, Sri J.P.N.Raj.

Counsel for the Opposite Party:
A.G.A.

A. Section 311 Cr.P.C. - Recalling of witness for examination- power to recall must be exercised with care, caution and circumspection and only for strong and valid reasons-principle of magnanimity- a balance between accused- prosecution and society (Para 8, 9, 10, 11& 12)

Witness- P.W.1 examined- applicant sought adjournments numerous times- stop order passed- P.W.2 examined- supported the prosecution in examination-in-chief- resiled from his earlier statement in cross-examination- declared hostile witness- application to cross-examine P.W.1-application rejected by trial court.

The accused-applicants did not sought an opportunity call the P.W. 1 again when the stop order was passed but when the P.W. 2 turned hostile. The ill-intention of the accused-applicant is apparent on the face of it as the application for recall was moved after more than eight months have elapsed after closing the opportunity of cross-examination.

No error. Application u/s 482 Cr.P.C. dismissed.

Chronological list of Cases Cited:-

1. (2016) 8 SCC 762 State of Haryana Vs Ram Meher and others

2. (2015) 8 SCC 787 Bablu Kumar and others Vs. State of Bihar and another

3. (2010) 6 SCC Sidhartha Vashist alias ManuSharmaV.State (NCT of Delhi)

4. (2012) 4SCC 516 Rattiram and othersVs. State of Madhya Pradesh

5. (2014) 2 SCC 401 J.Jayalalithaa and others Vs. State of Karnataka and others

6. (1999) 8 SCC 715 State of Karnataka Vs. K.Yarappa Reddy

7. (2002) 7 SCC 334 Mohd. Khalid Vs. State of West Bengal

8. (2001) 4 SCC 667 State of U.P. Vs. Shambhu Nath Singh and others

9. (2001)6 SCC 135 N.G. Dastane Vs. Shrikant Shivde (E-10)

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri J.P.N. Raj, Advocate, holding brief of Sri Pramod Shukla, learned counsel for the applicants and learned A.G.A. for the State.

2. The present application under Section 482 Cr.P.C. has been filed to set-aside the impugned order dated 6.6.2019 passed by Sessions Judge, Baghpat in S.T. No.403 of 2017 (State vs. Rohit and others), arising out of Case Crime No.122 of 2017, under Sections 147, 148, 149, 302/34 I.P.C., P.S. Baleni, District Baghpat whereby the learned Judge dismissed the application under Section 311 Cr.P.C. to recall PW-1 for cross-examination.

3. Submission of the learned counsel for the applicants is that the learned Sessions Judge has illegally closed the opportunity of cross-examination by the defence on behalf of the applicants vide order dated 19.9.2018 and further the application for recalling the aforesaid order has also been illegally rejected by the learned Judge vide impugned order dated 6.6.2019. Learned counsel has submitted that if the defence is not given proper opportunity to cross-examine PW-1- Mange Ram, who is the first informant of the case, it will cause a serious prejudice to defence case as his testimony would go unrebutted. It is further argued

that it is a fundamental right of an accused to have fair trial as envisaged under Article 21 of the Constitution and if the impugned orders are not set-aside then the main object of affording fair trial to accused in the spirit of life and liberty shall be greatly jeopardized. It is further argued that the courts have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. It is submitted that the powers to recall a witness under Section 311 Cr.P.C. is a very wide and could be exercised for the just decision of a case. The Section 311 Cr.P.C. empowers the Courts to recall material witness at any stage of enquiry or trial, if his evidence appears to it to be essential to the arrival at the just decision of a case. The aforesaid impugned orders passed by the courts below are patently illegal and arbitrary and further no prejudice shall be caused to the prosecution, inasmuch as, the trial is already going on. Therefore, the cross-examination of PW-1, who is the first informant and eye-witness, is absolutely essential to arrive at just decision of the case. There was no wilful default on the parts of the applicants in not cross-examining the PW-1 with any oblique purpose, yet the trial court committed manifest illegality by closing the same vide order dated 19.9.2018.

4. Before, I deal with the arguments raised by learned counsel for the applicants, I may record that the applicants are accused in a broad day light double murder case which according to prosecution took place on 28.7.2017 at 7:30 A.M. The F.I.R. was lodged by PW-1 on the same day at 8:45 A.M. After thorough investigation, charge-sheet was laid against the accused and the case was committed before the sessions court. The trial commenced on denial by the accused and charges were framed on 23.4.2018 under Sections 147, 148, 302/149 I.P.C. Then, 26.6.2018 was fixed for recording of evidence and on that date the examination-in-chief of the first informant/eye-witness Sri Mange Ram was recorded. He narrated the prosecution version and the manner in which the applicants gunned down two persons. However, an adjournment application was moved on behalf of the accused-applicants and the cross-examination was suspended. The court fixed 12.7.2018 on which date PW-1, Mange Ram was present and again an adjournment application was moved on behalf of accused which was allowed with specific direction that on the next date adjournment shall not be allowed. On the next date i.e. 26.7.2018, the witness was not present and the court posted the case for 10.8.2018. However, on 10.8.2018 as the accused could not be produced from the jail before the court the case was adjourned and 24.8.2018 was fixed. On 24.8.2018 PW-1 was present but the advocates had abstained from work due to which cross-examination could not take place. The trial was then fixed for 5.9.2019 and on that date PW-1, Mange Ram was present in the court, yet again an adjournment application was moved on behalf of the accused-applicants and the trial court accommodated them and 19.9.2018 was fixed. On 19.9.2018 the accused were produced from the jail and the witness, Mange Ram was also present, however, an adjournment application was moved on behalf of the accused- Rohit and Billu through their counsels and the learned Judge finding no justification for adjourning the case on that date closed the opportunity for cross-examination of PW-

1 after recording reasons the court fixed for 4.10.2018 for recording of remaining evidence.

5. I may record that on 4.10.2018, the first date fixed after closing the opportunity to cross-examine PW-1, no application on behalf of the defence to recall the order dated 19.9.2018 was moved, however, on that date examination-in-chief of PW-2- Manjeet, an eye witness, was recorded who is the son of PW-1. He fully corroborated the statement of PW-1 and the prosecution version contained in the F.I.R. He was also not cross-examined by the defence on that date and the court fixed 14.11.2018 for his cross-examination. On 14.11.2018 the learned Judge waited for the defence counsels till 3:45 P.M. but no one turned up and the court in the interest of justice fixed 3.12.2018. The order-sheet reflects that the PW-2 did not appear before the court on 3.12.2018, 11.12.2018, 21.12.2018, 1.1.2019, 4.1.2019, 17.1.2019 28.1.2019 and the trial was adjourned on account of presiding officer being on leave, the advocates abstained from work, on account of condolences and for non-appearance of PW-2 lingered on and more than a dozen dates were fixed, ultimately PW-2, Manjeet appeared before the court on 28.5.2019 and he was cross-examined by the defence and now the said witness who had supported the prosecution version in his examination-in-chief recorded on 4.10.2018 took a U-turn and resiled from his earlier statement and stated that the names of accused-applicants was disclosed by his father and had witnessed the incident for quite some distance and had only heard the sound of fire. He has stated that he had only seen the accused from their back and not their faces. At that stage, an application was moved by the DGC (criminal) to declare the said witness hostile and be permitted to cross-examine him. The learned DGC cross-examined the said witness. Thereafter, the most glaring fact in the present case is that an application for recalling PW-1 for cross-examination was moved on 3.6.2019 which was ultimately rejected by the learned Sessions Judge on 6.6.2019. The order dated 19.9.2018 remained unchallenged.

6. I have carefully gone through the impugned order passed by the learned Judge and the aforesaid admitted/unrebutted facts as contended in the impugned order as well as from the order-sheet, it is apparent that the applicants who are facing trial in a heinous double murder broad day light case deliberately did not cross-examine PW-1 on several dates probably for the reasons that they were exerting pressure on PW-1 for entering into compromise so that he resiles from his examination-in-chief recorded on 26.6.2018. The trial court despite affording sufficient opportunity to the accused-applicants for cross-examining PW-1, ultimately closed the opportunity for cross-examination on 19.9.2018. I may further record that 4.10.2018 was fixed for recording of remaining evidence and on that date examination-in-chief of PW-2, son of PW-1, an eye witness was recorded in which he has fully supported and corroborated the prosecution version and the statement of PW-1. On that date also no application was moved on behalf of applicants-accused for recalling PW-1 for cross-examination. The eye-witness PW-2 was also not cross-examined on 4.10.2018 and 14.11.2018 and then after 3.12.2018 and subsequent dates the said witness did not appear before the court may be due to

fear of accused or he was under coercion to resile from his statement and ultimately he appeared on 28.5.2019. He was cross-examined by the defence and he resiled from his examination-in-chief and, thus, declared hostile by the prosecution. Thereafter, application for recalling PW-1 moved on behalf of applicants on 3.6.2019 makes it crystal clear that when the applicants-accused had succeeded in their evil design to win over PW-2 who appeared before the court on 28.5.2018 and remained absent for more than a dozen dates, the application for recalling PW-1 for cross-examination was moved.

7. I am also of the considered opinion that the mala fide of the accused-applicants is apparent on the face of it as the application for recall of PW-1 for cross-examination was deliberately moved after more than eight months after the cross-examination was closed by the learned Judge.

8. It is well settled by catena of decisions by the Hon'ble Apex Court that the power under Section 311 Cr.P.C. must be exercised with the care, caution and circumspection and only for strong and valid reasons. The recall of a witness already examined should not be a matter of course and discretion given to the court in this regard has to be exercised judicially to prevent failure of justice. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society.

9. The Court is fully conscious of the position that after all the trial is basically for the prisoners/accused and the Court should afford an opportunity to them in the fairest manner possible. At the same time, the Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. Recalling of witnesses has to be applied on the basis of judicially established and accepted principles.

10. In ***State of Haryana v. Ram Mehar and others (2016) 8 SCC 762***, the Hon'ble Supreme Court has observed as under:-

"23. In ***Bablu Kumar and others v. State of Bihar and another, (2015) 8 SCC 787*** *the Court referred to the authorities in* ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC, Rattiram and others v. State of Madhya Pradesh (2012) 4 SCC 516, J. Jayalalithaa and others v. State of Karnataka and others (2014) 2 SCC 401, State of Karnataka v. K. Yarappa Reddy (1999) 8 SCC 715*** *and other decisions and came to hold that keeping in view the concept of fair trial,* ***the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. It has been further stated that the law does not countenance a "mock trial". It is a***

serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control*. We may note with profit though the context was different, yet the message is writ large. The message is ? all kinds of individual notions of fair trial have no room"."*

"38. At this juncture, we think it apt to state that the exercise of power under Section 311 Cr.P.C. can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. ***Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice****. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errOrs. Hence, we reiterate the necessity of doctrine of balance"."*

11. The Hon'ble Supreme Court in the case of ***Mohd. Khalid v. State of West Bengal (2002) 7 SCC 334*** has made a serious observation about adjournment of the case for cross-examination by the defence. In Para 54, it has been held that:-

"Before parting with the case, we may point out that the Designated Court deferred the cross-examination of the witnesses for a long time. That is a feature which is being noticed in many cases. Unnecessary adjournments give a scope for a grievance that the accused persons get a time to get over the witnesses. Whatever be the truth in this allegation, the fact remains that such adjournments lack the spirit of Section 309 of the Code. When a witness is available and his examination-in-chief is over, unless compelling reasons arc there, the Trial Court should not adjourn the matter on the mere asking. These aspects were highlighted by this Court in ***State of U.P. v. Shambhu Nath Singh and others (2001) 4 SCC 667 a****nd N.G. Dastane v. Shrikant Shivde (2001) 6 SCC 135. In the case of State of U.P. v. Shambhu Nath Singh and others (2001) 4 SCC 667, this Court deprecated the practice of Courts adjourning cases without examination of witnesses when they are in attendance with the following observations:-*

"9. We make it abundantly clear that if a witness is present in Court he must be examined on that day. The Court must know that most of the witnesses could attend the Court only at heavy cost

to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the Court is generally a poor solace for the financial loss incurred by him. It is a said plight in the Trial Courts that witnesses who are called through summons or other processes stand at a doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by every one provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are standard on account of the dimension of his judicial powers, can be a persuading factor for granting such adjournments lavishly, that too in a casual manner."

12. Keeping in view the law laid down by the Hon'ble Apex Court, I may record that on the pretext of alleged failure of justice the applicants-accused cannot be permitted to adopt tactics to win over the witnesses by hook or by crook and ultimately when they succeeded in their evil design to win over the son of PW-1 who had supported the prosecution version on 4.10.2018 and then an application was moved with a mala fide intention and probably the accused-applicants had also won over PW-1, Mange Ram. It is not a case where no opportunity was afforded to the accused to cross-examine the witnesses but the accused-applicants facing trial in a heinous broad day light double murder case have not come up with clean hands and, thus, the court below by a detailed and reasoned order was perfectly justified in rejecting the recall application moved by the applicants for recalling PW-1 after more than eight months.

13. In the present facts and circumstances of the case, this Court while exercising its inherent power under Section 482 Cr.P.C. cannot be oblivious of the fact that the accused cannot be permitted to delay the trial and keep on getting the case adjourned and ultimately they succeed in their goal in winning over the witnesses. I may further record that even PW-2, Manjeet in his cross-examination has not denied the time, place and date of incident and he has only gone to the extent of stating that he had seen the accused from the back and not from the faces and the names of the applicants were disclosed by his father. How much reliance can be placed on the testimony of PW-2 is a matter of appreciation of his evidence by the trial court.

14. The applicants-accused themselves are responsible for leaving the trial judge with no option but to close the cross-examination as sufficient opportunity was afforded to them and the very fact of moving the recall application after more than eight months without it being challenged in any forum till 3.6.2019 speaks volumes of malafides of the applicants and the court cannot permit to recall PW-1 at this stage so that the possibility of his being also won over by the applicants cannot be ruled out. It is a double murder case and cannot be said to be a private dispute between the parties since it affects the society at large and affects the law and public order, such kind of practices cannot be allowed to permeate and permit the accused/applicants to take advantage of their own wrong. Their conduct was not such which may attract the discretionary power of the Court u/s 311 Cr.P.C. for recalling PW-1, Mange Ram for cross-examination.

15. In the light of aforesaid, I do not find any merit in the present application and the trial court has rightly exercised

the discretion under Section 311 Cr.P.C. and the present application stands, accordingly, dismissed.

16. However, the trial court is directed to expedite the aforesaid session trial and conclude the same in accordance with law without granting unnecessary adjournments to either of the parties as expeditiously as possible preferably within a period of nine months from the date of production of a certified copy of this order, if there is no legal impediment.

17. Office is directed to communicate the order to the court concerned within a week.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.07.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.4042 of 2004
(u/s -482 Cr. P.C.)

Keshav Narayan &Anr. ...Applicants
Versus
State of U.P &Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashwini Kumar Awasthi, Sri Manish Tiwary

Counsel for the Opposite Parties:
A.G.A., Dr. Santosh Kumar Tiwari, Sri Rajnish Rai, Sri Vivek Singh.

A. Section 3 of Railway Property (Unlawful Possession) Act, 1966- Railway property recovered - said property was lying at the petrol pump when the applicant was manager-prima facie case against the applicant- proceedings cannot be quashed because report submitted by a police officer when he has no power to investigate- application dismissed. (Para 6)

Offence under the Railway Property (Unlawful Possession) Act, 1966- are non-cognizable- Section 5- enquiry and complaint can be filed but Enquiry officer cannot approach Magistrate to inform about the proceedings-

B. The matter under enquiry and letter submitted before the Magistrate is neither a report under Section 173 Cr.P.C. nor a formal complaint under Section 200 Cr.P.C. A letter addressing the magistrate does not imply that the procedure contemplated in law will not be followed. Such report in a non-cognizable offence in view to Explanation to Section 2(d) of Cr.P.C., such report can be deemed to be a complaint and Magistrate can proceed accordingly.

Application u/s 482 Cr.P.C. dismissed.

Chronological list of Case Cited: -

1. AIR (2001) Supreme Court 429 State of Bihar Vs. Chandra Bhushan Singh and Others

2. AIR 1981 SC 379 Balkrishn A. Devidayal, etc. Vs. State of Maharashtra

3. AIR (2002) SC 64 State of Bihar Vs. Baidnath Prasad @ Baidyanath Shah ans Another

4. (1999) CRI. L.J. 1075 (Ald) Ishwar Saran Shukla ans Another Vs. State of U.P.

5. Cr.P.CAIR (1996) SC 1619 Common Cause, a Registered Society Vs. Union of India (E-10)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Praveen Kumar, Advocate holding brief of Sri Manish Tiwary, learned counsel for applicants; and, Sri Rajnish Kumar Rai, Advocate for complainant and Sri Syed Ali Murtaza, learned AGA for State of U.P.

2. This is an application filed under Section 482 Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C.") praying for quashing of proceedings of Case Crime No. 8 of 2003, under Section 3 of Railway Property (Unlawful Possession) Act, 1966 (hereinafter referred to as "Act, 1966"), Police Station- D.L.W. Railway Protection Force (hereinafter referred to as "RPF") Post D.L.W. Varanasi.

3. Case was registered at P.S. RPF Post D.L.W. Varanasi on 20.05.2003 alleging that a piece of Railway line was recovered from Vikas Singh and he was arrested with Railway property. When enquired from him, he told that applicants who were earlier Manager at petrol pump where he (Vikas Singh) was working, may be able to tell about the said property, since Railway property was lying at the petrol pump before employment of Vikas Singh. Vikas Singh was enlarged on bail by Sessions Judge, Varanasi vide order dated 24.05.2003. On 05.04.2004, Investigating Officer informed Additional Chief Judicial Magistrate, North Eastern Region, Varanasi about the investigation, he is making in the matter. These proceedings have been challenged by applicants on the ground that offence under Act, 1966 is not cognizable in view of Section 5 thereof, hence, Enquiry Officer has only option of making enquiry and file complaint and no procedure is prescribed whereunder he may approach Magistrate concerned to inform about the proceedings conducted by him. It is also submitted that from G.D. Entry dated 20.05.2003 at Serial No. 37, it cannot be said that any offence has been committed by applicants under Section 3 or 4 of Act, 1966 and, therefore, report submitted by Enquiry Officer before Additional Chief Judicial Magistrate, North Eastern Region, Varanasi on 05.04.2004 is totally misconceived.

4. Learned AGA could not dispute that offences under Act, 1966 are non-cognizable but said that recovery of Railway property from Vikas Singh and statement given by him show prima facie involvement of applicants also and in any case, the matter is still under investigation and, therefore, it cannot be said that proceedings are liable to be quashed and no offence against applicants is made out or the procedure adopted by Investigating Officer of RPF is patently illegal.

5. Section 3 of Act, 1966 provides penalty for unlawful possession of Railway property. Section 6 authorizes a superior officer or member of Force to arrest any person who has been concerned in an offence punishable under Act, 1966 or against whom a reasonable suspicion exists of having been so concerned, without an order from Magistrate and without a warrant. Section 7 provides that any person arrested under Act, 1966, shall, if the arrest is made by a person other than the officer of the Force, to forward such person, without delay to the nearest officer of the Force. Section 8 of Act, 1966 provides:

*"8. **Inquiry how to be made**- (1) When an officer of the Force receives information about the commission of an offence punishable under this Act, or when any person is arrested by an office of the Force for an offence punishable under this Act or is forwarded to him under section 7, he shall proceed to inquire into the charge against such persons.*

(2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case:

Provided that-

(a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the

accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the officer of the Force that there is no sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the officer of the Force may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

6. In the present case, G.D. (Rojnamcha) No. 37 dated 20.05.2003 shows that after seizure of Railway property, Vikas Singh was interrogated and arrested. The matter is still under enquiry and letter dated 05.04.2004 submitted to Magistrate concerned is neither a report within the meaning of Section 173 Cr.P.C. nor can be said to be a formal complaint referable to Section 200 Cr.P.C.. The matter is still at the stage of enquiry by officer of Force and according to his investigation, there is no reason to doubt that it shall not proceed in the manner as contemplated in law i.e. by filing of a complaint before Magistrate concerned under Section 200 Cr.P.C. and thereupon Magistrate may issue the process against accused under Section 204 Cr.P.C. Every document of Enquiry Officer of Force if addressed to Magistrate, cannot be treated to be a report under Section 173 Cr.P.C. and it cannot be said that he is acting illegally and not in the manner as provided in law.

7. In **State of Bihar Vs. Chandra Bhusan Singh and Others AIR (2001) Supreme Court 429,** Court said as under:

"Merely because the inquiry was held by a member of the Force having some similar powers as are possessed by an investigating officer, would not make the complaint to be a report within the meaning of Section 173 of the Code."

8. In **Balkishan A. Devidayal, etc. v. State of Maharashtra AIR 1981 SC 379**, Court said that an officer conducting an inquiry under Section 8(1) of Act, 1966 has not been invested with all powers of an officer incharge of a police station making an investigation under Chapter XIV of Cr.P.C. He has no power to file a charge sheet before the Magistrate concerned under Section 173 of Cr.P.C.. The main purpose of Act, 1966 was to invest powers of investigation and prosecution of an offence relating to Railway property in RPF in the same manner as in a case relating to offences under the law dealing with excise and customs. The offences under Act, 1966 are non-cognizable which cannot be investigated by a police officer under Cr.P.C.. The result is that initiation of inquiry for an offence inquired into under Act, 1966 can be only on the basis of a complaint by an officer of the Force. Court also held that an officer of RPF could not be deemed to be a 'police officer' within the meaning of Section 25 of Evidence Act, 1872 and, therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8(1) of Act, 1966 cannot be excluded from evidence under the said section.

9. That being so, submission of applicants that RPF official is not proceeded in the matter in accordance with law at this stage by simply giving information vide letter dated 05.04.2004 in my view, is clearly erroneous and has no substance. Moreover, statement of Vikas Singh who was arrested by officer of the Force while recovering Railway property, stating that applicants can explain as to how Railway property was brought and kept at the petrol pump cannot be ignored and it cannot be said that no case against applicants is made out. Since the matter is still under

investigation, hence, at this stage such a plea cannot be entertained.

10. Counsel for applicants has placed reliance on a Supreme Court's decision in **State of Bihar Vs. Baidnath Prasad @ Baidyanath Shah and Another AIR (2002) SC 64,** wherein request was made for quashing of proceeding which was pending for six years but Court declined to do so. Court observed that delay is attributable to accused as they challenged various orders passed in different proceedings and, therefore, accused cannot be allowed to take advantage of delay for which they are substantially responsible.

11. Reliance is also placed on behalf of applicants on a Single Judge judgment in **Ishwar Saran Shukla and Another Vs. State of U.P. (1999) CRI. L.J. 1075 (Ald),** wherein Court found that because complainant failed to appear on three dates, Magistrate has rightly declined to accept the request of dismissal of complaint and discharge of accused person by invoking Section 249 Cr.P.C.. Therein, reliance was also placed on a Supreme Court's decision in **Common Cause, a Registered Society v. Union of India AIR (1996) SC 1619,** wherein Court declined to accept the request of accused for dropping of case since case was pending for more than two years observing that an offence under Section 3 of Act, 1966 does not fall in such category since offence therein is punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

12. I may also add that even otherwise, if a report submitted by a police officer in a non-cognizable offence, in view of Explanation to Section 2(d) of Cr.P.C., such report can be deemed to be a complaint and Magistrate can proceed accordingly but for that reason alone proceedings are not to be quashed since report submitted by a police cannot be held to be without jurisdiction merely because proceedings were instituted by police officer after investigation, when he had no power to investigate. Here also, I am fortified in taking the above view by the observations made by Supreme Court in **State of Bihar Vs. Chandra Bhusan Singh (supra)**, where, referring to Explanation to Section 2(d) of Cr.P.C., Court said as under:-

"Section 2(d) of the Code emcompasses a police report also as a deemed complaint if the matter is investigated by a police officer regarding the case involving commission of a non-cognizable offence. In such a case, the report submitted by a police officer cannot be held to be without jurisdiction merely because proceedings were instituted by the police officer after investigation, when he had no power to investigate."

12. In view of above discussion, I do not find that proceedings in the present case can be said to be without jurisdiction and liable to be quashed.

13. Application lacks merit and is accordingly dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.07.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA J.

CIVIL MISC. WRIT PETITION No.25552 of 2019
(u/s -482 Cr. P.C.)

Makholi & Ors. ...Applicants
Versus
State of U.P &Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashik Kumar Dubey.

Counsel for the Opposite Parties:
A.G.A.

A. Section 156(3) Cr.P.C. - order passed under - court below directed complaint to be registered as complaint case - application was not accompanied by an affidavit - order to register the application as complaint case is not same as directing to register an F.I.R and direction to investigate. Such order will be followed by due inquiry and the statement of the complainants and other witnesses will be recorded on oath. Hence, affidavit is not required in support of the application.(Para 6)

Application u/s 482 Cr.P.C. dismissed

Chronological list of Cases Cited:

1. 2006 (1) SCC (Cri.) 460 Mohd. Yusuf Vs. Afaq Jahan and others

2. (2007) 59 ACC 739 Sukhwasi Vs. State of U.P.

3. (2015) 6 SCC 287 Priyanka Srivastava & Another Vs State of Uttar Pradesh& Others(E-10)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Sri Ashok Kumar Dubey, learned counsel for the applicants, learned A.G.A. and perused the record.

2. This application under Section 482 Cr.P.C. has been preferred with the prayer to quash the impugned order dated 08.01.2015, passed by Additional Chief Judicial Magistrate, Court No. 9, Allahabad, in Case No. 18 of 2015 (Jai Prakash Tiwari vs. Makholi and others), under Section 156(3) Cr.P.C., Police Station Meja, District Allahabad by which the learned court below has directed that the aforesaid complaint be registered as complaint case.

3. Learned counsel for the applicants has submitted that this application was given as a counter blast to one first information report lodged on the side of applicants. It has further been submitted that the application filed by opposite party no. 2 was not supported with any affidavit, whereas under the law it needs to be supported with affidavit and, therefore, there is misuse and abuse of the power of the court and the order is liable to be set aside. In support of the said argument, learned counsel for the applicants has placed reliance upon the judgment of the Supreme Court in the case of ***Priyanka Sriva***stava & Another vs. State of Uttar Pradesh & Others, (2015) 6 Supreme Court Cases 287, wherein it has been held as under :-

"We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the

cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

4. The argument of the learned counsel for the applicants that the application was not supported by any affidavit due to which, the learned Magistrate should have rejected the application on this basis only, cannot be given weight due to reason that the complaint was filed on 20.12.2014 and the impugned order was passed on 08.01.2015 much before the judgment in ***Priyanka Srivastava & Another vs. State of Uttar Pradesh & Others (supra)*** which was decided on 19.03.2015 and prior to this judgment, no such affidavit was required to be filed with application. Secondly, the Magistrate has not directed for registration of F.I.R. in this case. It cannot be said that mere direction to register the application under Section 156(3) Cr.P.C., will in any way, cause prejudice to the applicants. It cannot be categorised as misuse of the process of the Court. When the application was registered as complaint, on oath, statement of the complainant will be recorded, which is no less than affidavit.

5. From perusal of the application filed under Section 156(3) Cr.P.C. by the opposite party no. 2, it appears that the applicants on the date of incident came to the house of opposite party no. 2 with lathi and danda in their hands and started abusing the opposite party no. 2. When he opposed, they started beating him. At this the opposite party no. 2 ran into the house where also he was beaten by the applicants and due to beating he sustained injuries. The applicants also damaged the television etc., which was kept in the house.

6. Relying on the judgment of this Court in the case of ***Sukhwasi vs. State of U.P.,*** (2007) 59 ACC 739 and of the Apex Court in ***Mohd. Yusuf vs. Afaq Jahan and others, 2006 (1) SCC (Cri.)460,*** the learned count below has passed the order to register the application as complaint case. It is pertinent to mention that no order directing police to register the first information report and for investigation was passed. When the case was registered as complaint case, it will be followed by due inquiry and the statement of the complainants and other witnesses will be recorded on oath and, therefore, there was no incumbency for the court to require any affidavit in support of the application.

7. Considering the aforesaid facts and circumstances, I do not find any ground to interfere in the order, however, there was no ground for invoking the extraordinary jurisdiction under Section 482 Cr.P.C. before this Court because the said order was passed after due inquiry against the applicants, hence, the application is liable to be dismissed.

8. Accordingly the application is dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2017

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

CIVIL MISC. WRIT PETITION No.23913 of 2017
(u/s -482 Cr. P.C.)

Omkar & Ors. ...Applicants

Versus

State of U.P. &Anr. ...Opposite Parties

Counsel for the Applicants:
SriJai Prakash Singh.

Counsel for the Opposite Parties:
A.G.A.

A. Sections 147, 148, 149, 37 and 302 Indian Penal Code - Trial in which applicant are accused reached its culminating stage - other complaint case in which other side is accused has been stayed by the High Court –
Held:- Principle that cross cases should be tried by same court - not universal principle - differs from case to case- stay not granted to the applicants - unnecessarily hamper the process of law- application dismissed. (Para 4)

The Court observed that the evidence produced in cross case cannot be used in other cross case. Both the cases have to be decided separately based on the evidences produced at the time of trial so as to avoid the possibility of mutually conflicting decisions which may sometimes happen if the verdict given in one case is not disclosed to the Court. (E-10)

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application under Section 482 of Cr.P.C. has been filed with the prayer to quash the order dated 4.7.2017 passed by the Additional Sessions Judge/F.T.C., Court No. 2, Kasganj, in S.T. No. 07 of 2010, State vs. Omkar and others, arising out of Case Crime No. 455 of 2009, under Sections 147, 148, 149, 307, 302 I.P.C., P.S.- Ganjdundwara, District- Kasganj by which the application seeking staying the pronouncement of the judgement in this case till disposal of the another criminal Misc. Case No. 16379 of 2009.

2. Heard learned counsel for the applicants and learned A.G.A. for the State. Perused the record.

3. Submission of the counsel for the applicants is that the trial in which the applicants are accused, has already reached at its culminating stage but the proceedings of cross case, which was in nature of complaint case, in which the other side has been made accused, has been stayed by the orders of the High Court. Further submission is that the present trial of the applicants should be stayed till the other cross case also comes up for trial on the principles that the cross cases should be decided together by the same court.

4. So far as the trial of the two cross cases is concerned, this is true that ordinarily cross cases should be tried together by the same court but that is not principle of universal application and varies from case to case on various factors and circumstances specially when out of two cases one case is pending and in other case evidences have already been completed. Admittedly, one case in which the applicants are accused, has reached at its culminating stage and the evidences have been recorded but the proceedings of other case have already been stayed by the High Court as it was deemed fit to do so by the competent Bench seized with the jurisdiction, and in such circumstances, it will unnecessary hamper the process of law if the trial of the applicants is allowed to wait for indefinite period of time specially in view of the heavy pendency of the cases where it is not very likely that the matter relating to the complaint case may be decided at any early date. This Court is also not very sure whether the other case is actually in the nature of cross case or not. Looking to the final stage of trial, this Court does not feel

inclined to stay the proceedings till disposal of the other case pending before the High Court. It may also be taken note of that the evidence which is produced in the cross-cases cannot be made of any use in other cross-case and both the cases have to be decided on the basis of the evidence produced in each of cases separately remaining uninfluenced by the evidence which is produced in the other alleged cross case. The only rationale to justify the decision in the two cases simultaneously is to avoid the possibility of mutually conflicting decisions which may sometimes happen if the court is not aware about the verdict given in the other case. But in the peculiar facts and circumstances of this particular case the precautionary principle cannot override the other significant considerations of pragmatic judicial prudence and the process of law cannot be stalled simply on the basis of the existence of some alleged cross case and that too where proceedings have been stayed by the High Court. The matter has already reached at the final stage and must be allowed to arrive at its logical end otherwise instead of promoting, it shall frustrate the ends of justice.

5. The application lacks merit and stands dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

FIRST APPEAL NO.138 of 1998

Bulandshahr Khurja Development Authority ...Appellant

Versus

Smt. Savita &Anr. ...Respondents

Counsel for the Appellant:
Sri A.K. Srivastava, Sri B.Dayal, Sri Ajay Kumar Misra.

Counsel for the Respondents:
-

A. First Appeal - Refund of court fees - Section 13 of the Court Fees Act, 1830; Section 158 C.P.C. - First appeal allowed remanding matter to court below for decision fresh - Grounds mentioned in S. 351 C.P.C. explained - Principle laid down by Apex Court in Pt. Chandra Bhushan Mishra's case and Surendra Singh's case relied upon - Applicable in Land Acquisition Appeal too - Court fees paid is liable to be refunded - Court below directed to grant certificate u/s 13 of C.F. Act. (E-1)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1- Heard Sri B. Dayal, learned counsel for the appellant. No one appears on behalf of the respondent.

2- The present first appeal arises from the impugned common judgment passed in LAR No.164 of 1992.

3- By the impugned common judgement passed in LAR Nos. 165,167,163, 164 and 166 all of 1992, the reference court determined compensation @ Rs. 400/- per Sq. yard along with other statutory benefits and interest.

4- Learned counsel for the appellant submits that by Notification dated 20.12.1988, under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'), land measuring

about 98 Bighas situate in village Akbarpur, Pargana Baran, district Bulandhshr, was acquired for establishing residential colony. He further submits that First Appeal No. 192 of 1998 arising from judgment in LAR No.162, First Appeal No.168 of 1998 arising from judgment in LAR No.167, First Appeal No.139 of 1998 arising from judgment in LAR No.166 were allowed on 20.4.2004 and First Appeal No.121 of 1995 arising from judgment in LAR No.163 of 1992 was allowed on 25.5.2018 by this Court and the matters were remanded to the court below for decision afresh and the impugned common judgment has been set aside.

Refund of Court Fees:

5- Learned counsel for the claimant-appellant now submits that in view of the provisions of Section 13 of the Court Fee Act, 1870 (hereinafter referred to as the 'Act') the Court fee paid on memorandum of above noted appeal in this Court, is liable to be refunded.

6- I have carefully considered the submissions of the learned counsel for the appellant.

7- Section 13 of the Court Fees Act, 1870 provides as under:

"13. Refund of fee paid on memorandum of appeal.-If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the 1 Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in section 351 of the same Code, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal: Provided that, if in, the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded".

8- The aforesaid provision was explained by Full Bench of this Court in **Chandra Bhushan Misra v. Smt. Jayatri Devi, AIR 1969 Allahabad 142** and the order for refund of the Court fees was passed. The said judgment relates to Court fees paid on memorandum of second appeal. The aforesaid Full Bench judgment was challenged by the State of U.P. before Hon'ble Supreme Court in **State of U.P. v. Pt. Chandra Bhushan Misra, (1980) 1 SCC 198** (Paragraph Nos. 2,3, 4 and 5)and Hon'ble Supreme Court held as under:

2.**"Section 13** of the Court Fees Act 1870, in so far as it is material is as follows:

"If an appeal or a plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure as ordered to be received, or if a suit is remanded in appeal on any of the grounds mentioned in s. 351 of the same code for a second decision of a lower court, the lower court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal".

Section 13, thus speaks of a suit remanded in appeal on any of the grounds mentioned in section 351 of the same Code i.e. the Code of Civil Procedure which was then in force. Section 351 of the Code of Civil Procedure 1859 provided for the remand of a case by the appellate court to the lower court for a decision on the merits on the case. where "the lower court shall have disposed of the case upon any preliminary point so as to exclude any evidence of fact whish shall appear to the appellate court essential to the rights of the parties". If the decision on the preliminary point was reversed by the appellate court. The Code of 1859 was repealed and replaced by the Code of 1877. Section 562 of the 1877 Code was substantially in the same terms as section 351 of the 1859 Code. The Code of 1882 was repealed and replaced by the Code of Civil Procedure 1908. Order XLI Rule 23 of the 1908 Code also provided for the remand of a case to the lower court by the appellate court where the suit had been disposed of upon a preliminary point and the decision of such preliminary point was reversed in appeal by the appellate court. In exercise of the powers vested in it under section 122 of the Code of Civil Procedure 1908, the Allahabad High Court amended the provisions of Order XLI Rule 23 so as to provide for the remand of a case by the appellate court to the trial court, not only when the suit had been decided upon a preliminary point and the decision was reversed in appeal, but also whenever the appellate court considered it necessary in the interest of justice. The question for consideration in this appeal is whether the power to grant refund of court fees under section 13 of the Court Fees Act 1870 was attracted to a case where the appellate court remanded the case to the lower court in the interest of justice as provided by the provisions of Order XLI Rule 23 as amended by the High Court of Allahabad.

3. In order to answer the question a reference is necessary to section 158 of the Code of Civil Procedure 1908. It was as follows:

"158. In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, Section or rule".

It follows from Section 158 that reference in Section 13 of the Court Fees Act 1879 to Section 351 of the Code of Civil Procedure 1859 has to be read as reference to Order XLI Rule 23 of the Code of Civil Procedure 1908. The submission of the learned counsel was that the reference to any provision of the Code of Civil Procedure 1908 pursuant to section 158 of the Code must be to provision occurring in the body of the main code consisting of the provisions from section 1 to section 158 and not to the provisions of the rules in the first schedule. He further submitted that even if reference to the rules in the first schedule was permissible it should only be to the rules as enacted by the legislature itself and not as amended by the High Court. The first part of the submission of the learned counsel has to be rejected straightaway having regard to the express reference to 'Order' and 'Rule' in section 158 of the Code of Civil Procedure 1908. The second part of the submission requires a slightly closer examination. Section 2(1) of the Code of

Civil Procedure 1908 defined "Code" as including "Rules". Section 2(18) defined "Rules" as meaning "Rules and forms contained in the first schedule or made under section 122 or section 125". Section 121 of the 1908 Code declared that the rules in the first schedule shall have effect "as if enacted in the body of the code until annulled or altered in accordance with the provisions of part X of the Code" (section 121 to 131). Section 122 enabled the High Court to make rules, from time to time "regulating their own procedure or the procedure of the Civil code subject to their superintendence, and made by such rules, annual, alter or add to all or any of the rules in the first schedule". Section 126 made the rules made by the High Court subject to the previous approval of the Government of the State. Section 127 provided that the rules so made and approved shall have the same force and effect as if they had been contained in the first schedule. These provisions make it abundantly clear that the rules made by a High Court altering the rules contained in the first schedule as originally enacted by the legislature shall have the same force and effect as if they had been contained in the first schedule and therefore, necessarily became part of the Code for all purposes. That is the clear effect of the definition of the expressions "Code" and "Rules" and sections 121, 122 and 127. It does not appear to be necessary to embark upon a detailed examination of each one of these provisions, since the position appears to us to be very clear. We, therefore, agree with the view expressed by Pathak and Kirty JJ., in **Chandra Bhushan Misra v. Smt. Javatri Devi**, regarding the effect of section 158 of the Code of Civil Procedure and sections 2(1) to 2(18), 121, 122 and 127.

4. Jagdish Sahai J., was inclined to the view that the amendments made by the High Court were only fictionally embodied in the Code and that the reference to section 351 of the Code of 1859 in section 13 of the Court Fees Act was to be construed as a reference only to the provisions of Order XLI Rule 23, as originally passed by the Legislature and not as amended by the High Court. In our opinion the view of Jagdish Sahai, J. does not give full effect to section 127 of the Civil Procedure Code 1908 which provided that the rules made by the High Court shall have the same force and effect as if they had been contained in the first schedule.

5. We are of the view that the question was rightly answered by the Full Bench of the Allahabad High Court and the appeal is, therefore, dismissed".

9- Recently, while dealing with the land acquisition matters in **Surendra Singh v. State of Haryana and others, (2018) 3 SCC 278** (Paragraph Nos. 38,39 and 40) Hon'ble Supreme Court held a under:

"38. Since we have remanded these cases to the Reference Court for fresh adjudication on merits in accordance with law, the appellants (land owners) are entitled to get back the amount of court fee paid by each appellant (land owner) on his appeal memo before the High Court as also before this Court as provided under Section 13 of the Court Fees Act.

39. The Registry is accordingly directed to issue necessary certificate of refund of Court Fee amount, if paid by any of the landowner on his memo of appeal in the High Court and in this Court under the Court Fees Act to enable the landowners to claim the refund of the court fee amount from the State Treasury concerned.

40. If for any reason, it is not possible for the Registry of this Court to issue refund certificate of the court fee amount paid by the appellant landowners on their memo of appeals filed in the High Court on their respective appeal memo then the requisite certificate shall be issued by the High Court concerned as per the Rules in favour of each appellant landowner under the Court Fees Act".

10- The words "on any of the grounds mentioned in section 351 of the same Code" as used in Section 13 of the Act, 1870 has been held by Hon'ble Supreme Court in the case of **Pt. Chandra Bhushan Misra** (supra) to be referable to Section 351 of the Code of Civil Procedure 1859. Refund of court fees under Section 13 of the Court Fees Act, has been exhaustively explained by Hon'ble Supreme Court in the aforesaid case of Chandra Bhushan Misra.

11- So far as the question of refund of court fees under section 13 of the Court Fees Act,1870 in land acquisition appeal is concerned, the Hon'ble Supreme Court, has provided in the case of **Surendra Singh (supra)** for refund of court-fees, while remanding the matter to the reference court for fresh adjudication on merits in accordance with law.

12- Thus, in view of the law settled by Hon'ble Supreme Court in the case of **Pt. Chandra Bhushan Misra (supra) and Surendra Singh (supra),** I find no difficulty to accept the submission of the learned counsel for the appellant for refund of Court-fees. Therefore, it is provided that the appellant is entitled for refund of court fees paid by him on his memorandum of the present first appeal in terms of the provisions of Section 13 of the Court-Fees Act. Necessary certificate under Section 13 of the Act, shall be granted to the appellant.

13- In view of the aforesaid, this first appeal is also **allowed**. The impugned judgment of the reference court in LAR No.164 of 1992 is set aside. LAR No.164 of 1992 is restored to its original number. The matter is remanded to the reference court for decision afresh in accordance with law. For refund of court fees paid on the memorandum of appeal, a certificate shall be granted to the appellant under Section 13 of the Court Fees Act. The reference court shall decide LAR No.164 of 1992 along with above referred all land acquisition references, if still pending, within six months from the date of presentation of a certified copy of this order, without granting any unnecessary adjournment to either of the parties.

14- Lower court record shall be returned by the office to the court below positively within two weeks.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL J.
THE HON'BLE RAJENDRA KUMAR -IV J.

FIRST APPEAL No.210 of 2011

Khalid Mukhtar ...Appellant

Versus

M/S Pradishiya Industrial & Investment Corporation Ltd. & Anr. ...Respondents

Counsel for the Appellant:
Sri Manish Goyal, Sri Raj Kumar Singh Chauhan, Ms. Ankita Jain

Counsel for the Respondents:
Sri Anurag Khanna, Sri Pranjal Mehrotra

A. First Appeal - Section 96 C.P.C. - Section 446 of Company Act 1956- Suit to declare that defendant / PIICUP had lost security and mortgage due to bar of limitation. PIICUP not entitled to enforce guarantee - Winding up order passed by Company Judge. Held:- Section 446 bars any suit except with leave of Court -Principle laid down - It is open to challenge recovery proceeding without impleading principal debtor, Section 446 would not come in picture - Appellant impleaded principal debtor and attempted to get determination of his liability - Court below rightly held the suit is barred by Section 446-First Appeal dismissed.

B. Section Contract Act. Liability of Guarantor - PIICUP initiated recovery proceedings against Guarantor without initiating proceeding against Principal Debtor - Held - Guarantor's liability is co-extensive with Principal Debtor.(E-1)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Ms. Ankita Jain, learned counsel for appellant. None appeared on behalf of respondents, hence we proceed to decide this appeal ex-parte.

2. This is an appeal under Section 96 of Code of Civil Procedure (hereinafter referred to as "CPC") arising from judgment dated 04.03.2011 passed by Ms. Rakhi Dixit, Additional Civil Judge (Senior Division), Court No. 2, Aligarh dismissing appellant's Original Suit (hereinafter referred to as "OS") No. 523 of 2002 on the ground that it is not maintainable and barred by Section 446 of Companies Act, 1956 (hereinafter referred to as "Act, 1956").

3. Facts in brief, giving rise to present appeal, are that plaintiff-appellant, Khalid Mukhtar (hereinafter referred to as "appellant") instituted above suit in the Court of Civil Judge (Senior Division), Aligarh seeking a declaration that defendant-1, i.e. M/s Pradeshiya Industrial & Investment Corporation of U.P. Ltd. *(hereinafter referred to as "PICUP")*, has lost security of Company and their mortgage in the matter of enforcement of guarantee due to bar of limitation, therefore, PICUP is not entitled to enforce guarantee in August, 1983 against appellant regarding alleged debt of defendant-2 i.e. M/s Buckeye Batteries Private Limited (hereinafter referred to as "Principal Debtor"). Appellant has also prayed for issue of a decree of permanent prohibitory injunction restraining PICUP from enforcement of guarantee in regard to Principal Debtor, against appellant.

4. The case set up in the plaint is that PICUP sanctioned a term loan of Rs. 30,000,00/- to Principal Debtor in respect whereof appellant stood Guarantor and executed, in August, 1983, legal mortgage/equitable mortgage and deed of hypothecation in favour of PICUP. The actual amount of loan, disbursed by PICUP, was Rs. 29,75,000/-. Aforesaid term loan was sanctioned and disbursed to enable Principal Debtor to set up a project of manufacturing of Dry Cells at Sikandarpur, District Aligarh. PICUP was also required to secure repayment of loan amount by hypothecation of movable legal mortgage/ equitable mortgage by deposit of title deeds of property of Principal Debtor. However, it failed to validly create any such mortgage or hypothecation. There was no compliance of Sections 125 of Act, 1956. Principal Debtor failed to satisfy its other liabilities, hence, a winding up Petition No. 29 of

1993 was filed on 22.11.1993 wherein a winding up order was passed by Company Judge on 17.04.1995. Once a winding up order is passed, Section 446 bars any suit or legal proceedings against such company except by leave of Court. Defendant-1, however, since failed to take appropriate steps due to its negligence against Principal Debtor or its property, is not entitled to enforce guarantee against appellant. Further, a Guarantor is liable only to the extent of liability of company and not beyond that. PICUP having lost its charge due to non compliance of Section 125 of Act, 1956, has made its position that of unsecured creditor. In any case, proceedings for recovery could have been initiated within three years from the date of default, under Articles 36 and 37 of Limitation Act, 1963 *(hereinafter referred to as "Act, 1963"),* hence claim of Principal Debtor cannot be enforced against appellant since it is now barred by limitation. The period of limitation could not have been extended either by Principal Debtor or Guarantor and moreso, it was never extended. PICUP once has lost its security due to negligence and careless etc., Guarantor also stood discharged under Section 139 of Contract Act, 1872 *(hereinafter referred to as "Act, 1872").* The guarantee document dated 16.09.1983 could be operative only against secured items.

5. PICUP contested the matter by filing written statement stating that loan was secured by way of mortgage of immovable property, hypothecation of movable assets of company and also personal bond of guarantee executed by appellant for due repayment of outstanding dues of PICUP. PICUP proceeded against company but entitled to proceed against Guarantor also, since liability of Guarantor is co-extensive with that of Principal Debtor and PICUP is free to proceed against either of the two or both. PICUP is also entitled to initiate recovery proceedings under the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972 *(hereinafter referred to as "Act, 1972").* Appellant can not wriggle out of guarantee bond only on the ground that PICUP is not able to recover its dues from Principal Debtor. In additional pleas, it is also pleaded that Principal Debtor, i.e. Company was promoted by appellant, Khalid Mukhtar himself, along with Dr. Aslam Qadeer and Khurseed Ahmad Khan for setting up a project for manufacturing dry cells with an installed capacity of 180 lacs IR 20 type cells and 50 lacs IR 6 type cells at Sikandarpur, District Aligarh. Loan agreement was executed by Principal Debtor on 16.09.1983. Deed of hypothecation is dated 03.10.1983 and equitable mortgage was also created on 03.10.1983 in respect of immovable properties of project located at Village Sikandarpur, Chherat, Pargana, Tehsil-Koil, District- Aligarh. PICUP also filed charge with Registrar of Company, Kanpur on 21.10.1983 vide Form No. 8 and also deposited original money receipt issued from the office of Registrar of Company, Kanpur as a token of filing of PICUP's charge with said Registrar. Besides the Company i.e. Principal Debtor, Sri Aslam Qadeer, appellant Khalid Mukhtar and Sri Khursheed Alam Khan have also executed personal bond of guarantee dated 16.09.1983, to ensure repayment of PICUP's loan availed by Principal Debtor. Principal Debtor did not perform well whereupon PICUP in its 77th Executive Committee meeting granted a rehabilitation package to Company, by way of funding of interest and re-schedulement of installment of loan. Still

performance of Principal Debtor did not improve, therefore, a notice under Section 29 of State Financial Corporation Act, 1951 *(hereinafter referred to as "SFC Act, 1951")* was issued and physical possession of Principal Debtor's Company was taken on 23.08.1995. However, in compliance of Company Judge's order dated 29.11.1995, passed in Company Petition No. 29 of 1993, possession of unit was handed over to Official Liquidator on 20.12.1995. The issue of charge claimed by Canara Bank as first charge is still pending consideration in Special Appeal No. 618 of 1997, filed by PICUP, against order dated 23.10.1997 passed by Company Judge in Company Petition No. 29 of 1993 wherein an interim order has also been passed by a Division Bench. PICUP issued a recovery certificate dated 19.03.2001 for recovery of outstanding dues from Guarantor. Appellant challenged the same before Company Judge vide Misc. Company Application No. 1 of 2001 in Company Petition No. 29 of 1993 but the same has been rejected by Company Judge vide order dated 19.03.2002. This order has also been challenged by appellant in Special Appeal No. 441 of 2002 wherein a conditional interim order was passed by this Court on 19.04.2002 directing appellant to deposit Rs. 20 lacs in two equal installments, by 31.05.2002 and 30.06.2002, but the said order has not been complied with and, therefore, interim-order stood vacated. Suit in question, as filed, by appellant is nothing but an abuse of process of law and appellant is bound by its guarantee bond. PICUP is entitled to recover the dues of Principal Debtor from appellant who is a Guarantor. The account position of outstanding dues of Principal Debtor as on 31.07.2002, given in para-26 of written statement, is Rs. 112.81 lacs, comprising of principal outstanding amount of Rs. 16.78 lacs and interest of Rs. 96.03 lacs.

6. Trial Court formulated eight issues as under:-

''1. क्या वादी इस बात की घोषणा प्राप्त करने का अधिकारी है कि प्रतिवादी संख्या 1 के द्वारा दाखिल की गयी सिक्योरिटी समाप्त हो गयी है एवं मारगेज काल बाधित होने के कारण शून्य व अप्रभावी है?

2. क्या वादी कम्पनीज के विरूद्ध अन्तर्गत धारा 446 कम्पनीज एक्ट की वसूली का कोई मामला वांछनीय है एवं प्रतिवादी संख्या 1 वादी के विरूद्ध गारंटी देने के सक्षम है?

3. वादी प्रतिवादी संख्या 1 का रिकवरी वाद धारा 3 लिमिटेशन एक्ट से बाधित है यदि हां तो प्रभाव?

4. क्या वाद धारा 34, 38 व 41 विशिष्ट अनुतोष अधिनियम से बाधित है?

5. क्या वाद धारा 115 साक्ष्य अधिनियम से बाधित है?

6. क्या वाद का मूल्यांकन कम किया गया है एवं प्रदत्त न्यायालय शुल्क अपर्याप्त है?

7. क्या वादी किसी अन्य अनुतोष को पाने का अधिकारी है?

8. क्या वादी का वाद धारा 446 कम्पनीज एक्ट 1956 से बाधित है?''

"1. Whether the plaintiff is entitled to be awarded with a declaration that the security submitted by defendant no 1 has become ineffective and the mortgage being time-barred is null and void?

2. Whether any recovery case u/s 446 of the Companies Act is pending against the plaintiff companies and that the defendant no 1 is capable to give guarantee against the plaintiff?

3. Whether the recovery suit of plaintiff no 1 is barred by Section 3 of the Limitation Act. If so, its effect?

4. Whether the suit is barred by Sections 34, 38 and 41 of the Specific Relief Act?

5. Whether suit is barred by Section 115 of the Evidence Act?

6. Whether suit has been undervalued and Court fee paid is insufficient?

7. Whether the plaintiff is entitled to receive any other relief?

8. Whether plaintiff's suit is barred by Section 446 of the Companies Act, 1956?" (English Translation by Court)

7. With the consent of parties, issue-8 was taken as preliminary issue. Trial Court has held that suit as framed interferes with the status of Principal Debtor who was also impleaded as opposite party-2 and in respect whereof a winding up order has been passed in Company Petition, hence, no suit is maintainable unless a permission has been obtained from Company Court.

8. Thus, the only point for determination, which has arisen in this appeal is, "whether Court below has rightly held that suit is barred by Section 446 or not".

9. Counsel for appellant contended that appellant's application seeking declaration has already been rejected by Company Judge vide order dated 19.03.2002 and the said judgment is reported in 2002 (2) AWC 1458 (Buckeye Batteries (P.) Ltd. vs. Official Liquidators and others) therefore, appellant has no other remedy but to file suit since Section 446 is not attracted in this case.

10. I find that appellant did not file an application seeking permission of Court to file a suit against Principal Debtor. In fact, in the application, filed by appellant before Company Judge, it challenged recovery certificate dated 19.03.2001 and sought a declaration against recovery of dues of Principal Debtor from appellant. Thus, Company Judge formulated the question to be decided on the application of appellant, as quoted in para-10, as under:-

"10. The Court has thus been called upon to decide ***whether the aforesaid application under Section 446 of the Companies Act, at the instance of the guarantor is maintainable and whether a Company Court in winding up proceedings can stay the recovery and adjudicate the question of law of guarantor of the company (in liq.) as against the creditor."***
(Emphasis added)

11. The aforesaid prayer was made invoking principle that first an attempt should be made to realise outstanding dues from Principal Debtor. Appellant also sought to invoke the principal of *'quia timet'*. Company Court answered the question by observing in para-20 of judgment that basically, object of application is to determine right of Guarantor as executors of a surety to the debts of Company; and since it is open to PICUP to recover its dues from Guarantor, the Guarantor is also entitled in law if so permitted to defend itself upon taking pleas open to it but it cannot be said that determination of liability of a Guarantor is incidental to the proceeding of winding up. Whether Guarantor is liable to indemnify creditor and extent of such liability towards PICUP is not a matter which can be said to be rising out of winding up proceedings, or is necessary to be decided by a Company Court for effective winding up of a company in liquidation. Accordingly, Company Judge rejected application of appellant.

12. The observations that appellant can defend itself by taking such plea as open in

law does not mean that learned Company Judge permitted appellant to get its liability settled against Company which is already under the process of winding up by impleading Company as defendant and without seeking any permission from Court. The two things are different. It was always open to appellant to file a suit against recovery proceedings initiated by PICUP challenging said recovery proceedings but without impleading Principal Debtor in that case. In such case, Section 446 obviously would not be come in picture but since in the present case, appellant not only has impleaded Principal Debtor, as defendant-2, but also attempted to get determination of his liability vis-a-vis obligations and property of Company, in my view, Court below has rightly held that suit was barred by Section 446 of Act, 1956.

13. In fact, after the order was passed by learned Company Judge, law has further developed with respect to liability of Guarantor and in respect of recovery proceedings initiated by PICUP against Guarantor by taking recourse to the provisions of U.P. Act, 1972, without initiating any such proceedings against Principal Debtor. A larger Bench in **Sobran Singh Vs. State of U.P. & Others (2014) 10 SCC 799,** held that it can do so since Guarantor's liability is co-extensive with Principal Debtor and Guarantor cannot absolve from its liability on the ground that financial institution failed to take timely steps for recovery of its dues from Principal Debtor.

14. The above point for determination is accordingly answered against appellant.

15. Appeal lacks merit and is, accordingly, dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2019
BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

FIRST APPEAL No733 of 2017
Alongwith

212 of 2017,341 of 2018, 345 of 2018,346 of 2018, 262 of 2019, 269 of 2019, 270 of 2019, 274 of 2019, 347 of 2019, 350 of 2019, 351 of 2019, 352 of 2019, 353 of 2019, 387 of 2019, 388 of 2019, 389 of 2019, 390 of 2019, 354 of 2019.

Agra Development Authority ...Appellant
Versus
Nafisa Begum &Ors. ...Respondents

Counsel for the Appellant:
Sri Jagannath Maurya, Sri M.C. Chaturvedi, Sri Suresh Chandra Dwivedi.

Counsel for the Respondents:
Sri Rahul Agarwal, Sri Alok Kumar Tripathi, Sri Kishan Jain.

A. *Ratio decidendi* - is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based - It is essence of a decision - Every observation and various observations made in the judgment is not the *ratio decidendi.* (Para 47 [i])

B. Land Acquisition Act, 1894 – Section 23 (1) - relevant date to determine market value for the purpose of compensation under Section 23(1) - is the date of gazetter publication of the notification under Section 4(1) of the Act - date of publication of notice is not relevant. (Para 47 (ii))

C. Market value of land acquired under the Act has to be determined by the court as on the date of the publication of the notification in the Gazette under Section 4(1) of the Act. (Para 47 [iii])

D. Fair market value of the acquired land is required to be determined on the basis of the market rate of the adjacent lands similarly situated to the acquired lands prevailing on the date of acquisition or/ and prior to acquisition but not subsequent to the date of acquisition. (Para 47 [iii])

E. Determination of market value- Market value is determined with reference to the open market sale - of comparable land in the neighbourhood of a willing seller to a willing buyer on or before the date of preliminary notification under Section 4(1) of the Act- Not safe to rely upon an auction sale, except where an open auction sale is the only comparable sale transaction available.

(Para 47 [xi])

F. Sale deeds pertaining to portion of lands which are subject to acquisition is most relevant piece of evidence for assessing the market value of the acquired lands.

(Para 47 [xiv])

G. Market value of wholly developed commercial plots cannot be compared with the under-developed or undeveloped or agricultural land although it may be adjoining or situated at a little distance. (Para 47 [xvi])

H. Exemplars - general rule highest of the exemplars, if it is a bonafide transaction has to be considered and accepted. (Para 47 [viii])

Held :-Judgments of the reference court in rejecting the sale deed exemplars and relying upon bid/ lease deeds of dates subsequent to acquisition, is wholly erroneous, illegal, contrary to the mandate of Section 23(1) of the Act

Subsequent auction/ lease deeds of developed commercial plots of 'Taj Nagari Phase-I Scheme' cannot be made basis to determine market value of the previously acquired land for 'Taj Nagari Phase-II Scheme' (Para 47 [xvii])

Matters remitted back to the reference court to decide the references afresh in accordance with law.

First Appeals allowed. Cross-objections disposed off.

List of cases cited:-

1. Executive Engineer Karnatka Housing Board vs. Land Acquisition Officer and others, {(2011) 2 SCC 246 (Paras-1, 4, 5 and 6),
2. Kolkata Metropolitan Development Authority vs. Gobinda Chandra Makal and another {(2011) 9 SCC 207 (Paras-31 to 36),

3. Major General Kapil Mehra vs. Union of India and another {(2015) 2 SCC 262 (Paras-25, 26 and 27)},

4. Bhupal Singh and others vs. State of Haryana {(2015) 5 SCC 801},

5. Maya Devi (dead) through legal representatives and others vs. State of Haryana and another {(2018) 2 SCC 474 (paras-4 and 5)},

6. Pyare Mohan Lal vs. State of Jharkhand, {(2010) 10 SCC 693},

7. Lal Chand vs. Union of India, {(2009) 15 SCC 769},

8. T.S. Ramchandra Shetty vs. Chairman Karnataka Housing Board and others {(2009) 14 SCC 334},

9. Ranvir Singh and others vs. Union of India {(2005)12 SCC 59},

10. Bangaru Narshinga Rao, Naidu and others vs. Revenue Divisional Officer Vizianagaram, {(1980) 1 SCC 575},

11. Deo Karan and others vs. State of U.P. and others 2017 (122) ALR 78: 2017 (1) ADJ 389

12. First Appeal No.467 of 2006 (Ramphal and others vs. State of U.P. and others) judgment dated 25.03.2019 in

13. P. Ram Reddy and others Vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad& others (1995) 2 SCC 305 (para 8);

14. Chandrabhan and others Vs. Ghaziabad Development Authority and others (2015) 15 SCC 343

15. Union of India and another Vs. K.S. Subramanian (1976) 3 SCC 677 (para 12).

16. Lal Chand Vs. Union of India and another (2009) 15 SCC 769 (paras 14 & 15),

17. Land Acquisition Officer & Mandal Revenue Officer Vs. Narasaiah (2001) 3 SCC 530 (para 14),

18. Major General Kapil Mehra and others Vs. Union of India and another (2015) 2 SCC 262 (paras 16,17 & 21)

19. Haryana State Industrial Development Corporation Vs. Pran Sukh and others (2010) 11 SCC 175 (paras 10 & 22).

20. V.N. Devadoss vs. Chief Revenue Control Officer and Inspector and others {(2009) 7 SCC 438}.

21. Satish vs. State of U.P. {(2009) 14 SCC 758 (Par-42)},

22. Anjana Molu Desai vs. State of Goa, {(2010) 13 SCC 710 (para-13)},

23. Chindha Thakre Patil vs. S.L.A.O. {(2011) 10 SCC 787 (para-15)},

24. Mehrawal Khewaji Trust (Regd.) vs. State of Punjab, {(2012) 5 SCC 432}

25. Mohd. Yusuf and others vs. State of Haryana and others, AIR 2018 SC 2248.

26. Haryana State Industry Development Corporation vs. Pranshukh {(2010) 11 sCC 175 (paras-20 and 22)},

27. Udho Das vs. State of Haryana, {(2010) 12 SCC 51 (para-21)},

28. Anjana Molu Desai vs. State of Goa, {(2010) 13 SCC 710 (para-20)}.

29. Mehta Ravindrarai Ajeet Rai vs. State of Gujrat, {(1989) 4 SCC 250 (paras-4 and 5)}, State of U.P. vs. Major Jitendra Kumar and others, AIR 1982 SC 876 (para-3),

30. Chamanlal Hargovind Das vs. S.L.A.O., {(1988) 3 SCC 751 (para-9)},

31. Union of India vs. Dyagala Devamma and others, AIR 2018 SC 3511.

32. N. Narasimhaiah vs. State of Karnataka, 1996 (3) SCC 88 (Para-17),

33. Usha Stud and Agricultural Farms Private Limited and others vs. State of Haryana and others, 2013 (4) SCC 210 (paras-19 to 24),

34. Surinder Singh Brar and others vs. Union of India and others, 2013 (1) SCC 403 (para-75),

35. V.K.M. Kattha Industries Private Limited vs. State of Haryana and others, 2013 (9) SCC 338 (para-14)

36. Chandra Bhan vs. GhaziabadDevelopment Authority and others, (2015) 15 SCC 343 (paras-19 to 21),

37. Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited, JT 2014 (1) SC 1 (paras-28 to 36)

38. Delhi Administration (Now NCT of Delhi) vs. Manoharlal, AIR 2002 SC 3088 (para-5)

39. M/s Amar Nath Om Parkash and others vs. State of Punjab and others, AIR 1985 SC 218 (paras-8, 11 and 12),

40. State of Orissa vs. Sudhansu Sekhar Misra and others, AIR 1968 SC 647,

41. Union of India and others vs. Dharnwanti Devi and others, (1996) 6 SCC 44

42. State of Orissa and others vs. Md. Illiyas, JT 2005 (10) SC 64 (para-14).

43. Brig. Sahib Singh Kalha Vs. Amritsar Improvement Trust, (1982) 1 SCC 419

44.Administrator General of West Bengal Vs. Collector, Varanasi, (1988) 2 SCC 150

45. Land Acquisition Officer Revenue Divisional Officer, Chottor vs. L. Kamalamma (Smt.) Dead by and others, (1998) 2 SCC 385,

46. Land Acquisition Officer vs. Nookala Rajamallu and others, (2003) 12 SCC 334,

47. V. Hanumantha Reddy (Dead) Versus Land Acquisition Officer, (2003) 12 SCC 642,

48. Viluben Jhalejar Contractor Versus State of Gujarat, (2005) 4 SCC 789, (20

49. Atma Singh Versus State of Haryana and another, (2008)2 SCC 568

50.Andhra Pradesh Housing Board Versus K. Manohar Reddy and others, (2010) 12 SCC 707,

51. SpecialLand Acquisition Officer and another Versus M.K. Rafiq Sahib, (2011) 7 SCC 714,

52. Major General Kapil Mehra Vs. Union of India and another (2015)2 SCC 262,

53. Ashok Kumar and another Vs. State of Haryana, (2016) 4 SCC 544 (Para-12)

54. Raj Kumar vs. HaryanaState, (2007) 7 SCC 609

55. Executive Engineer, Karnatka Housing Board vs. Land Acquisition Officers and others, (2011) 2 SCC 246 (paras-5 and 6)

56. Natural Resources Allocation, In Re, Special Reference No. 1 of 2012 [JT 2012 (10) SC 145: 2012 (10) SCC 1]

57. Civil Appeal No.4879 of 2018 {New Okhla Industrial Development Authority (NOIDA) VS. Deo Karan &Ors.} decided on 1.5.2018 (SC)(E-5)

(Delivered by Hon'ble Surya Prakash Kesarwani J.)

1. Heard Sri M.C. Chaturvedi, learned Senior Advocate assisted by Sri J.N. Maurya and Sri Suresh Chandra Dwivedi, learned counsels for the appellants and Sri Rahul Agarwal alongwith Sri Ashok Kumar Tripathi and Sri Kishan Jain, learned counsels for the claimants-respondents.

2. This batch of first appeals and cross objections arise from one and the same land acquisition notification for land of village Basai Mustaqil and involve common facts and questions, therefore, with the consent of the learned counsels for the parties, all these first appeals have been heard together **treating the First Appeal No.733 of 2017 as the leading first appeal.** These first appeals were heard on several occasions at length including on 13.05.2019, 15.05.2019, 20.05.2019, 27.05.2019 and 28.05.2019. In First Appeal No.733 of 2017, appellants and respondents, both have filed paper books. **Cross objections have been filed by the claimants-respondents in First Appeal Nos.212 of 2017, 387 of 2019, 262 of 2019, 269 of 2019, 270 of 2019, 274 of 2019 and 347 of 2019.**

FACTS

3. Briefly stated facts of the present case are that by notification under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') dated 30.01.1989 published in the official gazette on 30.01.1989 and subsequently, published in local newspapers on 14.02.1989 and 15.02.1989, land measuring **734.50 acres** of villages **Basai Mustquil,** Tora, Chamroli and Lakavali, Tehsil and District Agra, falling partly within municipal limit *(chungi ander)* and partly outside the municipal limit *(chungi bahar)* **was acquired for "Taj Nagari Phase-II Scheme"** of the Agra

Development Authority (for short 'ADA'). Public notice of the acquisition was published by the Special Land Acquisition Officer (for short the SLAO) on 04.04.1989. Notification under Section 6(1) read with Section 17(1) of the Act was issued on 08.02.1990. Possession was taken on 30.03.1991.

4. By the award dated 29.02.1992, the SLAO determined compensation of all the acquired land of *chungi ander* @ Rs.130/- per square yard and for all the acquired land of *chungi bahar* @ Rs.97.50 per square yard.

5. Dissatisfied with the award, the appellant ADA filed a Writ Petition No.31481 of 1992, which was dismissed by this Court by order dated 05.01.2000. Aggrieved, the appellant ADA filed S.L.P. No.7561 of 2000, which was allowed by Hon'ble Supreme Court by judgment dated 07.02.2001 on the ground that the appellant- ADA had no notice under Section 50 of the Act for adducing evidence and, therefore, the matter was remitted back to the SLAO for making award afresh.

6. **On remand, the SLAO made his award on 05.11.2001 determining market value for the acquired land of chungi ander @ Rs.49/- per square yard and for the acquired land of chungi bahar @ Rs.39.20 per square yard.** Dissatisfied with the offer made by the award dated 05.11.2001 passed by the SLAO, several land owners filed references under Section 18 of the Act which have been decided by the impugned judgment dated 08.02.2017 in leading Land Acquisition Case No.47 of 2004 (Nafisha Begum and others vs. The Collector, Agra and others) passed by Sri Sanjeev Fauzdar, Additional District Judge/ Presiding Officer, Nagar Mahapalika (Nagar Nigam) Tribunal, Agra. **The reference court determined the market value for the acquired land of chungi ander @ Rs.610/- per square yard and for the acquired land of chungi bahar @ Rs.405/- per square yard. Aggrieved with this judgment, the appellant- ADA has filed the present bunch of first appeals.**

7. **All these first appeals involve acquisition of land of village Basai Mustaquil.** Particulars of land acquisition references and the acquired khasra plot numbers which are subject matter of first appeals, are as under:

Sl. No.	First Appeal No.	Arising from LAR No.	Claimant's acquired Khasra Plot No. (subject matter of Appeals)
1	733 of 2017	47 of 2004 Nafisha Begam & others Vs. Collector	473
2	212 of 2017	968 of 2003 Kalua & Ors Vs. Collector	1994,1997,2000
3	341 of 2018	979 of 2003 Kanahaiya Lal Vs. Collector	274
4	345 of 2018	365 of 2004 Doctors Sahkari Grih Nirman Samiti Vs.Collector	185M,186M,189M,190Ka
5	346 of 2018	373 of 2004 Sher Singh Vs. Collector	327
6	262 of 2019	526 of 2004 Raj Grih Sahkari Awas Samiti Vs. Collector	236
7	**269 of 2019**	525 of 2004 Sri Satyanarayan Jain Vs. State	**203**
8	270 of 2019	361 of 2004 Smt. Rajni Verma Vs.	1429,1431

			Collector	
9	274	2019	of	363 of 2004 Smt. Rajni Verma Vs. Collector	1209,1219
10	347	2019	of	375 of 2004 Raj Grih Sahkari Awas Samiti Vs. Collector	364
11	350	2019	of	111 of 2008 Narendra Prasad & Ors Vs. Collector	225
12	351	2019	of	437 of 2004 Surajbhan & Ors Vs. Collector	340
13	352	2019	of	106 of 2008 Mahendra Kumar & Ors Vs. Collector Agra	248,2043Ka,2082 Ka,2083Ka,2084 ka,2087 Ka,2115 Ka,2128 Ka, 2129Ka,2136 Ka,2137 Ka
14	353	2019	of	977 of 2003 Sultan Khan &Ors. Vs. Collector	450
15	387	2019	of	44 of 2004 Sri Munna Lal and another Vs. Collector	273
16	388	2019	of	972 of 2003 Smt. Premwati & Ors Vs. Collector	345
17	389	2019	of	421 of 2004 Bhed Singh & Ors Vs. Collector	289,288,290,291
18	390	2019	of	128 of 2004 Munshi Lal &Ors. Vs. Collector & Ors	251
19	354	2019	of	46 of 2004 Natthilal and Amit Mittal vs. State	338

8. Before the reference court, the appellants have filed in L.A.R. No.47 of 2004, the following sale deed exemplars of land of village Basai Mustaqil:

First Appeal No. (arising from the judgment in the above L.A.R.)	**Sale Deed Exemplar and Date**	**Buye r and Seller**	**Khas ra Plot No.**	**Area**	**Consideration**	**Rate(per sq. meter) Rs.**
733 of 2017	109C/ 24.2.88	Mawasi/Kanhaiya Kunj Sahkari Awas Samiti	141	3 bighas (6912 sq. meters	240000/-	34.72
	110C/ 28.5.88	Munesh Garg/ Madhuban Nagar Sahkari Awas Samiti	**203**	2-12-12 bigha : 7248.93 square yard	2 lac	27.59
	111C/ 28.5.88	Munesh Garg/ Madhuban Nagar Sahkari Awas Samiti	453	2-11-17 bigha	2 lacs	
	112C/ 8.6.88	Nathi Lal/Darbhesh Sahkari Awas Samiti	180	3-0-12 bigha	1,65,000/-	
	113C/ 13.10.88	Angad/Baldev Sahkari Awas	1330, 1327	1-6-0 bigha	84,500/-	

	Samiti			
114C/22.10.88	Babu Lal/Sri Ram Sahkari Awas Samiti	1228, 1260	0-6-0 bigha	21,000/-
115C/15.9.88	Panchsheel Sahkari Awas Samiti/Nirmal Sahkari Awas Samiti	**1998, 1999**	1-16-0 bigha	1,33,200/-
116C/11.10.88	Shabhudin/ Surajmakhi Gramin Sahakari Awas Samiti	383	1-0-0	50,000/-
117C/15.2.88	Adarsh Sahkari Grih Nirman Samiti/Maya Nagar Sahkari Awas Samiti	1806, 1890, 1778, 1779, 1789	10 biswa	50,000/-

9. With the consent of all the learned counsels for the parties, the following questions were framed on 13.05.2019 for determination in this bunch of first appeals:-

"Questions"

(a) Whether the date 30.01.1989 when the notification under Section 4(1) of the Act was published in the official gazette or the date 04.04.1989 when the public notice was published by the SLAO, shall be the relevant date for determination of compensation of the market value of the acquired land?

(b) Whether the market value of the acquired land determined by the court below is lawful and adequate?

(c) Whether consideration received by ADA in auction sale of developed plots in "Taj Nagari Phase-I Scheme", can be made basis for determination of market value of the land acquired by the appellant -ADA for the scheme in question i.e. "Taj Nagari Phase-II" particularly when sale deed exemplars were filed in evidence by the ADA for determination of market value of the acquired land under the present acquisition, i.e. "Taj Nagari Phase-II"."

SUBMISSIONS ON BEHALF OF THE APPELLANTS:-

10. Sri M.C. Chaturvedi, learned senior advocate appearing for the appellants submits as under:

(i) Market value of land acquired under the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') as per principles laid down in Section 23 of the Act, is to be determined as on the date of publication of Notification under Section 4(1) of the Act. Therefore, the date 30.01.1989, when the Notification under Section 4(1) of the Act was published in the Gazette, shall be the relevant date for determination of the market value under Section 23 (1) of the

Act and not the date of public notice given by the Special Land Acquisition Officer i.e. 04.04.1989. Reliance is placed on the judgment of Deo Karan & others Vs. State of U.P. 2017(1) ADJ 389 (para 13, 14 and 15) and judgment in First Appeal No.467 of 2006 decided on 25.3.2019 (paras 20, 23, 25 and 27). He also refers to the judgments of Hon'ble Supreme Court relied in these two judgments.

(ii) The Reference Court has illegally relied on auction sale of developed commercial plots of "Taj Nagari Phase-I Scheme" which can not be made basis to determine market value of the huge land measuring 734.50 acres for developing "Taj Nagari Phase-II Scheme".

(iii) Consideration received by Agra Development Authority for lease of developed commercial plots in the year 1989 of "Taj Nagari Phase-I Scheme" can not be made basis to determine market value of totally undeveloped agricultural land acquired by Notification under Section 4(1) of the Act dated 30.01.1989. Besides this the lease/sales of plot of "Taj Nagari Phase-I Scheme" as relied by the court below are subsequent to the date of the present acquisition.

(iv) The appellants have led documentary evidences in the form of sale deed exemplars which include certain sale deeds of land of Khasra plots which were subsequently acquired under the present acquisition. Thus, these sale deeds filed in evidence were relevant and were good exemplars to determine the market value of land acquired under the present acquisition but the court below has committed a manifest error of law and facts not to rely upon these sale deeds exemplars.

(v) No sale deed exemplar was filed in evidence by the claimants-respondents.

(vi) The reference court committed manifest error of law to rely upon lease deed dated 11.06.1993 of plot No.1 and lease deed dated 15.07.1993 of plot No.5 of "Taj Nagari Phase-I" Scheme as instances for determining market value of the land acquired under the present acquisition, i.e. land acquisition notification 30.01.1989, inasmuch as the land of "Taj Nagari Phase-I" Scheme was acquired in the year 1983 and more than 40% land thereof was left for parks and roads etc. and huge investment was made by the appellants to construct roads, parks, electric line and drainage etc. Huge staff was employed to supervise the work. Larger part of the "Taj Nagari Phase-I" Scheme developed by the appellants was for residential purposes. Only few plots of very prime location were earmarked for commercial purposes, i.e. for hotels etc. Therefore, auction sale of the aforesaid developed commercial plot No.1 and 5 of "Taj Nagari Phase-I" Scheme, cannot be compared with the land of the present acquisition whereby agricultural land was acquired in the year 1989. That apart, as per terms of the lease deed of the aforesaid commercial plot Nos.1 and 5, the auction amount was to be paid by the purchaser in several instalments. Thus, the reference court has committed a manifest error of law and facts to treat the lease deeds dated 11.06.1993 and 15.07.1993 as exemplars to determine the market value of the land acquired under the present acquisition dated 30.01.1989.

(vii) The judgment of the reference court is contrary to the law settled by Hon'ble Supreme court in **Chamanlal Hargovind Das vs. S.L.A.O., (1988) 3 SCC 751 : AIR 1988 SC 1652.** The reference court completely failed to follow the guiding principles of

Section 23 of the Act and the principles laid down in Chamanlal Hargovind Das (supra) for determination of market value.

(viii) The aforesaid two commercial plots leased on 11.06.1993 and 15.07.1993 of "Taj Nagari Phase-I" Scheme are situate from the land acquired under the present acquisition and the claimants' land is situate far away from the link road.

(ix) The market value means the price which a willing purchaser would pay to the willing seller for the property having due regards to its existing conditions on the relevant date excluding any advantage which may accrue in future in consequence of carrying out of the developed scheme for which the property is being acquired but the reference court completely ignored the settled principles of law and awarded exorbitant compensation @ Rs.405/- per square yard, which is wholly illegal and arbitrary.

(x) The relevant sale deed exemplars including the sale deed exemplar of a land acquired under the present acquisition, were filed in evidence by the appellants but the reference court committed a manifest error of law and facts in not giving any weight to it and rely on wholly irrelevant exemplars being lease deeds dated 11.06.1993 and 15.07.1993 relating to all commercial plots of "Taj Nagari Phase-I" Scheme.

(xi) The claimants-respondents have completely failed to adduce any evidence to establish either the compensation awarded by the S.L.A.O. is insufficient or that the sale deed exemplars relied by the appellants herein are not good exemplars. The respondents could not demonstrate by any evidence that the sale deed exemplars filed in evidence by the appellants before the reference court are not good exemplars.

(xii) The written submissions filed by the appellants were ignored by the reference court.

(xiii) The evidence of DW-1 in L.A.R. No.47 of 2004 (subject matter of First Appeal No.733 of 2017), was the evidence of Lekhpal in which he clearly stated on 21/22.12.2016 that the plot No.473 was an agricultural land.

(xiv) The finding of the reference court that the sale deed exemplars filed in evidence by the appellants do not reflect true market value, is wholly baseless and without any foundation or evidence. Therefore, the finding is perverse.

(xv) The claimants' land at the time of acquisition was used for agricultural purpose and it was totally undeveloped.

(xvi) In any case, even if there is an auction of undeveloped similar agricultural land, it shall not furnish a safe guide for determination of market value.

(xvi) Without prejudice to the submissions made above, the auction lease exemplars dated 11.06.1993 and 15.07.1993 and other auction exemplars were subsequent to the dates of present acquisition. Therefore, apart from the fact that these auction/ leases were developed land having no similarity to the acquired land yet it has no relevance for the purposes of the present acquisition inasmuch as these auction/ lease deeds

were of a date subsequent to the present acquisition.

11. In support of his submissions, Sri M.C. Chaturvedi, learned senior advocate relied upon the provisions of Section 23 of the Act and the law laid down by Hon'ble Supreme Court in Executive Engineer Karnatka Housing Board vs. Land Acquisition Officer and others, {(2011) 2 SCC 246 (Paras-1, 4, 5 and 6), Kolkata Metropolitan Development Authority vs. Gobinda Chandra Makal and another {(2011) 9 SCC 207 (Paras-31 to 36), Major General Kapil Mehra vs. Union of India and another {(2015) 2 SCC 262 (Paras-25, 26 and 27)}, Bhupal Singh and others vs. State of Haryana {(2015) 5 SCC 801}, Maya Devi (dead) through legal representatives and others vs. State of Haryana and another {(2018) 2 SCC 474 (paras-4 and 5)}, Pyare Mohan Lal vs. State of Jharkhand, {(2010) 10 SCC 693}, Lal Chand vs. Union of India, {(2009) 15 SCC 769}, T.S. Ramchandra Shetty vs. Chairman Karnataka Housing Board and others {(2009) 14 SCC 334}, Ranvir Singh and others vs. Union of India {(2005)12 SCC 59}, Bangaru Narshinga Rao, Naidu and others vs. Revenue Divisional Officer Vizianagaram, {(1980) 1 SCC 575}, and the judgments of this Court in Deo Karan and others vs. State of U.P. and others 2017 (122) ALR 78 : 2017 (1) ADJ 389 and judgment dated 25.03.2019 in First Appeal No.467 of 2006 (Ramphal and others vs. State of U.P. and others).

SUBMISSIONS ON BEHALF OF CLAIMANTS RESPONDENTS:-

12. Learned counsel for the claimants-respondents submits as under:-

(i) On the point of "relevant date" all the judgments relied by the appellants are per incuriam since it is based on judgments of Hon'ble Supreme Court in which a three Judges Bench Judgment in Chandrabhan's case was not noticed. The relevant date would be the last date of publication of Notification under Section 4(1) of the Act or the date of publication of notice by the Collector which ever is later. To support his submissions he referred to the provisions of Section 23(1) read with Section 4(1) of the Act and the judgmnts of Hon'ble Supreme Court in P. Ram Reddy and others Vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad & others (1995) 2 SCC 305 (para 8); **Chandrabhan and others Vs. Ghaziabad Development Authority and others (2015) 15 SCC 343 a**nd Union of India and another Vs. K.S. Subramanian (1976) 3 SCC 677 (para 12).

(ii) Paper No.101 C is the map which establishes that on one side of the road "Taj Nagari Phase-I Scheme" was established and on the other side of the road the land has been acquired under the acquisition in question.

(iii) Lease deed exemplars filed by the claimants have been found to be good exemplar by the court below to determine compensation of the acquired land after giving due deduction. Since the market value determined under the impugned judgment reflects the true market value of the acquired land as on the date of acquisition i.e. 30.4.1989, therefore, it can not be interfered with.

(iv) Evidence of Sri Vinod Kumar Dubey (PW -1) dated 29.2.2016 as pairokar of the claimants establishes not only the building potentiality of the acquired land but also market value as on the date of acquisition. The acquired land was near to the well developed land of "Taj Nagari Phase-I Scheme". Near to the

acquired land there were large number of Hotels, Hospitals and other commercial establishments as have been stated by PW 1 in his evidence. Nothing adverse could be brought out even in his cross examination. The evidence of DW 1 (Raghuraj Singh - Lekhpal) also supports the case of the claimants-respondents in so far as the potentiality of the acquired land is concerned.

(v) The evidence of PW -1 could not be rebutted by the appellants. Therefore, the market value determined by the court below can not be said to be excessive rather it is inadequate and it needs to be enhanced to Rs.700/- per sq. yard by allowing the cross objection.

(vi) Judgments relied in support of submissions are the judgments of Hon'ble Supreme Court in Lal Chand Vs. Union of India and another (2009) 15 SCC 769 (paras 14 & 15), Land Acquisition Officer & Mandal Revenue Officer Vs. Narasaiah (2001) 3 SCC 530 (para 14), Major General Kapil Mehra and others Vs. Union of India and another (2015) 2 SCC 262 (paras 16,17 & 21) and Haryana State Industrial Development Corporation Vs. Pran Sukh and others (2010) 11 SCC 175 (paras 10 & 22).

(vii) The claimants-**respondents have filed sale deed exemplars being paper Nos.33C to 42C in LAR No.968 of 2003, which disclose selling rate ranging from Rs.155.84 to Rs.300/- per square yard.**

(viii) The court below has rightly disbelieved the sale deed exemplars filed by the appellants inasmuch as it came to the conclusion that it did not reflect the true market value.

(ix) Auction leases were relevant exemplars for determining market value of land under the present acquisition inasmuch as the auction lease deeds filed in evidence are the only comparable sale transaction. The reference court has determined market value on the basis of these exemplars after making reasonable deductions. The relevant date of the present acquisition is 30.01.1989 and not 04.04.1989.

(x) The acquired land of the claimants-respondents is a free-hold land and, therefore, it shall fetch better market value than the leased land. Under the circumstances, the reference court should have allowed higher compensation on the basis of relied upon lease deed exemplars. In this regard, the judgments of Hon'ble Supreme Court in **Executive Engineer Karnatka Housing Board vs. Land Acquisition Officer and others, {(2011) 2 SCC 246 (para07)}** and **Major General Kapil Mehra vs. Union of India and another {(2015) 2 SCC 262}**, are relied.

(xi) Auction sales are relevant for fixing market value in view of the law laid down by Hon'ble Supreme Court in **V.N. Devadoss vs. Chief Revenue Control Officer and Inspector and others {(2009) 7 SCC 438}.**

(xii) When there are several exemplars with reference to similar land, it is the general rule that the highest exemplar, found to be bona fide transaction, has to be considered and accepted. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in **Satish vs. State of U.P. {(2009) 14 SCC 758 (Par-42)}, Anjana Molu Desai vs. State of Goa, {(2010) 13 SCC 710 (para-13)}, Chindha Thakre Patil vs. S.L.A.O. {(2011) 10 SCC 787 (para-15)}, Mehrawal Khewaji Trust (Regd.) vs. State**

of Punjab, {(2012) 5 SCC 432} and Mohd. Yusuf and others vs. State of Haryana and others, AIR 2018 SC 2248.

(xiii) Since the claimants have produced satisfactory evidence in the form of lease deeds of plot Nos.1 and 5 to show higher market value, therefore, the sale deed exemplars relied by the appellants to show a lessor market value has to be treated as undervalued and unreliable evidence. Therefore, the reference court has rightly not relied upon the sale deed exemplars filed by the appellants herein. Reference may be had to the judgments of Hon'ble Supreme Court in **Haryana State Industry Development Corporation vs. Pranshukh {(2010) 11 sCC 175 (paras-20 and 22)}, Udho Das vs. State of Haryana, {(2010) 12 SCC 51 (para-21)}, Anjana Molu Desai vs. State of Goa, {(2010) 13 SCC 710 (para-20)}.**

(xiv) In the case of **Udho Das vs. State of Haryana, {(2010) 12 SCC 51 (paras-18 and 19)},** Hon'ble Supreme Court held that if the compensation proceeding continued over a period of almost 20 years, then the potential of the acquired land must be adjudged keeping in view the development in the year split over the period of 20 years.

(xv) Bona fide post notification sales in the form of lease deed exemplars have been rightly relied upon by the reference court. In the circumstances that there was no sharp or speculative rise in the price of the land after the acquisition. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in **Mehta Ravindrarai Ajeet Rai vs. State of Gujrat, {(1989) 4 SCC 250 (paras-4 and 5)}, State of U.P. vs. Major Jitendra Kumar and others, AIR 1982 SC 876 (para-3), Chamanlal Hargovind Das vs. S.L.A.O., {(1988) 3 SCC 751 (para-9)}, and Union of India vs. Dyagala Devamma and others, AIR 2018 SC 3511.**

(xvi) The claimants-respondents have filed evidence in L.A. Case No.968 of 2003 (subject matter of First Appeal No.212 of 2017), the following lease deed/ sale deed exemplars with regard to lease or sale of certain commercial plots as under:

(A) Leases by open auction of commercial plots of T.N. Phase-I Scheme granted by A.D.A.

SL. No.	Paper No.	Date of bid/ lease	Name of bidder / lessee	**Plot No. T.N. Phase-I Scheme**	Area (in square meters)	Auction Amount + lease rent (in Rs.)	Rate (Rs.) (per square meter)
1	102 C (Ext. 14)/ 71C (Ext. 1)	11.06. 1993	JSG Hotels Pvt. Ltd.	**1**	4000	44,0 4,00 0/-	1001/ -
2	131 C (Ext. 36)/ 72C (Ext. 2)	15.07. 1993	Goyal Interna tiona l Hotels and Resort s Ltd.	**5**	22,3 93.4 8	2,99, 92,3 73/-	1339/ -

(B) Allotment of other commercial plots of T.N. Phase-I Scheme

SL. No.	Paper No.	Date of lease	Name of lessee	Plot No. T. N. Phase-I Scheme	Area (in square meters)	Amount (in Rs.)	Rate (Rs.) (per square meter)
1	110C (Ext. 20)/ 71C (Ext. 1)	17.02. 1992	Omega Hotels Ltd.	2	4800	17,05 ,440/-	355/-
2	119C (Ext. 26)	30.08. 1988	M/s. Unitech Ltd.	3	30351 .1702	98,03 ,428/-	323/- (allotment cancelled)
3	125C (Ext. 31)	29.04. 1993	M/s East India Hotels Ltd.	4	70670	2,28, 26,41 0/-	323/-
4	144C (Ext. 45)/ 148C (Ext. 49)	08.02. 1995	Dr. Ramchand Tiwari	66	195.0 96	1,39, 854/-	716.8 4
5	183C (Ext. 90)/8 3C (Ext. 6)	25.08. 1992	Vishnu Kumar Gupta	18	289.3 8	2,07, 543.3 3	717.2 0
6	135C (Ext. 40)/7 2C (Ext. 2)	15.07. 1993	Vishnu Kumar Gupta	Additional area adjoining to plot No .5	1134	19,89 ,603	1754. 68

(C) Details of sale deeds filed by claimants by List 32C dated 04.01.2010 regarding land sold by farmers/ society of village Basai Mustaqil (not filed with Paper Book)

SL. No.	Paper No.	Date of sale deed	Name of seller/ purchaser	Khasra Plot No.	Area (in square yard)	Consideration (in Rs.)	Rate (in Rs.) (per square yard)	Remark
1	33 C	11.0 6.19 87	Prem Singh and others/ Phool Singh	342	150	24 ,7 50 /-	165/ -	-
2	34 C	10.0 1.19 86	Premwati/Smt. Bisna Bai	353	80	14 ,5 00 /-	181. 25	Agreement to sale
3	35 C	19.0 1.19 87	LakhanSingh S/oDharamal/ Lakhan Singh S/oTej Singh	295	100	18 ,0 00 /-	180/ -	-
4	36 C	12.1 0.19 88	Darvesh Sahkari Avas Samiti Ltd./ Smt. Rambeti	1056	200	35 ,0 00 /-	175/ -	-
5	37 C	21.0 3.19 86	Smt. Rashmi Beti/ Smt. Rajan Devi	1060 to 1062	200	30 ,0 00 /-	150/ -	-
6	38 C	25.0 6.19 87	Kailashi Ram/…….	367	257 .22 2	35 ,9 80 /-	139. 87	-
7	39 C	24.0 8.19 87	Munni Devi/ Mufizuddin	-	100	25 ,0 00 /-	250/ -	With construction
8	40 C	06.0 6.19 87	Thakur Gulab Singh &	278	108	30 ,0 00	277. 77	Situate in M.P. Pura

			Dr. Basant Lal /.....			/-		Nagla mahadev
9	41 C	02.06.1987	Smt. Bhoori Devi/ Ramji Lal	276	100	30,000/-	300/-	-
10	42 C	02.06.1987	Smt. Har Pyari/ Jamuna Das	330	171	26,650/-	155.84	-

DISCUSSION AND FINDINGS:

13. I have carefully considered the submissions of learned counsels for the parties.

Question No. (a) Whether the date 30.01.1989 when the notification under Section 4(1) of the Act was published in the official gazette or the date 04.04.1989 when the public notice was published by the SLAO, shall be the relevant date for determination of compensation of the market value of the acquired land?

14. The relevant provisions for the purposes of relevant date for determination of market value of the land acquired, are Section 23(1) and Section 4(1) of the Act, which are reproduced below:

"23.Matters to be considered in determining compensation:-

(1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration-

first, the ***market-value of the land at the date of the publication of the notification*** under section 4, sub-section (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession taking possession of the land, by the reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings; fifthly, if in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.

(1A) In addition to the market value of the land, as above provided, the Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of land, whichever is earlier.

Explanation.- In computing the period referred to in this sub-section, any period or periods during which the

proceedings for acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded.

4. ***Publication of preliminary notification and powers of officers thereupon****. (1) Whenever it appears to theappropriate Governmentthat land in any locality is needed oris likely to be needed for any public purposeor for a company,* ***a notification to that effect shall be published in the Official Gazette****and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification)."*

(Emphasis supplied by me)

15. Specifically the question that what would be the relevant date for determining market value of acquired land for the purposes of compensation under Section 23(1) of the Act, came for consideration before Hon'ble the Supreme Court in **Kolkata Metropolitan Development Authority vs. Gobinda Chandra Makal and another {(2011) 9 SCC 207 (Paras-31 to 36)**, in which Hon'ble Supreme Court specifically laid down the law that the context in which words are used in Section 4(1) and 6, and the context in which the same words are used in **Section 23(1) are completely different. In Section 23(1), the words "the date of publication of the notification under Section 4(1)" would refer to the date of publication of the notification in the Gazette.** The relevant portion of the aforesaid judgment of Hon'ble Supreme court in **Kolkata Metropolitan Development Authority** (supra) (paras 31 to 36), are reproduced below:-

"Re : Relevant date for determining compensation

31. The notification under section 4(1)of the Act is dated 13.9.2000. It was published in the gazette dated 13.9.2000. Thereafter it was published in two newspapers. Lastly, the Collector caused public notice of the substance of such notification to be given at convenient places in the locality on 16.11.2000. *The reference court and the High Court have proceeded on the basis that the relevant date for determining the market value is 16.11.2000. They have also relied upon the expert valuer's report which assessed the market value as on 16.11.2000. We have noticed above that the Expert Valuer determined the market value with reference to a sale deed dated 10.3.2000, by adding 8% as the increase in prices for the period of eight months between 10.3.2000 and 16.11.2000 (at the rate of 1% per month).* ***The question is whether the relevant date for determination of compensation is 13.9.2000 or 16.11.2000.***

32. Sub-section (1) ofSection 23provides that the compensation to be awarded shall be determined by the Reference Court, based upon the market value of the acquired land at the time of publication of the notification undersection 4sub-section (1). ***The first respondent*** *contends that the `date of publication of notification undersection 4(1)' is statutorily defined insection 4(1)(that is,* ***the last of the dates****, out of the dates of publication of the notification*

in the official gazette, publication of the notification in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and public notice of the substance of such notification being given atconvenient places in the locality), ***and therefore the said words refer to 16.11.2000 as the date of publication of notification undersection 4(1)of the LA Act.***

33.Section 6was amended in 1984 providing that no declaration undersection 6in respect of any land covered by a notification undersection 4(1)shall be made after the expiry of one year from the date of publication of the notification undersection 4(1). In that context, to avoid any confusion as to what would be the date of publication of the notification undersection 4(1),section 4(1)was also amended to clarify the position and it was provided that "the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification". ***But the words `publication of the notification undersection 4(1)' occurring in the first clause ofsection 23(1)have different meaning and connotation from the use of the said words insections 4(1)and6of the LA Act. Prior to the 1984 amendment ofsection 4, the words "publication of notification undersection 4(1)" in section 23(1)referred to the date of publication of the notification in the official Gazette. Even after the amendment ofsection 4(1), the said words insection 23(1)continue to have the same earlier meaning. We may briefly indicate the reasons for our said conclusion.***

34. One of the principles in regard to determination of the market value undersection 23(1)is that the rise in market value after the publication of the notification undersection 4(1)of the Act should not be taken into account for the purpose of determination of market value. ***If the deeming definition of `publication of the notification' in the amendedsection 4(1)is imported as the meaning of the said words in the first clause ofsection 23(1), it will lead to anomalous results.*** *The owners of the lands which are the subject matter of the notification and neighbouring lands will come to know about the proposed acquisition, on the date of publication in the gazette or in the newspapers. If the giving of public notice of the substance of the notification is delayed by two or three months, there may be several sale transactions in regard to nearby lands in that period, showing a spurt or hike in value in view of the development contemplated on account of the acquisition itself.*

35. If the words `publication of the notification' insection 23(1)(clause firstly) should be construed as referring to the last of the dates of publication and public notice, and the date of public notice in the locality is to be considered as the date of publication, the landowners can legitimately claim that the sales which took place till the date of public notice should be taken into account for the purpose of determination of compensation, leading to disastrous results. Let us give two illustrations :

Illustration A : The market value of the acquired land on 13.9.2000 is Rs.1,00,000 per acre. A notification undersection 4(1)is published in the gazette on 13.9.2000 and in two newspapers on 14.9.2000. But the public notice in the locality is given only two months later on 16.11.2000. As the land owners

in the area come to know about the proposed acquisition and consequential expectations of development in the area, developers and speculators enter the arena and start buying neighbouring lands leading to steep increase in prices. Consequently several sales take place in October 2000 at rates ranging from Rs.1.5 lakhs to Rs.2 lakhs per acre. If 16.11.2000 should be taken as the date of publication of the notification undersection 4(1), the land owners can legitimately contend that the sale deeds executed in October 2000, being prior to the `date of publication of the preliminary notification' should be taken note of for the purpose of determining the compensation. That would result in compensation being determined between Rs.1,50,000 to Rs.2 lakhs per acre even though the market rate as on 13.9.2000 which is the date of publication of the notification was only Rs.1,00,000.

Illustration B : When large tracts of lands are acquired and the preliminary notification dated 13.9.2000 is published in the Gazette on 13.9.2000 and in the newspapers on 14.9.2000, but public notice of the substance is delayed by more than two months and is given on 16.11.2000, there will be ample time for unscrupulous land owners of acquired lands to create evidence of higher market value by managing nominal sale(s) in regard to some neighbouring land which is not the subject of acquisition at a price of Rs.2,00,000/- as against the market price of Rs.1,00,000/- and thereby cause a huge loss to the state.

36. The same words used in different parts of a statute should normally bear the same meaning. But depending upon the context, the same words used in different places of a statue may also have different meaning. [See: Justice G.P. Singh's Principles of Statutory Interpretation - 12th Edition - PP. 356-358]. The use of the words `publication of the notification' insections 4(1)and6on the one hand and insection 23(1)on the other, in theLA Act, is a classic example, where the same words have different meanings in different provisions of the same enactment. The words `publication of the notification undersection 4sub-section (1)', are used insection 23(1)for fixing the relevant date for determination of market value. The words "the last of the date of such publication and giving of such public notice, being hereinafter referred to as the date of the publication of the notification" in section 4(1) and the words "one year from the date of the publication of the notification" in the first proviso tosection 6, refer to the special deeming definition of the said words, for determining the period of one year for issuing the declaration undersection 6, which is counted from the date of `publication of the notification'. ***Therefore the context in which the words are used insections 4(1)and6, and the context in which the same words are used insection 23(1)are completely different. Insection 23(1), the words "the date of publication of the notification undersection 4(1)" would refer to the date of publication of the notification in the gazette. Therefore, `13.9.2000' will be the relevant date for the purpose of determination of compensation and not 16.11.2000."***

(Emphasis supplied by me)

16. The principle laid down in the case of **Kolkata Metropolitan Development Authority (supra)** on the question of relevant date for determining market value under Section 23(1) of the Act, has been reiterated by Hon'ble Supreme Court in a recent judgment in **Maya Devi (dead) through legal**

representatives and others vs. State of Haryana and another {(2018) 2 SCC 474 (para-5)}, as under:

"5. So far as the first contention is concerned, the sale deed relied upon by the appellant/ claimants dated 27.12.1988 is post notification. Sub-section (1) of Section 23 of the Act provides that the compensation to be awarded shall be determined by the reference court, based upon the market value of the acquired land at the date of the publication of the notification under Section 4(1). In Kolkata Metropolitan Development Authority v. Gobinda Chandra Makal and Anr. (2011) 9 SCC 207, it was held that the relevant date for determining the compensation is the date of publication of the notification under Section 4(1) of the Act in the Gazette. In para (34), it was held as under:-

"34. One of the principles in regard to determination of the market value under Section 23(1) is that the rise in market value after the publication of the notification under Section 4(1) of the Act should not be taken into account for the purpose of determination of market value. If the deeming definition of "publication of the notification" in the amended Section 4(1) is imported as the meaning of the said words in the first clause of Section 23(1), it will lead to anomalous results. The owners of the lands which are the subject-matter of the notification and the neighbouring lands will come to know about the proposed acquisition, on the date of publication in the Gazette or in the newspapers. If the giving of public notice of the substance of the notification is delayed by two or three months, there may be several sale transactions in regard to nearby lands in that period, showing a spurt or hike in value in view of the development contemplated on account of the acquisition itself."

Applying the ratio of the above decision, we are of the view that the post notification instances cannot be taken into consideration for determining the compensation of the acquired land."

(Emphasis supplied by me)

17. In the case of **N. Narasimhaiah vs. State of Karnataka, 1996 (3) SCC 88 (Para-17), Usha Stud and Agricultural Farms Private Limited and others vs. State of Haryana and others, 2013 (4) SCC 210 (paras-19 to 24), Surinder Singh Brar and others vs. Union of India and others, 2013 (1) SCC 403 (para-75), V.K.M. Kattha Industries Private Limited vs. State of Haryana and others, 2013 (9) SCC 338 (para-14) and Chandra Bhan vs. Ghaziabad Development Authority and others, (2015) 15 SCC 343 (paras-19 to 21),**Hon'ble Supreme Court has not specifically and exhaustively examined the question of relevant date for determination of market value as has been done in the case of **Kolkata Metropolitan Development Authority (supra) and Maya Devi** (supra).

18. In the case of **Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited, JT 2014 (1) SC 1 (paras-28 to 36)**, Hon'ble Supreme Court laid down the principles of binding precedent, as under:

"28. At this juncture, we think it condign to refer to certain authorities which lay down the ***principle for understanding the ratio decidendi of a judgment.*** *Such a deliberation, we are*

disposed to think, is necessary as we notice that contentions are raised that certain observations in some paragraphs in ***SPB & Co. vs. Patel Engineering Ltd. and another, [JT 2005 (9) SCC 219 : (2005) 8 SCC 618]*** *have been relied upon to build the edifice that latter judgments have not referred to them.*

29.In ***Ambica Quarry Works v. State of Gujarat and others, [JT 1986 SC 1036 : (1987) 1 SCC 213],*** *it has been stated that the* ***ratio of any decision must be understood in the background of the facts of that case. Relying on Quinn v. Leathem, [1901 AC 495]****, it has been held that the case is only an authority for what it actually decides, and not what logically follows from it.*

30. Lord Halsbury in the case of Quinn (supra) has ruled thus: -

"...there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

31.In ***Krishena Kumar v. Union of India and others, [JT 1990 (3) SC 173 : (1990) 4 SCC 207],*** *the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to* ***Caledonian Railway Co. v. Walker's Trustees*** *[1882 (7) App Cas 259 : 46 LT 826 (HL)] and Quinn (supra) and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows: -*

"The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration*. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para 573) "The concrete decision alone is binding between the parties to it but it is* ***the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law*** *and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it,* ***and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi." [Emphasis added]***

32.In State of Orissa v. Mohd. Illiyas[JT 2005 (10) SC 64 : 2006 (1) SCC 275], *it has been stated thus: -*

"12. ... According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential findings of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. ***A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."***

33.In Islamic Academy of Education v. State of Karnataka [JT 2003 (7) SC 1 : 2003 (6) SCC 697], t*he Court has made the following observations: -*

" ***2. ... The ratio decidendi of a judgment has to be found out only on reading the entire judgment.*** *In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation.* ***In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment."*** *[Bold is by us]*

34. The said authorities have been relied upon in ***Natural Resources Allocation, In Re, Special Reference No. 1 of 2012[JT 2012 (10) SC 145 : 2012 (10) SCC 1].***

*35. At this stage, we may also profitably refer to another principle which is of assistance to understand and appreciate the ratio decidendi of a judgment. The judgments rendered by a court are not to be read as statutes.****In Union of India v. Amrit Lal Manchanda and another[JT 2004 (2) SC 378 : 2004 (3) SCC 75], i****t has been stated that observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be red in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.*

36.In ***Som Mittal v. Government of Karnataka,[JT 2008 (3) SC 52 : 2008 (3) SCC 574],*** *it has been observed that judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasizing a point or accentuating a principle or even by way of a flourish of writing style.* ***Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation."***

(Emphasis supplied by me)

19. In the case of **Delhi Administration (Now NCT of Delhi) vs. Manoharlal, AIR 2002 SC 3088 (para-5) and M/s Amar Nath Om Parkash and others vs. Sate of Punjab and others, AIR 1985 SC 218 (paras-8, 11 and 12),** Hon'ble Supreme Court held that ratio of decision is binding. Initiation of principles and reasons on which a question has been decided is alone binding precedent. Similar view has also been taken in **State of Orissa vs. Sudhansu Sekhar Misra and others, AIR 1968 SC 647, Union of India and others vs. Dharnwanti Devi and others, (1996) 6 SCC 44 and State of Orissa and others vs. Md. Illiyas, JT 2005 (10) SC 64 (para-14).**

20. Thus, the ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. The abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment.

21. Since the question regarding relevant date for determining market value for the purposes under Section 23(1) of the Act has been specifically decided and principle of law in this regard has been laid down by Hon'ble Supreme Court in the case of **Kolkata Metropolitan Development Authority** (supra) and as such respectively following the aforesaid judgment, **I hold that the relevant date for determining market value for the purposes of compensation under Section 23(1) of the Act, shall be the date of publication of notification in the Gazette under Section 4(1) of the Act. The date of publication of notice as provided under Section 4(1) of the Act shall not be relevant. Therefore, in the present set of facts, 30.01.1989 being the date of publication of notification in the official Gazette under Section 4(1) of the Act, is the relevant date for determining market value for the purpose of compensation under Section 23(1) of the Act**. Question No.(a) is answered accordingly.

Question No.(b) Whether the market value of the acquired land determined by the court below is lawful and adequate?

AND

Question No.(c) Whether consideration received by ADA in auction sale of developed plots in "Taj Nagari Phase-I Scheme", can be made basis for determination of market value of the land acquired by the appellant - ADA for the scheme in question i.e. "Taj Nagari Phase-II" particularly when sale deed exemplars were filed in evidence by the ADA for determination

of market value of the acquired land under the present acquisition, i.e. "Taj Nagari Phase-II"?

22. Since both the afore-noted questions are interlinked, therefore, both are being considered together.

Whether sale deed exemplars of post notification period are good exemplars when sale deed exemplars of period within three years before the date of acquisition notification dated 30.01.1989, are available:-

23. The first factor provided in Section 23(1) of the Act specifically provides that for determining amount of compensation to be awarded for land acquired under the Act, the court shall take into consideration the market value of the land at the date of publication of the notification in the Gazette under Section 4(1) of the Act. Thus, the market value of land acquired under the Act has to be determined by the court as on the date of the publication of the notification in the Gazette under Section 4(1) of the Act. This view is supported by the law laid down by Hon'ble Supreme Court in the case of **Chamanlal Hargovind Das vs. S.L.A.O., (1988) 3 SCC 751 (para-4), Union of India vs. Dyagala Devamma and others, (2018) 8 SCC 485 : AIR 2018 SC 3511, Manoj Kumar and others vs. State of Haryana and others, (2018) 13 SCC 96 (Para-25).**

24. In **Bhupal Singh Vs. State of Haryana, (2015) 5 SCC 801** Hon'ble Supreme Court specifically considered similar question of determination of market value under Section 23 of the Act and **held that the fair market value of the acquired land is required to be determined on the basis of the market rate of the adjacent lands similarly situated to the acquired lands prevailing on the date of acquisition or/ and prior to acquisition but not subsequent to the date of acquisition.**

25. In view of the law laid down by Hon'ble Supreme Court in the case of **Chamanlal Hargovind Das** (supra), **Manoj Kumar and others** (supra), **Dyagala Devamma and others** (supra) and **Bhupal Singh** (supra), **I have no difficulty to hold that market value of the acquired land is required to be determined on the basis of the market rate of the adjacent land similarly situated to the acquired lands prevailing on the date of acquisition or/ and prior to the acquisition but not subsequent to the date of acquisition.**

What is Market Value:-

26. Thus, as per settled principle of law, compensation for the land acquired has to be determined at market value. Market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. The determination of market value is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.

Principles for Determination of Market Value:-

27. **Important principles for determination of market value** of acquired land as settled by Hon'ble Supreme Court in various judgments may be summarized as under:-

(i) While fixing the market value of the acquired land, **comparable sales method of valuation** is preferred than other methods of valuation of land such as capitalisation of net income method or expert opinion method. Comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it had been sold in the open market at the time of issue of notification under Section 4 of the Act. However, **comparable sales method of valuation of land** for fixing the market value of the acquired land is not always conclusive but **subject to the following factors**:-

(a) Sale must be a genuine transaction,

(b) the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act,

(c) the land covered by the sale must be in the vicinity of the acquired land,

(d) the land covered by the sales must be similar to the acquired land

(e) the size of plot of the land covered by the sales be comparable to the land acquired.

(f) if there is dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the Court to proportionately reduce the compensation for acquired land.

(ii) The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, **suitable adjustment has to be made having regard to various positive and negative factors** vis-a-vis the land under acquisition.

(iii) **For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.**

(iv) **Deduction not to be done** when land holders have been deprived of their holding 15 to 20 years back and have not been paid any amount.

(v) When there are several exemplars with reference to similar lands, it is the general rule that the **highest of the exemplars, if it is satisfied, that it is a bonafide transaction has to be considered and accepted.** When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. (Ref. (2012) 5 S.C.C 432, Mehrawal Khewaji Trust (Registered), Faridkot and others Vs. State of Punjab and others).

(vi) **In view of Section 51A of the Act, 1894 certified copy of sale deed is admissible in evidence,** even the

vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that contents of the transaction as evidenced by the registered sale deed would automatically be accepted. The legislature advisedly has used the word 'may'. A discretion, therefore, has been conferred upon a Court to be exercised judicially, i.e., upon taking into consideration the relevant factOrs.**Only because a document is admissible in evidence, the same by itself would not mean that the contents thereof stand proved. Having regard to the other materials brought on record, the Court may not accept the evidence contained in a deed of sale.** (Ref. (2004) 8 S.C.C 270 para 28 and 38, Cement Corpn. Of India Ltd. Vs. Purya and others).

(vii) **While fixing the market value** of the acquired land, the Land Acquisition Collector is required to keep in mind the following factors:

(a) Existing **geographical situation** of the land as on the date of acquisition.

(b) Existing **use** of the land as on the date of acquisition.

(c) Already **available advantages**, like proximity to National or State Highway or road and/ or developed area,

(d) **Market value of other land** situated in the same locality/ village/ area or adjacent or very near the acquired land.

(viii) Section 23(1) of the Act lays down what the Court has to take into consideration while Section 24 lays down what the Court shall not take into consideration and have to be neglected. The main object of the enquiry before the Court is to determine the market value of the land acquired.

(ix) The question whether a land has **potential value** or not, is **primarily one of fact** depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing.

(x) In fixing market value of the acquired land, which is undeveloped or under-developed, the Courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired {Reference: **(2011) 8 SCC 91, Valliyamal and another vs. Special Tehsildar Land Acquisition and another** (Paras 13 to 19)}.

(xi) **Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost".[**Ref. (2012) 7 S.C.C 595 para 21, Sabhia Mohammed Yusuf Abdul Hamid Mulla (dead) and others Vs. Special Land Acquisition Officer and (2010) 1 SCC 444 (Paras- 24 & 25), Subh Ram vs. State of Haryana].

(xii) The **circle rate filed** by the Collector or valuation register maintained by the Revenue Authorities under the Stamp Act, 1899 are **irrelevant and cannot form a valid criteria to determine market value of land acquired under the Act, 1894, unless**

such determination is under a statutory obligation and after following a prescribed procedure. {Reference: Jawajee Nagnatham v. Revenue Divisional Officer, Adilabad, A.P. and others, (1994) 4, SCC 595, the Land Acquisition Officer v. Jasti Rohini (1995)1 SCC 717, U.P. Jal Nigam v. M/s Kalra Properties (P) Ltd. (1996) 3 SCC 124, Krishi Utpadan Mandi Samiti v. Bipin Kumar, (2004) 2 SCC 283}.

DEDUCTIONS

28. The principles regarding deduction to be applied while determining market value of a land for compensation under the Act, 1894, has been applied by Hon'ble Supreme Court, providing for deduction ranging up to 75% depending on the nature of land, its situation and stage of development etc., vide **Brig. Sahib Singh Kalha Vs. Amritsar Improvement Trust, (1982) 1 SCC 419 (deductions between 20% and 33%), Administrator General of West Bengal Vs. Collector, Varanasi, (1988) 2 SCC 150 (upheld deduction of 40%), Chimanlal Hargovinddas Vs. Special Land Acquisition Officer, Poona and another (supra),(deduction between 20% to 50%), Land Acquisition Officer Revenue Divisional Officer, Chottor vs. L. Kamalamma (Smt.) Dead by and others, (1998) 2 SCC 385, (deduction of 40% as development cost), Kasturi and others vs. State of Haryana (supra), (1/3rd deduction was upheld on development),Land Acquisition Officer vs. Nookala Rajamallu and others, (2003) 12 SCC 334, (53% deduction), V. Hanumantha Reddy (Dead) Versus Land Acquisition Officer, (2003) 12 SCC 642, (37% deduction towards development), Viluben Jhalejar Contractor Versus State of Gujarat, (2005) 4 SCC 789, (20 to 50% towards development), Atma Singh Versus State of Haryana and another, (2008)2 SCC 568, (20% deduction towards largeness of area), Subh Ram and others Vs. State of Haryana and others, (supra)**, (where valuation of a large area of agricultural or undeveloped land has to be determined on the basis of sale price of a small developed plot, standard deductions would be 1/3rd towards infrastructural space and 1/3 towards infrastructural developmental cost, i.e. 2/3rd % i.e. 67%), **Andhra Pradesh Housing Board Versus K. Manohar Reddy and others, (2010) 12 SCC 707,** (deductions on account of development could vary between 20% to 75%), **Special Land Acquisition Officer and another Versus M.K. Rafiq Sahib, (2011) 7 SCC 714, (60% deduction).**

29. Recently, in **Major General Kapil Mehra Vs. Union of India and another (2015)2 SCC 262,** Hon'ble Supreme Court again observed that while f**ixing market value** of acquired land, Land Acquisition Collector is required to keep in mind the following **factors:-**

(i) Existing geographical situation of land.

(ii) Existing use of land.

(iii) Already available advantages, like proximity to National or State Highway or road and/ or developed area,

(iv) Market value of other land situated in the same locality/ village/ area or adjacent or very near the acquired land.

COMPARATIVE SALE METHOD OF MARKET VALUE

30. **It is settled law that market value of the land acquired is determined with**

reference to the market sale of comparable land in the neighbourhood by a willing seller to a willing buyer on or before the date of preliminary notification i.e. under Section 4(1) of the Act 1894, as that would give a fair indication of market value.

31. In the case of **Ashok Kumar and another Vs. State of Haryana, (2016) 4 SCC 544 (Para-12),** Hon'ble Supreme Court considered situation of two acquired lands and held as under:

"In the case of the appellants herein, it is an admitted position that the properties do not abut the national highway. Admittedly, it is situated about 375 yards away from the national highway and it appears that there is only the narrow Nahan Kothi Road connecting the properties of the appellants to the national highway. Therefore, it will not be just and proper to award land value of Rs.250/- per square yard, which is granted to the property in adjoining village. Having regard to the factual and legal position obtained above, we are of the considered view that the just and fair compensation in the case of appellants would be Rs.200/- per square yard."

32. With respect to factors of comparable sales, Hon'ble Supreme Court in **Major General Kapil Mehra** (supra) has referred to its earlier decision in Urban Water Supply and Drainage Board and Others Versus K.S. Gangadharappa and another, (2009) 11 SCC 164, and has observed that element of speculation is reduced to minimum if underlying principles of fixation of market value with reference to comparable sales are satisfied, i.e.,(i) when sale is within a reasonable time of the date of notification under Section 4(1); (ii) it should be a bona fide transaction; (iii) it should be of the land acquired or of the land adjacent to the land acquired; and (iv) It should possess similar advantages.

Whether auction sale transaction can be relied to determine market value when other regular deed exemplars are available:-

33. Market value is determined with reference to the open market sale of comparable land in the neighbourhood of a willing seller to a willing buyer on or before the date of preliminary notification under Section 4(1) of the Act, as that would give a fair indication of market value. Auction sales stand on different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction. In a well advertised open auction-sale, there is always a tendency for the price of the auctioned property to go up considerably, whereas in case, the auction-sale by banks or financial institutions to recover dues, there is an elements of distress, which have the effect of dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. Therefore, when other regular sale transactions are available for determining market value of the acquired land, it would not be safe to rely upon an auction sale. But where an open auction sale is the only comparable sale transaction available on account of proximity in situation and proximity in time to the acquired land, the court may with caution, rely upon the price disclosed by such auction sales, by providing an appropriate deduction or cut to off-set the competitive-hike in value.

34. Similar view has been taken by Hon'ble Supreme Court in the case of **Raj**

Kumar vs. HaryanaState, (2007) 7 SCC 609. Similar question has been exhaustively considered by Hon'ble Supreme Court in the case of **Executive Engineer, Karnatka Housing Board vs. Land Acquisition Officers and others, (2011) 2 SCC 246 (paras-5 and 6)** and it has been held as under:

*"5. We may deal with the last submission first. The standard method of determination of market value of any acquired land is by the valuer evaluating the land on the date of valuation (publication of notification under section 4(1) of the Land Acquisition Act, 1894 - `Act' for short) notification, acting as a hypothetical purchaser willing to purchase the land in open market at the prevailing price on that day, from a seller willing to sell such land at a reasonable price. Thus, the market value is determined with reference to the open market sale of comparable land in the neighbourhood, by a willing seller to a willing buyer, on or before the date of preliminary notification, as that would give a fair indication of the market value. A `willing seller' refers to a person who is not acting under any pressure to sell the property, that is, where the sale is not a distress sale. A willing seller is a person who knowing the advantages and disadvantages of his property, sells the property after ascertaining the prevailing market prices at the fair and reasonable value. Similarly, a willing purchaser refers to a person who is not under any pressure or compulsion to purchase the property, and who, having the choice of different properties, voluntarily decides to buy a particular property by assessing its advantages and disadvantages and the prevailing market value thereof. Of course, unless there are indications to hold otherwise, all sale transactions under registered sale deeds will be assumed to be normal sales by willing sellers to willing purchasers. Where however there is evidence or indica*tions that the sale was not at prevailing fair market value, it has to be ignored.

6. But auction sales stand on a different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction. Human ego, and desire to do better and excel other competitors, leads to competitive bidding, each trying to outbid the others. Thus in a well advertised open auction sale, where a large number of bidders participate, there is always a tendency for the price of the auctioned property to go up considerably. On the other hand, where the auction sale is by banks or financial institutions, courts, etc. to recover dues, there is an element of distress, a cloud regarding title, and a chance of litigation, which have the effect of dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. There is therefore every likelihood of auction price being either higher or lower than the real market price, depending upon the nature of sale. As a result, courts are wary of relying upon auction sale transactions when other regular traditional sale transactions are available while determining the market value of the acquired land. This Court in Raj Kumar v. HaryanaState - 2007 (7) SCC 609, observed that the element of competition in auction sales makes them unsafe guides for determining the market value."

35. In the present set of facts, the auction sale/ lease deeds are not the only comparable sale transactions. The lease deed exemplars of plot Nos.1 and 5 are of

two commercial plots of "Taj Nagari Phase-I Scheme". Lease deeds of these plots and other few commercial plots were made after four or five years of the present acquisition, i.e. between the year 1992 to 1995. Much thereafter, the construction took place and hotels were established. The land for "Taj Nagari Phase-II Scheme" i.e. the present acquisition was basically acquired for residential purpose on 30.01.1989, i.e. much prior to the leases of commercial Plot Nos.1 and 5 of Taj Nagari Phase-I Scheme. Even under "Taj Nagari Phase-I Scheme", the residential plots were sold after full development, approximately at about Rs.300/- per square meter. Even some commercial plots of "Taj Nagari Phase-I Scheme" for Five Star Hotels were allotted/ leased between the year 1992 to 1995 ranging from Rs.323/- per square meter to Rs.717.20 per square meter depending upon its location. These plots could also not be proved to be in proximity in situation to the acquired land. Thus, these auction/ lease deeds of few commercial plots of "Taj Nagari Phase-I Scheme" are neither in proximity in time to the acquired land nor in proximity in situation nor it has any similarity to the acquired land inasmuch as the acquired land is agricultural land while the aforesaid auctioned/ leased plots were fully developed commercial plots from amongst the total area of 85.47 acres land acquired under the "Taj Nagari Phase-I Scheme" in which the major portion was developed as housing plots.

36. Learned counsels for the respondents have relied upon judgments of Hon'ble Supreme Court in **Natural Resources Allocation, In Re, Special Reference No. 1 of 2012 [JT 2012 (10) SC 145 : 2012 (10) SCC 1] and V.N. Devadoss vs. Chief Revenue Control Officer and Inspector and others {(2009) 7 SCC 438}**. I have perused both the judgments. **Natural Resources Allocation case (supra**) is with regard to auction of 2G spectrum and the question basically involved before the Hon'ble Supreme Court was as to whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions and What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources. The judgment in the case of **V.N. Devadoss** (supra) arose from the proceedings under Section 47A of the Indian Stamp Act for payment of stamp duty and in that context, the Hon'ble Supreme Court held that the property was offered for sale in the open market by inviting bids and, therefore, there is no question of any intention to defraud the revenue or non-disclosure of the correct price of the properties which were disposed of under the orders of BIFR and AAIFR on the basis of value fixed by Assets Sales Committee.

37. In the present set of facts, some sale deed exemplars namely Paper No.110-C is the sale deed dated 28.05.1988 for sale of plot No.203 which were filed in evidence. This plot No.203 was acquired which is subject matter of the abovenoted First Appeal No.269 of 2019. Similarly, paper No.115C is the sale deed dated 15.09.1988 of plot Nos.1998 and 1999. The acquisition of plot Nos.1994, 1997 and 2000, are subject matter of above noted First Appeal No.212 of 2017. These two sale deeds were executed by individuals to two Sahkari Awas Samitis. The sale deed

paper No.110C is of the same plot which has been acquired under the present acquisition and paper No.115C is the sale deed of adjoining plots, which are subject matter of the aforesaid two First Appeals. These two sale deeds are in proximity of time of the present acquisition. Sale deed (paper No.110C) was executed about seven months before the present acquisition while the sale deed (paper No.115C) was executed about 4 months before the present acquisition. The finding of the court below in the impugned judgments upon contention raised by the claimants that these two sale deed exemplars and other sale deed exemplars filed by the appellants herein do not reflect the correct market value, appears to be not sound but wholly baseless. By these two sale deeds, the property was sold by individuals to two residential housing societies. Therefore, without any reliable evidence on record, it cannot be assumed that these sale deeds do not reflect the true consideration. Mere vague allegation of suppression of consideration by individuals while selling land, deserves to be outrightly rejected. A similar question came for consideration before Hon'ble Supreme court in the case of **Lal Chand vs. Union of India, {(2009) 15 SCC 769 (para-76 to 79)}** and the Hon'ble Supreme Court held as under:

"76. This takes us to the value of "undervalued" sale deeds. When the respondents rely upon certain sale deeds to justify the value determined by the Land Acquisition Collector or to show that the market value was less than what is claimed by the claimants, and if the claimants produce satisfactory evidence (which may be either with reference to contemporaneous sale deeds or awards made in respect of acquisition of comparable land or by other acceptable evidence) to show that the market value was much higher, the sale deed relied upon by the respondents showing a lesser value may be inferred to be undervalued, or not showing the true value. Such deeds have to be excluded from consideration as being unreliable evidence. A document which is found to be undervalued cannot be used as evidence.

77. But we have noticed a disturbing trend in some recent cases, where a court accepts the sale deed exhibited by the claimants as the basis for ascertaining the market value. But then, it also accepts a contention of the claimants that the general tendency of members of public is not to show the real value, but show a lesser value to avoid tax/stamp duty and therefore the sale deeds produced and relied on by them, should be assumed to be under valued.

78. On such assumption, some courts have been adding some fancied percentage to the value shown by the sale deeds to arrive at what they consider to be `realistic market value'. The addition so made may vary from 10% to 100% depending upon the whims, fancies, *and the perception of the learned Judge as to what is the general extent of suppression of the price in sale deeds. Such increase, in the market value disclosed by the sale deeds, on the assumption that all sale deeds show a `depressed' market value instead of the real value, is impermissible. The Court can either accept the document as showing the prevailing market value, in which event it has to be acted upon. Or the Court may find a document to be undervalued in which it should be rejected straightaway as not reliable. There is no third way of accepting a*

document, by adding to the market value disclosed by the document, some percentage to off-set the under-valuation.

79. ***There is no legal basis to proceed on a general assumption that parties, without exception, fail to reflect the true consideration in the sale deeds, that there is always undervaluation or suppression of the true price and that consequently, all sale deeds reflect a depressed value and not the real market value and therefore, some percentage should be added to arrive at the real value. Such a course also amounts to branding all vendors and purchasers as dishonest persons without any evidence and without hearing them. It ignores the fact that government has fixed minimum guideline values and whenever a registering authority is of the view that a sale deed is undervalued, proceedings are initiated for determination of the true market value. It also ignores the fact that a large number of sale deeds are accepted by the registering authorities as disclosing the current market value. Be that as it may."***

(Emphasis supplied by me)

38. In **Bangaru Narshinga Rao, Naidu and others vs. Revenue Divisional Officer Vizianagaram, {(1980) 1 SCC 575 (para-2)},** Hon'ble Supreme Court observed that there cannot be any doubt that the best evidence of the market value of the acquired land is afforded by transactions of sale in respect of the very acquired land provided of course there is nothing to doubt the authenticity of the transactions. In the case of **Ranvir Singh and others vs. Union of India, (2005) 12 SCC 59**, Hon'ble Supreme court reiterated the well-settled principle that the sale deeds pertaining to portion of lands which are subject to acquisition would be the most relevant piece of evidence for assessing the market value of the acquired lands. Similar view has been taken by Hon'ble Supreme Court in various other judgments including the judgment in **Special Tehsildar Land Acquisition, Vishakhapattanam vs. A Mangala Gowri (Smt.) (1991) 3 SCR 472 and T.S. Ramchandra Shetty vs. Chairman Karnataka Housing Board and others {(2009) 14 SCC 334**}.

39. The impugned judgments of the reference court in rejecting the sale deed exemplars and relying upon auction bid/ lease deeds of dates subsequent to acquisition, is wholly erroneous, contrary to the mandate of Section 23(1) of the Act and also contrary to the law laid down by Hon'ble Supreme Court in the judgments referred hereinabove including the judgments in the case of **Executive Engineer, Karnataka Housing Board (supra), Lal Chand (supra), Chimanlal Hargovinddas (supra), Major General Kapil Mehra (supra), Manoj Kumar and others (supra) and Bhupal Singh** (supra). However, it is clarified that if any relevant and bona fide sale deed exemplars of higher value, were available then the reference court should have considered those sale deed exemplars also to determine the market value. During the course of the arguments, learned counsel for the respondents has stated that the claimants have filed some sale deed exemplars being paper Nos.33C to 42C in L.A.R. No.968 of 2003 (Kalua & Ors Vs. Collector) from which the present First Appeal No.212 of 2017 arise, which discloses selling rate of similar land ranging from Rs.155.84 to Rs.300/- per square yard. However, copies of all these sale deeds have not been filed with the

paper book in First Appeal No.212 of 2017. If these sale deeds were available in evidence, then it must have been considered by the reference court.

Whether market value of wholly developed land can be compared with under developed land:-

40. The principles of law as settled by Hon'ble Supreme Court in various judgment including the judgments afore-noted, leaves no manner of doubt that the market value of wholly developed land cannot be compared with the under-developed land although it may be adjoining or situated at a little distance. In **Ranvir Singh and others vs. Union of India {(2005)12 SCC 59** (para-26)}, Hon'ble Supreme Court held that "While adopting the said method, in our opinion, the High Court committed manifest errOrs.***The market value of fully developed land cannot be compared with wholly underdeveloped land although they may be adjoining or situated at a little distance. For determining the market value, it is trite, the nature of the land plays an important role."***

41. In **Bhim Singh and others vs. State of Haryana (2003) 10 SCC 529 (para-10),** Hon'ble Supreme Court considered the similar matter and held as under:

"It was next submitted that the claimants were entitled to higher compensation as the Respondents had in 1989 auctioned plots of land at the rate of Rs. 1725 to Rs. 2510 per square yard. In our view this submission merely needs to be stated to be rejected. What price is fetched after full developmentcannot be the basis for fixing compensation in respect of land which was agricultural."

(Emphasis supplied by me)

42. The submission of learned counsel for the claimants-respondents that bona fide post notification sales in the form of lease deed exemplars have been rightly relied by the reference court, does not hold good and deserves rejection in view of the discussions made above, and the law laid down by Hon'ble Supreme court in catena of judgments.

43. The conclusion reached by the reference court in para-71 of the impugned judgment is based on discussion made on issue No.1 which is not based on the situation existing as on the date of acquisition, i.e. 30.01.1989 but is mainly based on developments which took place much subsequently. No documentary evidence could be led by the claimants that any five star hotel or even residential houses were existing over the plots of Taj Nagari Phase-I Scheme when the land in question under Taj Nagari Phase-II Scheme was acquired on 30.01.1989. No documentary evidence could be led by the claimants to establish that any five star hotel was existing over a similar land in close proximity of the acquired land as on the date of acquisition. The evidence of **DW-1 Raghuraj Singh Lekhpa**l (who was posted in Tehsil Sadar Agra only in the year 2012) was recorded on 22.12.2016 who in his cross examination, described the existence of hotel and a mall etc. as on the date of his cross-examination and not on the date of acquisition, i.e. 30.01.1989. The evidence of **PW-1 Rahis Khan** was filed in the form of Affidavit dated 21.11.2016 who described in Para-14, existence of some hotels at a distance of 2-3 kms. built in the year 1988. He also could not support it by any documentary

evidence. That apart, these hotels even if existing as on the date of acquisition, cannot be said to be in close proximity of the acquired land from time angle and situation angle. He admitted in para-34 that award was received under protest. In rest of the paras, he merely described the developments over the land of Taj Nagari Phase-I which were undisputedly leased/ sold much subsequent to the present acquisition. **In his cross-examination, he admitted that at the time of acquisition, agriculture was carried over the acquired land. He also admitted in his cross-examination that the lease deed of Plot No.1 was executed by the A.D.A. after fully developing it.** Thus, the lease deed of the aforesaid plot No.1 and 5 of Taj Nagari Phase-I Scheme, which have been made basis to determine market value of the land acquired on 30.01.1989 are wholly irrelevant and are not good exemplars for determination of market value of the land acquired on 30.01.1989, yet these exemplars and the evidence of P.W.-1 have been heavily relied by the reference court without application of mind and without consideration of the fact that at the time of acquisition the acquired land was being used for agriculture. Such an approach is also contrary to law laid down by Hon'ble Supreme Court in various judgments including the judgment in Bhim Singh's case (supra)

44. In the impugned judgment, the bid/ lease deed of plot No.1 dated 11.06.1993 and the lease deed of plot No.5 dated 15.07.1993 of land of 'Taj Nagari Phase-I Scheme' (Ext.14 and Ext.2 respectively) executed by the appellant A.D.A. after fully developing the aforesaid plots, have been made basis to determine compensation of the land acquired on 30.01.1989 for 'Taj Nagari Phase-II Scheme'. In **Civil Appeal No.4879 of 2018 {New Okhla Industrial Development Authority (NOIDA) VS. Deo Karan &Ors.} decided on 1.5.2018**, Hon'ble Supreme Court considered the question of determination of market value of land acquired in the year 1980-82 on the basis of market value determined in a case with respect to the land acquired on 24.03.1988 and observed, as under:

"In the case of Raghuraj Singh (supra), Notification under Section 4 was issued on 24.3.1988, i.e., much later than the Notifications in question issued in 1980 and 1982. Again the reliance was placed on Raghuraj Singh (supra), which also relied upon the agreement to sell dated 12.01.1989. ***The aforesaid course adopted by the High Court, was wholly impermissible and bad in law****. The way in which the High Court had determined the compensation, that too on the basis of the agreement to sell, was not a satisfactory or permissible way of arriving at the valuation in the aforesaid decision on which reliance had been placed. Thus, aforesaid decisions of Jagdish Chandra and Raguraj Singh could not have been relied upon for basing the determination of value with respect to the Notifications issued in the years 1980 and 1982.* ***We are shocked that how the High Court hasdetermined the same valuation for the notifications issued in the years 1980 and 1982, when the rates were determined in the aforesaid cases of Jagdish Chandra and Raghuraj Singh with respect to the Notifications under Section 4 issued in the years 1987 and 1988.***

6. We record our dissatisfaction towards the slipshod and perfunctory manner and the hazardous way in which the

compensation was determined by the High Court, that too on the basis of agreement to sell."

(Emphasis supplied by me)

45. In the light of the afore-quoted observations made by Hon'ble Supreme Court in the case of **Deo Karan** (supra) the approach adopted by the reference court to pass the impugned judgments, determining the market value of the agricultural land acquired under the present acquisition by notification dated 30.01.1989; on the basis of consideration mentioned in the bid/ lease deed dated 11.06.1993 of fully developed commercial plot No.1 and the lease deed dated 15.07.1993 of fully developed commercial plot No.5, both of 'Taj Nagari Phase-I Scheme', is wholly impermissible and bad in law.

46. In view of the above discussion, I hold that in the impugned judgments, the reference court has committed manifest error of law in determining the market value of the land acquired on 30.01.1989 for 'Taj Nagari Phase-II Scheme'. Subsequent auction/ lease deeds of developed commercial plots of 'Taj Nagari Phase-I Scheme' cannot be made basis to determine market value of the previously acquired land by the appellant for 'Taj Nagari Phase-II Scheme' particularly when relevant sale deed exemplars were filed in evidence. Both the question Nos.(b) and (c) are answered accordingly.

CONCLUSIONS

47. Detail discussion and conclusions reached above are briefly summarised, as under:

(i) The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. The abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment

(ii) Since the question regarding relevant date for determining market value for the purposes under Section 23(1) of the Act has been specifically decided and principle of law in this regard has been laid down by Hon'ble Supreme Court in the case of **Kolkata Metropolitan Development Authority** (supra) and as such respectively following the aforesaid judgment, I **hold that the relevant date for determining market value for the purposes of compensation under Section 23(1) of the Act, shall be the date of publication of notification in the Gazette under Section 4(1) of the Act. The date of publication of notice as provided under Section 4(1) of the Act shall not be relevant. Therefore, in the present set of facts, 30.01.1989 being the date of publication of notification in**

the official Gazette under Section 4(1) of the Act, is the relevant date for determining market value for the purpose of compensation under Section 23(1) of the Act. Question No.(a) is answered accordingly.

(iii) Market value of land acquired under the Act has to be determined by the court as on the date of the publication of the notification in the Gazette under Section 4(1) of the Act.

(iv) **Fair market value of the acquired land is required to be determined on the basis of the market rate of the adjacent lands similarly situated to the acquired lands prevailing on the date of acquisition or/ and prior to acquisition <u>but not subsequent to the date of acquisition.</u>**

(v) **Market value** is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. The **determination of market value** is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality.

(vi) While fixing the market value of the acquired land, **comparable sales method of valuation is preferred than other methods of valuation** of land such as capitalisation of net income method or expert opinion method. However, **comparable sales method of valuation of land** for fixing the market value of the acquired land is not always conclusive but **subject to the following factors:-**

(a) Sale must be a genuine transaction,

(b) the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act,

(c) the land covered by the sale must be in the vicinity of the acquired land,

(d) the land covered by the sales must be similar to the acquired land

(e) the size of plot of the land covered by the sales be comparable to the land acquired.

(f) if there is dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the Court to proportionately reduce the compensation for acquired land.

(vii) The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, **suitable adjustment has to be made having regard to various positive and negative factors** vis-a-vis the land under acquisition.

(viii) When there are several exemplars with reference to similar lands, it is the general rule that the **highest of the exemplars, if it is a bonafide transaction has to be considered and accepted.**

(ix) **While fixing the market value** of the acquired land, the Land Acquisition Collector is required to keep in mind the following **factors:**

(a) Existing **geographical situation** of the land as on the date of acquisition.

(b) Existing use of the land as on the date of acquisition.

(c) Already **available advantages,** like proximity to National or State Highway or road and/ or developed area,

(d) **Market value of other land** situated in the same locality/ village/ area or adjacent or very near the acquired land.

(x) **Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost".**

(xi) Market value is determined with reference to the open market sale of comparable land in the neighbourhood of a willing seller to a willing buyer on or before the date of preliminary notification under Section 4(1) of the Act, as that would give a fair indication of market value. Auction sales stand on different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction. In a well advertised open auction-sale, there is always a tendency for the price of the auctioned property to go up considerably, whereas in case, the auction-sale by banks or financial institutions to recover dues, there is an elements of distress, which have the effect of dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. Therefore, when other regular sale transactions are available for determining market value of the acquired land, it would not be safe to rely upon an auction sale. But where an open auction sale is the only comparable sale transaction available on account of proximity in situation and proximity in time to the acquired land, the court may with caution, rely upon the price disclosed by such auction sales, by providing an appropriate deduction or cut to off-set the competitive-hike in value.

(xii) The lease deed exemplars of plot Nos.1 and 5 are of two commercial plots of "Taj Nagari Phase-I Scheme". Lease deeds of these plots and other few commercial plots were made after three or four years of the present acquisition, i.e. between the year 1992 to 1995. Much thereafter, the construction took place and hotels were established over it. The land for "Taj Nagari Phase-II Scheme" i.e. the present acquisition was basically acquired for residential purpose on 30.01.1989, i.e. much prior to the leases of commercial Plot Nos.1 and 5 of Taj Nagari Phase-I Scheme. Even under "Taj Nagari Phase-I Scheme", the residential plots were sold after full development, approximately at about Rs.300/- per square meter. Even some commercial plots of "Taj Nagari Phase-I Scheme" for Five Star Hotels were allotted/ leased between the year 1992 to 1995 ranging from Rs.323/- per square meter to Rs.717.20 per square meter depending upon its location. These plots could also not be proved to be in proximity in situation to the acquired land. Thus, these auction/ lease deeds of few commercial plots of "Taj Nagari Phase-I Scheme" are neither in proximity in time to the acquired land nor in close proximity in situation nor it has any similarity to the

acquired land. The acquired land is agricultural land while the aforesaid auctioned/ leased plots were fully developed commercial plots from amongst the total area of 85.47 acres land acquired under the "Taj Nagari Phase-I Scheme" in which the major portion was developed as housing plots.

(xiii) In the present set of facts, the sale deed exemplar Paper No.110-C is the sale deed dated 28.05.1988 for sale of plot No.203 which was filed in evidence. This plot No.203 was acquired and it is subject matter of the abovenoted First Appeal No.269 of 2019. Similarly, paper No.115C is the sale deed dated 15.09.1988 of plot Nos.1998 and 1999. The acquisition of plot Nos.1994, 1997 and 2000, are subject matter of above noted First Appeal No.212 of 2017. These two sale deeds were executed by individuals to two Sahkari Awas Samitis. The sale deed paper No.110C is of the same plot which has been acquired under the present acquisition and paper No.115C is the sale deed of adjoining plots, which are subject matter of the aforesaid two First Appeals. These two sale deeds are in close proximity in situation and time of the present acquisition. Sale deed (paper No.110C) was executed about seven months before the present acquisition while the sale deed (paper No.115C) was executed about 4 months before the present acquisition. The finding of the court below in the impugned judgments upon contention raised by the claimants that these two sale deed exemplars and other sale deed exemplars filed by the appellants herein do not reflect the correct market value, appears to be not sound but wholly baseless. By these two sale deeds, the property was sold by individuals to two residential housing societies. Therefore, without any reliable evidence on record, it cannot be assumed that these sale deeds do not reflect the true consideration. Mere vague allegation of suppression of consideration or under-valuation by individuals while selling land, deserves to be outrightly rejected.

(xiv) Sale deeds pertaining to portion of lands which are subject to acquisition would be the most relevant piece of evidence for assessing the market value of the acquired lands.

(xv) The impugned judgments of the reference court in rejecting the sale deed exemplars and relying upon bid/ lease deeds of dates subsequent to acquisition, is wholly erroneous, illegal, contrary to the mandate of Section 23(1) of the Act and also contrary to the law laid down by Hon'ble Supreme Court. During the course of the arguments, learned counsel for the respondents has stated that the claimants have filed some sale deed exemplars being paper Nos.33C to 42C in L.A.R. No.968 of 2003 (Kalua & Ors Vs. Collector) from which the present First Appeal No.212 of 2017 arise, which discloses selling rate of similar land ranging from Rs.155.84 to Rs.300/- per square yard. However, copies of all these sale deeds have not been filed with the paper book in First Appeal No.212 of 2017. If these sale deeds were available in evidence, then it must have been considered by the reference court.

(xvi) Market value of wholly developed commercial plots cannot be compared with the under-developed or undeveloped or agricultural land although it may be adjoining or situated at a little distance. What price is fetched after full development of commercial or residential plots cannot be the basis for fixing compensation of agricultural land.

(xvii) In the impugned judgments, the reference court has committed manifest error of law in determining the market value of the land

acquired on 30.01.1989 for 'Taj Nagari Phase-II Scheme'. Subsequent auction/ lease deeds of developed commercial plots of 'Taj Nagari Phase-I Scheme' cannot be made basis to determine market value of the previously acquired land by the appellant for 'Taj Nagari Phase-II Scheme' particularly when the relevant sale deed exemplars were filed in evidence. Both the question Nos.(b) and (c) are answered accordingly.

48. For all the reasons afore-stated, the impugned judgments in land acquisition references as mentioned in para-7 above, cannot be sustained and are hereby set aside and all the **First Appeals filed by the appellant Agra Development Authority are allowed. The cross-objections filed by the claimants are disposed of.** Matters are remitted back to the reference court to decide the references afresh in accordance with law in the light of the observations made above, expeditiously preferably within six months from the date of presentation of a certified copy of this order, without granting any unnecessary adjournments to either of the parties.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

FIRST APPEAL No.827 of 2000
Alongwith

First Appeal Nos.-150 of 2001, 412 of 2001, 497 of 2001, 539 of 2001, 551 of 2001,552 of 2001, 1067 of 2001, 1072 of 2001, 1073 of 2001, 1074 of 2001, 1075 of 2001, 63 of 2002, 64 of 2002, 450 of 2002, 713 of 2002, 854 of 2002, 1000 of 2002, 1001 of 2002, 1003 of 2002, 1004 of 2002, 1005 of 2002, 1006 of 2002, 581 of 2003, 1017 of 2003, 296 of 2004, 324 of 2004, 750 of 2004, 751 of 2004, 752 of 2004, 898 of 2004, 940 of 2004, 959 of 2004, 368 of 2005, 369 of 2005, 370 of 2005, 371 of 2005, 482 of 2005, 483 of 2005, 906 of 2014, 907 of 2014, 929 of 2014, 621 of 2015, 695 of 2015, 696 of 2015, 697 of 2015, 698 of 2015, 702 of 2015 and 318 of 2016.
First Appeal Defective Nos.-414 of 2001, 439 of 2001, 460 of 2001 and 392 of 2002.

Asha Ram &Anr. ...Appellants
Versus
U.P. Awas Evam Vikash Parishad & Anr. ...Respondents

Counsel for the Appellants:
Sri Ravi Kant, Sri Manoj Kumar Pandey, Sri Surendra Tiwari, Sri B.K. Mishra, Sri Manoj Kumar Pandey.

Counsel for the Respondents:
Sri Kant, Sri Vivek Saran, Sri Madan Mohan, S.C.

A. Land Acquisition Act, 1894- Compensation - Fair compensation & Parity of Compensation - Land owner whose land is acquired for public purpose should get fair compensation - Once a fair compensation is determined judicially, all land owners whose land is taken away by the same Notification are entitled for same compensation and benefit thereof should be given even to those who could not approach the court - Fairness requires that all those similarly situated are treated similarly
(Para 36, 37)

B. Land Acquisition Act, 1894 - Notification under Section 4 of the Act issued on 26.06.1982–Section 6 notification published on 28.02.1987 -Special Land Acquisition Officer determined the compensation at the rate of Rs.50/-per square yard - Land owners reference under Section 18 of the Act to the Reference Court for enhancement of compensation-

Reference Court enhanced the rate of compensation from Rs.50/- per square yard to Rs.120/- per square yard - Order passed in land acquisition references was challenged in appeal before High Court under Section 54 of the Land Acquisition Act, 1894 - Orders of the Reference Court were set aside by High Court. Held- Appellants entitled to compensation at the rate of Rs.297/- per square yard along with other statutory benefits under the law.

(Para 38)

All the appeals allowed.

List of Cases Cited: -

1. Pradeep Kumar and others v. State of U.P. and others (2016) 6 SCC 308 followed

2. Ghaziabad Development Authority v. Kashi Ram and others, First Appeal No. 910 of 2000

3. First Appeal No. 459 of 1995, Noida v. Smt. Charan Kaur, dated 22nd January, 2019

4. First Appeal No. 744 of 2007, Jagdish Chandra v. NOIDA, 2008 (1) ADJ 253

5. Narendra and others v. State of Uttar Pradesh and others, Civil Appeal Nos. 10429-10430 of 2017 followed

6. Jai Prakash (Dead) by L.Rs. and others v. State of U.P. and another, Civil Appeal No. 16960 of 2017

7. First Appeal Defective No. 162 of 1987, Karim and others v. State of U.P., order dated 03rd December, 2014

8. First Appeal No. 56 of 2005, U.P. Avas Evam Vikash Parishad v. Jawahar Lal and others, dated 21st July, 2015

9. SLP (C) No. 4636 of 2016, U.P. Avas Evam Vikas Parishad v. Jawahar Lal and others distinguished (Para 33)

10.Special Land Acquisition Officer v. Karigowda andothers (2010) 5 SCC 708 distinguished (Para 34)

11. Loveleen Kumar and others v. State of Haryana and others (2018) 7 SCC 492(E-5)

(Delivered by Hon'ble Pradeep Kumar Singh Baghel J.)

1. These are fifty-three first appeals under Section 54 of the Land Acquisition Act, 18941. The appeals are arising out of five separate judgments and orders of the Reference Court passed in the respective land acquisition references. First Appeal Nos. 827 of 2000, 412 of 2001 and 552 of 2001 arise out of the judgment and order dated 23rd May, 2000 of the Reference Court. First Appeal Nos. 150 of 2001, 497 of 2001, 539 of 2001 and 854 of 2002 have been filed against the order of the Reference Court dated 13th April, 1998. First Appeal Nos. 898 of 2004, 906 of 2014, 907 of 2014, 929 of 2014, 318 of 2016 and First Appeal Defective No. 392 of 2002 have been filed against the order of the Reference Court dated 02nd April, 2002; whereas First Appeal No. 551 of 2001 has been filed challenging the order of the Reference Court dated 18th February, 2000. Rest thirty-nine first appeals arise out of the judgment and order dated 29th March, 2001 passed in the respective references by the Reference Court. All the aforesaid first appeals arise out of common notifications for acquisition.

2. There are two sets of first appeals: one in respect of acquisition for U.P. Awas Evam Vikas Parishad and the other in respect of acquisition for the Ghaziabad Development Authority. Though the judgments of the Reference Court are different, yet both the sets of appeals arise out of common notification for the same acquisition proceeding. The issues of facts and law are similar in both the sets of

appeals, hence learned counsel for the parties have agreed that both the sets of appeals may be decided by a common judgment.

3. First we deal with the first set of appeals led by First Appeal No. 827 of 2000.

4. Earlier a Division Bench of this Court vide its judgment and order dated 28th October, 2015 had affirmed the order of the Court of Reference awarding compensation at the rate of Rs.120/- per square yard to the land owners. Dissatisfied with the compensation, the land owners/ appellants preferred special leave petitions, being S.L.P. (Civil) No. 28776-28777 of 2016, which were converted to Civil Appeal No. 18634-18635 of 2017, along with several other special leave petitions. The Supreme Court vide its judgment and order dated 09th December, 2017 has disposed of the civil appeals and set aside the judgment and order of the Division Bench of this Court on the ground that its relevant judgment rendered in **S.L.P. (C) Nos. 1506-1517 of 2016, Pradeep Kapoor (sic Kumar) v. State of U.P.,** was not placed before the Court and was not considered. Accordingly, the matter has been remitted back to this Court to reconsider afresh in the light of the law laid down by the Supreme Court in the said case. The order of the Supreme Court reads as under:

"Leave granted.

Learned counsel for the parties have filed certain documents along with the Special Leave Petitions. The said documents are taken on record, particularly the decision of this Court in SLP (C) Nos. 1506-1517/2016, titled as Pradeep Kapoor vs. State of U.P. These documents were not on record before the High Court. They are taken on record. These appeals are remitted back to the High Court for deciding afresh. A prayer is made for consideration of the aforesaid documents. It is open to the parties if they so desire to adduce additional evidence, in that event, the High Court may ask Reference Court to record additional evidence and to record finding and then High Court may decide the appeals afresh.

The judgment of the High Court is set aside and the appeals are remitted to the High Court for being decided afresh in accordance with law.

The appeals are disposed of accordingly."

5. Consequent upon the matter has been heard by this Court.

6. We have heard Sri Ravi Kant, learned Senior Advocate, assisted by Sri Manoj Kumar Pandey, Sri Akhilesh Kalra and Sri Yash Tandon, learned counsel for the appellants in the respective appeals, and Sri Vivek Saran, learned counsel for the respondent- Awas Evam Vikas Parishad, and learned Standing Counsel.

7. Learned counsel for the parties are agreed that they do not want to adduce any additional evidence, hence there is no need to remit the matter back to the Reference Court. It was stated that learned counsel for the parties shall confine their submissions only to the materials which are on the record.

8. The Uttar Pradesh Awas Evam Vikas Parishad2 is a housing and development board. One of the functions of the Parishad is to frame and execute housing and improvement schemes and other projects. The Parishad framed Scheme No. 3 for construction of the residential colony in six villages, namely, Makanpur, Prahladgarhi, Jhandapur,

Mohiuddinpur, Arthala and Sahibabad in Pargana Loni, Tehsil Dadri, District Ghaziabad. Total 1229.914 acres land was proposed to be acquired. The details of the proposed land for acquisition are as follows:

Sl. No.	Village	Area (in acres)
1	Arthla	358-93
2	Jhandapur	36-947
3	Prahladgarhi	437-379
4	Makanpur	75-6156
5	Mohiuddinpur Kanavani	141-97
6	Shahibabad	107-05

9. At the instance of the Parishad the State Government issued a notification under Section 4 of the Act on 26th June, 1982 in respect of the aforesaid land. On 28th February, 1987 the notification under Section 6 of the Act was published. The Special Land Acquisition Officer3 passed the award on 27th February, 1989 and determined the compensation of the land at the rate of Rs.50/- per square yard. The land owners made applications for reference under Section 18 of the Act to the Reference Court for enhancement of the compensation. Five separate set of references were made. The lead case in the present appeals arise out of LAR No. 56 of 1995 (Asha Ram and others v. State of U.P.), which was connected with LAR No. 205 of 1995, LAR No. 209 of 1995 and LAR No. 236 of 1992. They were referred to the VIIIth Additional District Judge, Ghaziabad. These references were in respect of Villages Jhandapur, Shahibabad, Arthala, Mohiuddinpur and Prahladgarhi. The first set of references i.e. LAR No. 56 of 1995 and three others were decided by the VIIIth Additional District Judge, Ghaziabad vide its judgment and order dated 23rd May, 2000, thereby enhancing the rate of compensation from Rs.50/- per square yard to Rs.120/- per square yard.

10. Dissatisfied with the judgment and award dated 23rd May, 2000 passed by the Reference Court, the appellants-Asha Ram and others preferred the first appeals under Section 54 of the Act, being First Appeal Nos. 827 of 2000, 412 of 2001 and 552 of 2001. The other first appeals of first set have also been filed arising out of the common order of the SLAO.

11. The facts of the second set of appeals are that initially the land in question was acquired by the notification dated 26th June, 1982 at the instance of the Uttar Pradesh Awas Evam Vikas Parishad under Section 28 of the Uttar Pradesh Awas Evam Vikas Parishad Adhiniyam (for short, the "Parishad Adhiniyam") for acquisition of the 2127 acres of land situated in Village Makanpur, Prahlad Garhi, Jhandapur, Moinuddinpur, Arthala, etc.

12. Meanwhile the State Government took a decision to give 731 acres of land to the Ghaziabad Development Authority out of the proposed land which was notified under Section 4 of the Act read with under Section 28 of the Parishad Adhiniyam. 731 acres of land was situated in revenue Villages Makanpur, Prahlad Garhi, Hasanpur and Owapur. In this regard a Government order was issued on 31st July, 1984. It was agreed between the parties that both the parties shall carry out trunk

structural services jointly and both the authorities shall work after the mutual discussion. It was also resolved that whatever compensation shall be decided for the acquisition of the land, the same shall be borne by the Parishad and the Development Authority of their respective area. The notification under Section 32 of the Parishad Adhiniyam relatable to Section 6 of the Land Acquisition Act was issued on 28th February, 1987. A separate notification under Section 4(1) of the Act was issued seeking to acquire a huge tract of land including 710 acres of land, which was initially subject matter of acquisition made by the Parishad. On 24th February, 1988 the notification under Section 6(1) of the Act was issued.

13. It is pertinent to mention that the notification under Section 6 of the Act in respect of the land acquired for the Parishad (under Section 32 of the Parishad Adhiniyam) was issued on 28th February, 1987 and on the same day a separate notification under Section 4 of the Act was published for the Ghaziabad Development Authority in respect of 731 acres of land, which was earlier the subject matter of acquisition by the Parishad. The Special Land Acquisition Officer has passed an award on 27th February, 1989 determining the market value at the rate of Rs.50/- per square yard. The tenure holders- appellants filed applications under Section 18 of the Act for reference. The Reference Court vide its judgment dated 29th March, 2001 enhanced the compensation from Rs.50/- to Rs.120/- per square yard. Dissatisfied with the judgment and order of the Reference Court dated 29th March, 2001, thirty-nine first appeals, as have been mentioned in the earlier part of this judgment, have been preferred.

14. In respect of the land, which was acquired for the Parishad, the SLAO vide his order dated 27th February, 1989 has passed the award wherein the same compensation i.e. Rs.50/- per square yard was determined. The land loosers in the said case made an application under Section 18 of the Act for reference. The Reference Court vide its judgment and order dated 23rd May, 2000 enhanced the compensation at the rate of Rs.120/- per square yard.

15. Aggrieved by the said reference order, the land loosers in that case filed a first appeal, being First Appeal No. 827 of 2000, which was dismissed by a Division Bench on 28th October, 2015. The Division Bench upheld the order of the Reference Court and affirmed the rate of compensation of Rs.120/- per square yard.

16. The tenure holders against the order of the Division Bench dated 28th October, 2015 preferred special leave petitions being S.L.P. (Civil) No. 28776-28777 of 2016, which were converted to Civil Appeal No. 18634-18635 of 2017. The Supreme Court vide order dated 09th December, 2017, as quoted above, has disposed of the said civil appeals along with the connected appeals and has remanded the matter back to this Court to decide the matter afresh in the light of the judgment of **Pradeep Kumar v. State of U.P., S.L.P. (C) Nos. 1506-1517 of 2016.**

17. A Division Bench of this Court vide an order dated 28th October, 2015 dismissed First Appeal No. 827 of 2000, Asha Ram and another v. U.P. Awas Evam Vikas Parishad, holding that the compensation awarded by the Reference Court at the rate of Rs.120/- per square yard is a fair compensation and no

interference was called for in the order of the Reference Court.

18. Aggrieved by the order of the Division Bench, special leave petitions, as mentioned above, were preferred by the claimants and the order of the Division Bench dated 28th October, 2015 has been set aside and the matter has been remitted to this Court to decide afresh in the light of the law laid down by the Supreme Court in **Pradeep Kumar** (supra).

19. Arising out of the same acquisition proceeding and the award passed by the SLAO, three other judgments dated 13th April, 1998, 18th February, 2000 and 02nd April, 2002 have been passed by the Reference Court in the respective land acquisition references of the tenure holders. Against these three judgments of the Reference Court, 11 first appeals, as have been mentioned above, have been filed by the farmers which are connected in this batch of first appeals.

20. All the six villages, where the land has been acquired, situate in Tehsil Dadri, District Ghaziabad. In the past the State Government has acquired a large tract of land for the industrial development for the New Okhla Industrial Development Authority and the Ghaziabad Development Authority from 1982 onwards by different notifications under the Land Acquisition Act and a series of litigation ensued by the land loosers, whose all/ most of the holdings have been taken by the State for the planned development activities. The situation of these villages have been mentioned by the SLAO and the Reference Court in its order. The SLAO after inspection of the area of the land has found that the land in question situates towards the south of Delhi-Ghaziabad Link Road, in the east side there is well developed residential colonies at Mohan Nagar and the Ghaziabad Development Authority. In the west, Vaishali and Kaushambi schemes developed by the Ghaziabad Development Authority are situated and the villages are only at a distance of 14 kms. from the limits of Delhi. In their reference applications also, the appellants-claimants have mentioned that the entire area is well developed. It is near the National Highway-24 and it is well connected with the railways and bus services and the area is surrounded by several well developed residential colonies and the residential area. They have claimed that the market value of the land was Rs.8000/- per square yard and it has potential for residential and commercial use.

21. Learned counsel for the appellants have drawn our attention to some of the judgments of this Court in respect of acquisition of the land of same village Makanpur and the adjoining villages, where market value of the land has been determined at Rs.297/- per square yard. In all those cases the notifications have been made within a span of 2-6 years and recently in all those cases, irrespective of the dates of notifications, the compensation has been awarded at the same rate i.e. Rs.297/- per square yard.

22. In the case of **Ghaziabad Development Authority v. Kashi Ram and others, First Appeal No. 910 of 2000**, and other connected appeals, the land was acquired in the same village Makanpur, Pargana Loni, Tehsil Dadri, District Ghaziabad for the planned development by the Ghaziabad Development Authority. In the said case, the notification under Section 4 of the Act was issued on 12th September, 1986,

which was published in the Gazette on 28th February, 1987 and the notification under Section 6(1) of the Act was issued on 24th February, 1988. The possession of the land was taken by the State on 14th June, 1988 and 29th June, 1988. The SLAO passed the award and granted compensation at the rate of Rs.50/- per square yard. The matter was referred to the Reference Court under Section 18 of the Act. The Reference Court enhanced the rate of compensation from Rs.50/- per square yard to Rs.90/- per square yard. Aggrieved by the order of the Reference Court, the Ghaziabad Development Authority filed 60 appeals and the land owners had also filed the appeals for enhancement of compensation and lowering the deductions from 33% made towards development cost. The Division Bench by a common judgment decided the batch of first appeals vide judgment and order dated 13th November, 2014. The Court dismissed the appeals filed by the Ghaziabad Development Authority and the appeals of the claimants/ land owners for enhancement of compensation were allowed. This Court found that the claimants/ land owners shall be entitled for compensation at the rate of Rs.297/- per square yard. Aggrieved by the judgment of the Division Bench dated 13th November, 2014 passed in First Appeal No. 910 of 2000 the Ghaziabad Development Authority preferred Petition for **Special Leave to Appeal (C) No. 5815 of 2015, Ghaziabad Development Authority v. Kashi Ram and others, and other** connected special leave petitions, which were dismissed by the Supreme Court on 05th May, 2015 with the following order:

"We find no reason to interfere in these matters by exercising our powers under Article 136 of the Constitution. Consequently the Special Leave Petitions stand dismissed."

23. The Ghaziabad Development Authority filed review applications which were dismissed by the Supreme Court on 06th October, 2015. The curative petitions filed by the Ghaziabad Development Authority also came to be dismissed on 15th March, 2016.

24. It was urged by learned counsel for the appellants that in the case of **Ghaziabad Development Authority v. Kashi Ram (supra)** the land of the same village Makanpur was acquired and its notification was also around the same period when the land in the present appeals was acquired. Hence, it was urged that the appellants are also entitled for the same compensation.

25. Our attention has been drawn to following cases, wherein the State has acquired the land for the planned development in and around the same years and in all those cases the compensation has been uniformly awarded at the rate of Rs.297/- per square yard. It would be convenient to give the details of those cases in a tabular form:

Sl.No.	Village	Dates of notification u/s 4 and 6 of the Act	No. and name of the lead first appeal	Compensation awarded by SLAO per square yard (in Rs.)	Compe-nsation given by Reference Court per square yard (in Rs.)	Compensation awarded by High Court per square yard (in Rs.)	Comp en-sation awarded by the Supreme Court per square yard (in Rs.)
1	Chalera	30.10.	First App	43.64	148.75	297/-	....

	Bangar	1987 15.12.1989	eal No. 744 of 2001, Jagdish Chandra &Ors. v. NOIDA &Anr.							npur	08.1988 22.02.1989	Appeal No. 41 of 2005, Rameshwar Dayal v. State of U.P. &Ors.			7/- Civil Appeal No. 16960-17, arising out of SLP No. 13802/16, Jai Prakash (dead) by L.Rs. And others v. State of U.P.
2	Maka npur	12.09.1986 24.02.1988	First Appeal No. 910 of 2000, GDA v. Kashi Ram &Ors.	50/-	90/-	297/-	SLP dismissed. Order of High Court affirmed.								
								6	Bhangel Begumpur, Nagla Charandas, Geha Tilpatabad Tehsil Dadri	27.02.1988 15.12.1989	First Appeal No. 1056 of 1999, Raghuraj Singh &Ors. v. State of U.P. &Ors.	35.07	93.75	297/-	... ..
3	Maka npur	15.03.1988 -	First Appeal No. 522 of 2009, Pradeep Kumar v. State of U.P	72/-	135/-	297/-	Civil Appeal No. 1506-1517 of 2017 dismissed on 11.9.17. Narendra Kumar v. State.								
								7	Adjoining Village of Bhangel Begumpur, Nagla Charandas, Geha Tilpatabad Tehsil Dadri	05.01.1982 -	First Appeal No. 564 of 1997, Khajan Singh and others v. State	.....	…..	297/-	Civil Appeal No. 6775 of 2013, Harbhajan Kumar and others v. Collector, LA. While
4	Maka npur	12.09.1986 24.02.1988	First Appeal No. .... Narendra Kumar	50/-	90/-	115/-	297/-								
5	Maka	16.	First	90/-	160/-	160/-	Rs.29								

of U.P., decided on 11.10.2012	deciding similar civil appeal extended the benefit of enhanced compensation @ Rs.297/-	

26. Our attention has also been drawn to an order passed by this Court in **First Appeal No. 459 of 1995, Noida v. Smt. Charan Kaur,** dated 22nd January, 2019, whereby a review application has been allowed by a Division Bench of this Court, in which one of us (P.K.S. Baghel, J.) was a member. In the said case in respect of the same village Makanpur a notification under Section 4(1) of the Act was made on 15th March, 1998 proposing to acquire 463.959 acres of land. The SLAO awarded compensation at the rate of Rs.72/- per square yard. The Reference Court has enhanced it to Rs.106/- per square yard. The land owners preferred First Appeal No. 459 of 1995 and 48 other first appeals. The Division Bench of this Court decided all the said first appeals by a common judgment and order dated 30th October, 2014 setting aside the judgment dated 24th April, 1993 and remanded the matter back to the Reference Court for deciding afresh in the light of the observations made in the judgment. In the said case, review application was filed on the ground that a Division Bench of this Court in **First Appeal No. 744 of 2007, Jagdish Chandra v. NOIDA, reported in 2008 (1) ADJ 253,** wherein the land of the same area was acquired, has enhanced the compensation at the rate of Rs.297/- per square yard. It was argued on behalf of the review applicant that the said judgment was not brought to the notice of this Court. The review application was allowed on the ground of similar facts.

27. It is pertinent to mention that against the same reference order another first appeal, being First Appeal No. 737 of 1995, was decided by this Court on 13th November, 2015 and this Court has remitted the matter back to the Reference Court to decide it afresh. The order of the Division Bench dated 13th November, 2015 was challenged before the Supreme Court in **Special Leave Petition (Civil) No. 25237-48 of 2015**, wherein leave was granted and the special leave petitions were converted to **Civil Appeal No. 1506-17 of 2016 (Pradeep Kumar and others v. State of U.P. and others)**. The Supreme Court vide its order dated 16th February, **2016, reported in (2016) 6 SCC 308 (Pradeep Kumar and others v. State of Uttar Pradesh and another)**, allowed the civil appeals and set aside the judgment of the Division Bench of this Court dated 13th November, 2015 and remanded the matter back to this Court to decide afresh. While remanding the matter back to this Court, the Supreme Court has made following observations:

"2. In our opinion certain aspects with regard to the valuation and location of the land have not been properly discussed and therefore, the matters require reconsideration by the High Court. For instance, we may say that the Notification under Section 4 of the Land Acquisition Act, 1894, had been issued on 10-3-1988. The appellants have been awarded compensation @ Rs.135

per square yard for the land belonging to them, whereas in respect of certain land, said to be similarly situated, which had been acquired in the year 1986, compensation of Rs.297 per square yard had been awarded.

3. We are of the view that the aforestated aspects have not been clarified because normally the price of the land goes on increasing, but the reason as to why lesser amount has been given to the appellants, has not been properly explained in the impugned judgment4."

28. Pursuant thereto, a Division Bench of this Court allowed the first appeal vide order dated 21st April, 2016, whereby this Court enhanced the compensation in the light of the earlier orders passed in respect of similarly situated land at the rate of Rs.297/- per square yard for the same village. The relevant part of the order of the Division Bench dated 21st April, 2016 reads as under:

"28. We are definitely of the opinion that similarly situated farmers, whose land holding in the same village, has been acquired under subsequent notifications, would be entitled to the benefit of the rate which had been determined by the High Court in respect of earlier notification. The land of the farmers acquired under the subsequent notification similarly situate, cannot be any less valuable than the one determined by the Court in respect of earlier Notification, except for special reasons.

*** *** ***

41. We are also of the opinion that in view of the fact that the land of the appellants was acquired in 1988, and because the statute does not empower the authorities or reference court to deduct any amount from the market value determined specifically when no development of the land had been shown to have taken place nor any amount has been spent for the same, there should be no deduction from the rate so determined. We draw support from the judgement in the case of ***Jagdish Chandra and others vs. New Okhla Industrial Development Authority and another, 2008(1) ADJ 253 and Ganeshi Singh vs. State of U.P. and others, 2008 (5) ADJ 306.***

42. The appeals of the tenure holders are allowed. The orders of the Reference Court dated 24.3.1993 and dated 30.4.1993 are set aside. It is held that tenure holders shall be entitled to compensation at the rate of Rs. 297/- per square yard."

29. Regard may be had to the fact that in the case of **Narendra and others v. State of Uttar Pradesh and others, Civil Appeal Nos. 10429-10430 of 2017,** the Supreme Court has quoted with approval the judgment of this Court in **Pradeep Kumar (supra)** in the following terms:

"14) This Court in Civil Appeal No. 1506-1517 of 2016 titled Pardeep Kumar etc. etc. v. NOIDA which pertains to subsequent acquisition proceeding in the same village Makanpur, but falling under NOIDA, had on 16th February, 2016 set aside the order passed by the High Court of Judicature at Allahabad and remanded the matter back to the High Court for reconsideration in view of the judgments passed by the coordinate benches of the same High Court in Kashi Ram's case as well as other cases. The High Court, after the remand vide its

judgment dated 11th April, 2016 in First Appeal No. 522 of 2009 titled, Pardeep Kumar and Others vs. State of U.P. &Anr. awarded the same enhanced compensation at the rate of Rs. 297/- per sq. Yard even in the same case also. The High Court while awarding the compensation at the same rate held:

"27. Therefore, one of the questions which needs to be examined by us is, can the appellants be denied the same rate of compensation only because the filed by them before the reference court did not disclose the rate which they seek now in terms of the judgment of the High Court in the case of Ghaziabad Development Authority (supra). Kanshi Ram case.

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29. It is settled law that the compensation under the Act, 1894 had to be fair and just. Fairness requires that all those similarly situated are treated similarly. Technicalities qua rate as per exemplars filed by poor farmers, who are illiterate, has to be given only such importance as may not defeat their right of fair and just compensation qua compulsory acquisition of land holdings.

30. The determination of acquisition at the rate of Rs.297/- per square yard in the case of Ghaziabad Development Authority (supra) Kashi Ram case has therefore, to be taken as the fair rate determined for the land situated in the village Makanpur with regard to the notification issued on 12th September, 1986 as well as under Notification dated 15th March, 1988."

30. After the judgment of **Narendra (supra) in the case of Jai Prakash (Dead) by L.Rs. and others v. State of U.P. and another, Civil Appeal No. 16960 of 2017,** the Supreme Court on the basis of parity has awarded the same compensation of Rs.297/- per square yard. In the said case earlier the appellants were awarded compensation at the rate of Rs.160/- per square yard. The land in this case also is situated in Village Makanpur, District Ghaziabad. The relevant part of the order of the Supreme Court in **Jai Prakash (supra)** reads as under:

"We have considered the matter and we find that the respondent-State has not averred and established that the two lands i.e. the land in Narendra's case (supra) and the land in the instant case, are different and diverse so as to deny parity of compensation to the appellants.

We find that there is nothing on record which requires that two lands should be treated differently. It is a fact that lands in both cases cited above, are situated on the same side of the road as is apparent from the Map on record. We, therefore, have no hesitation in granting the same rate of compensation to the present appellants i.e. Rs.297/- per square yard, as was awarded in Narendra's case (supra).

Hence, the appeal is allowed and the orders passed by the courts below are set aside.

We further direct that the compensation at the rate of Rs.297/- per square yard be paid to the appellants by the respondents within a period of six months from today."

31. Similarly, in **First Appeal Defective No. 162 of 1987, Karim and others v. State of U.P.,** vide order dated 03rd December, 2014 this Court has enhanced the compensation at the rate of Rs.297/- per square yard.

32. Learned counsel for the Parishad-respondent has placed reliance on a judgment of a Division Bench of this Court in **First Appeal No. 56 of 2005, U.P. Avas Evam Vikash Parishad v. Jawahar Lal and others,** dated 21st July, 2015, wherein this Court has determined the compensation in respect of the land of the same villages which were acquired for the Parishad. In the said case the notification under Section 4(1) of the Act read with Section 28 of the Parishad Adhiniyam was published on 26th June, 1982. The SLAO passed the award at the rate of Rs. 50/- per square yard and after making 25% deduction it was determined at the rate of Rs.37.50 per square yard. The Reference Court enhanced the compensation at the rate of Rs.160/- per square yard and thereafter it applied 25% deduction and ultimately the market rate was found to be at Rs.120/- per square yard. Before the Division Bench the only submission made was in respect of deduction of 25%. It was submitted that the said deduction was not justified. However, this Court did not accept the said submission and dismissed the first appeal. Against the said order a special leave petition, being **SLP (C) No. 4636 of 2016, U.P. Avas Evam Vikas Parishad v. Jawahar Lal and others**, was preferred, which was dismissed along with other special leave petitions by the Supreme Court by the following order dated 28th March, 2016:

"Heard the learned counsel for the petitioner and perused the relevant material.

Exemption from filing certified copy of the impugned judgment and O.T. is granted.

We do not find any legal and valid ground for interference. The Special Leave Petitions are dismissed."

33. We have perused the judgment of the Division Bench of this Court. In the said case, no submission was raised seeking parity of compensation at the rate of Rs.297/- per square yard as in the case of similarly situated land. The only submission raised before the Division Bench was in respect of the deduction of 25%. In view of the said distinguishing fact, the said judgment has no application in the facts of the present case.

34. In the case of **SpecialLand Acquisition Officer v. Karigowda and others5 t**he Supreme Court has laid down the law in respect of capitalisation of yield method. In the said case the land was being used exclusively by the owners for growing mulberry crops and it was used for commercial purposes. The Supreme Court has held that it is settled principle of law that onus to prove entitlement to receive higher compensation is upon the claimants. We have perused the said judgment. In the said case, the claimants have failed to produce on record the sale instances and they have also not produced on record any specific evidence to justify the compensation awarded to them by the Reference Court. The Court has noticed "in fact, there is hardly any evidence, much less cogent and impeccable evidence to support increase on the basis of net income capitalization method.". In our view, the said case has no application in the present facts and circumstances.

35. In **Loveleen Kumar and others v. State of Haryana and others6** the Supreme Court observed that the Reference Court and the High Court did not consider the sale-deeds produced on behalf of the State. Hence, the Court was of the view that the matter needs

reconsideration by the High Court as the evidence was not properly appreciated and the matter was remitted to the High Court.

36. It is pertinent to mention that the Supreme Court in **Narendra (supra**) has approved the judgment of **Pradeep Kumar (supra**) and has considered elaborately the provision of Section 28-A of the Act. Section 28-A of the Act reads as under:

"***28A Re-determination of the amount of compensation on the basis of the award of the Court.****-(1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court:*

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18."

The Supreme Court in ***Narendra (supra) h****as observed as under:*

" 7) The purpose and objective behind the aforesaid provision is salutary in nature. It is kept in mind that those land owners who are agriculturist in most of the cases, and whose land is acquired for public purpose should get fair compensation. Once a particular rate of compensation is judicially determined, which becomes a fair compensation, benefit thereof is to be given even to those who could not approach the court. It is with this aim the aforesaid provision is incorporated by the Legislature. Once we keep the aforesaid purpose in mind, the mere fact that the compensation which was claimed by some of the villagers was at lesser rate than the compensation which is ultimately determined to be fair compensation, should not be a ground to deny such persons appropriate and fair compensation on the ground that they claimed compensation at a lesser rate. In such cases, strict rule of pleadings are not be made applicable and rendering substantial justice to the parties has to be the paramount consideration. It is to be kept in mind that in the matter of compulsory acquisition of lands by the Government, the villagers whose land

gets acquired are not willing parties. It was not their voluntary act to sell of their land. They were compelled to give the land to the State for public purpose. For this purpose, the consideration which is to be paid to them is also not of their choice. On the contrary, as per the scheme of the Act, the rate at which compensation should be paid to the persons divested of their land is determined by the Land Acquisition Collector. Scheme further provides that his determination is subject to judicial scrutiny in the form of reference to the District Judge and appeal to the High Court etc. In order to ensure that the land owners are given proper compensation, the Act provides for "fair compensation'. Once such a fair compensation is determined judicially, all land owners whose land was taken away by the same Notification should become the beneficiary thereof. Not only it is an aspect of good governance, failing to do so would also amount to discrimination by giving different treatment to the persons though identically situated. On technical grounds, like the one adopted by the High Court in the impugned judgment, this fair treatment cannot be denied to them.

8) No doubt the judicial system that prevails is based on adversarial form of adjudication. At the same time, recognising the demerits and limitations of adversarial litigation, elements of social context adjudication are brought into the decision making process, particularly, when it comes to administering justice to the marginalised section of the society.

9) History demonstrates that various forms of conflict resolution have been institutionalized from time to time. Presently, in almost all civil societies, disputes are resolved through courts, though the judicial system may be different in different jurisdictions. Traditionally, our justice delivery system is adversarial in nature. Of late, capabilities and method of this adversarial justice system are questioned and a feeling of disillusionment and frustration is witnessed among the people. After all, what is the purpose of having a judicial mechanism - it is to advance justice. Warren Burger once said:

"The obligation of the legal profession is... to serve as healers of human conflict...(we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."

10) Prof. (Dr.) N.R. Madhava Menon explains the meaning and contour of social justice adjudication as the application of equality jurisprudence evolved by the Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Court has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. The Courts, in such situations, generally invoke the principle of fairness and equality which are essential for dispensing justice. Purposive interpretation is given to subserve the ends of justice particularly

when the cases of vulnerable groups are decided. The Court has to keep in mind the "problem solving approach' by adopting therapeutic approaches to the maximum extent the law permits rather than "just deciding' cases, thereby bridging the gap between law and life, between law and justice. The notion of access to justice is to be taken in a broader sense. The objective is to render justice to the needy and that means fair solutions to the conflict thereby providing real access to "justice'."

37. In view of the clear enunciation of law in the aforesaid judgments, we find that the appellants are entitled for fair compensation. The fairness requires that "all those similarly situated are treated similarly."

38. Accordingly, we find that all the appellants in both the sets of first appeals are entitled to compensation at the rate of Rs.297/- per square yard. We have mentioned in detail regarding the other similar cases where compensation has been awarded at the rate of Rs.297/- per square yard even though there were gaps between the different notifications, but the villages are same. As discussed above, **Narendra (supra)** lays emphasis on fair compensation and on parity of compensation in respect of similarly situated land. A careful analysis of the said judgment clearly shows that gaps of a few years in the notifications have been ignored by the Supreme Court and this Court also in the subsequent judgment in **First Appeal No. 522 of 2009, Pradeep Kumar v. State of U.P.**, which has been affirmed by the Supreme Court. We do not find any reason for not awarding compensation at the same rate. Accordingly, the orders of the Reference Court dated 13th April, 1998, 18th February, 2000, 23rd May, 2000, 29th March, 2001 and 02nd April, 2002, which are under challenge in the respective appeals, are set aside. The appellants are entitled to compensation of the land at the rate of Rs.297/- per square yard along with other statutory benefits under the law which shall be calculated and paid to them expeditiously within six months from today.

39. All the pending amendment and substitution applications are allowed. In those appeals where there is deficiency of court fees, the benefit of this order will be given only after making the deficiency good. The other pending applications accordingly stand disposed of.

40. All the appeals are accordingly allowed. No order as to costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2019

BEFORE
THE HON'BLE HARSH KUMAR, J.

SECOND APPEAL No. 260 of 1992

Sartaj & Anr. ...Appellants
Versus
Ayub Khan & Ors. ...Respondents

Counsel for the Appellants:
Sri Vipin Saxena

Counsel for the Respondents:
Sri S.K. Verma, Sri A.R. Gupta, Sri K.C. Pushkar Pandey, Sri Krishna Chandra Pushkar.

A. Specific Relief Act, 1963 - Section 26 - When instrument may be rectified- Rectification of an instrument may be permitted when through fraud or a 'mutual mistake' of parties, a contract or

other instrumentin writing does not express their real intention.

(Para 21)

B. Specific Relief Act, 1963 - mutual mistake as ground for rectification – If a mistake is averred, as the ground for the rectification of a contract, or instrument in writing, the evidence must prove a mistake common to all the parties.

(Para21)

C. Plaintiffs purchased property from defendants Sri Jodha and Smt. Jal Devi by registered sale deed. Due to inadvertent clerical mistake in the sale deed, names of their father and mother - Sri Govind father of Sri Jodha and; Smt. Ram Devi mother of Smt. Jal Devi, were wrongly mentioned as vendors - Suit for rectification of sale deed decreed by trial court - In appeal plaintiff's suit dismissed - High Court held due to mutual mistake at the time of framing and reducing the sale deed in writing, in place of vendors names of their predecessors Sri Govind and Smt. Ram Devi were wrongly mentioned who were admittedly not alive at that time. The sale deed did not express real/correct intention of contract between the parties (Para 26)

Appeal allowed.

List of Cases Cited: -

1. AIR 1957 Assam 49 'Santi Ranjan Das Gupta Vs. Dasuram Mirzamal Firm',

2. AIR 1956 Orissa 83 'Bidyadhar Mohanty and another Vs. Ananta Hota and another distinguished (Para 16)

3. AIR 1921 Calcutta 730 'Bepin Krishna Ray and others Vs. Jogeshwar Ray and others relied upon (Para 15, 23)

4. AIR 1958 Rajasthan 276.M/s. Siddique and Co. v. M/s. Utoomal and Assudamal Co., AIR1946 PC 42 relied (para 22)

5. Natarajan Asari Vs. Pichamuthu Asari, AIR 1972 (Madras) 192 (Para 24) (E-5)

(Delivered by Hon'ble Harsh Kumar, J.)

1. The present second appeal has been filed against impugned judgment and decree dated 30.9.1991 passed by Additional Civil Judge, Etah in Civil Appeal No.92 of 1989 (Ayub Khan Vs. Sartaj and others), by which the lower appellate court by allowing appeal and setting aside judgment and decree dated 17.7.1989 passed by 4th Additional Munsif, Etah in Civil Suit No.467 of 1986 (Sartaj Vs. Ayub Khan), dismissed plaintiffs' suit. Feeling aggrieved plaintiffs have preferred this appeal which was admitted vide order dated 4.2.1992 on following two substantial questions of law framed by this Court:-

"(i) whether the Additional Civil Judge had not at all considered the material issues involved in the case and based his judgment on irrelevant considerations.

(ii) whether the Additional Civil Judge had committed illegality in rejecting the admitted facts on which depended the decision of the case."

2. At the time of hearing parties' counsel in appeal one more substantial question of law found to arise in the second appeal and was framed as under:-

(iii) whether the Additional Civil Judge was correct in holding that there was no mutual mistake for rectification in the impugned sale deed.

3. The brief facts relating to the case are that appellants filed Civil Suit No.467 of 1986 with the allegations that plaintiffs purchased property land Khasra No.843-A and 843-B area 0.20 acre from defendant-respondent nos.2 & 3 Sri Jodha son of Sri Govind and

Smt. Jal Devi daughter of Smt. Ram Devi on 19.12.1985 by registered sale deed for valuable consideration of Rs.2,000/- but due to inadvertent clerical mistake and misunderstanding of scribe, in the sale deed in question, executed by Jodha and Jal Devi, defendant nos.2 & 3 by putting their thumb impressions, names of their father and mother, Sri Govind father of Sri Jodha and Smt. Ram Devi mother of Smt. Jal Devi were wrongly mentioned as vendors in place of Sri Jodha and Smt. Jal Devi and taking undue advantage of above mutual/clerical mistake defendant no.1 Ayub Khan obtained a sale deed from Sri Jodha and Smt. Jal Devi in his favour on 6.3.1986. The following reliefs sought in the plaint are for issuing of (a) a decree for rectification of sale deed dated 19.12.1985 for writing names Sri Jodha and Smt. Jal Devi as vendors in place of names of Sri Govind and Smt. Ram Devi, (b) a decree for cancellation of sale deed dated 6.3.1986 allegedly obtained by defendant no.1 from defendant nos.2 & 3 in respect of property in suit and (c) a decree for permanent injunction restraining defendants from interfering in the peaceful possession of plaintiffs over the property in suit. In written statement filed by contesting defendant no.1 Ayub Khan in paras 1, 2 & 3 of written statement it was admitted that Sri Govind father of Sri Jodha and Smt. Ganga Devi @ Ram Devi mother of Smt. Jal Devi, were previous owners of land in suit and Sri Govind died about 10 years back while Smt. Ganga Devi @ Ram Devi died about 12 years back, leaving behind them Sri Jodha son of Govind and Smt. Jal Devi daughter of Smt. Ganga Devi @ Ram Devi as their only legal heirs.

4. The trial court framed following five issues on parties' pleadings viz.

(i) Whether sale deed dated 19.12.1985 is liable to be rectified?

(ii) Whether sale deed dated 6.3.1986 is liable to be cancelled?

(iii) Whether suit is barred by provisions of Section 34 of Specific Relief Act?

(iv) Whether suit is under valued and Court fees paid is insufficient? and

(v) To what relief, if any, are the plaintiffs entitled?

5. Apart from disputed sale deeds, copy of extract of Khatauni, reports of handwriting and finger print expert by both parties were filed as documentary evidence. The plaintiffs produced Sri C.K. Jauhari, Finger Print and Hand Writing Expert as P.W.-1, Sri Safi Alam as P.W.-2, Sri Jodha son of Govind as P.W.-3 and Sartaj-plaintiff as P.W.-4 while defendant no.1 produced Noor Alam Khan as D.W.-1 and Ayub Khan himself as D.W.-2. After hearing parties' counsel and analyzing the evidence on record, the trial court in its findings on issue no.1 came to the conclusion that sale deed dated 19.12.1985 was executed by defendant nos.2 & 3 Sri Jodha and Smt. Jal Devi and the sale deed is liable to be rectified as prayed and passed (i) a decree for rectification of sale deed dated 19.12.1985, (ii) a decree for cancellation of sale deed dated 18.3.1986 as well as (iii) a decree for permanent injunction against defendants. Feeling aggrieved the defendant no.1 Ayub Khan preferred Civil Appeal No.92 of 1989 before District Judge, Etah which was transferred for disposal to Additional Civil Judge, Etah and was allowed by impugned judgment and decree dismissing the suit of plaintiffs by setting aside judgment and decree passed by trial court. Hence the plaintiffs have preferred this appeal.

6. Heard Sri Vipin Saxena, learned counsel for appellants, Sri Anant Ram

Gupta, learned counsel for respondent no.1 and perused the record.

7. Learned counsel for appellants contended that lower appellate court acted wrongly and illegally in not considering the undisputed/admitted facts on record and material issues involved in the case and misappreciated the evidence on irrelevant considerations; that it was not only proved rather was admitted to the defendant-respondent no.1 Ayub Khan that Govind and Maiku were original tenure holders of land in suit and after death of Maiku his share in land in dispute devolved on his wife Smt. Ganga Devi @ Ram Devi and after death of Govind his share in land in disputed devolved on his son Sri Jodha defendant-respondent no.2 and on death of Smt. Ganga Devi @ Ram Devi her share in land in dispute devolved on her daughter Smt. Jal Devi defendant-respondent no.3; that after mutation of their names in revenue records in respect of land in suit, they executed disputed sale deed dated 19.12.1985 in favour of plaintiff-appellants; that it is admitted to defendant-respondent no.1 Ayub Khan that Govind and Smt. Ganga Devi @ Ram Devi had died about 10 & 12 years back respectively and so the question of execution of sale deed by them, the dead persons neither arose nor was possible; that lower appellate court has acted wrongly in misguiding itself by relying on the fact that stamp paper for execution of impugned sale deed dated 19.12.1985 was purchased in the name of Sri Govind; that it was fully proved from the evidence on record that identity of vendor was mistaken by scribe on account of not looking over mutation entry on right side margin over copy of extract of Khatauni, and so at the time of purchase of stamp name of original tenure holder was wrongly mentioned in place of name of Sri Jodha and same mistake was repeated, due to which the sale deed executed by defendant-respondent nos.2 & 3 was also wrongly scribed in the name of dead persons as vendors, over which thumb impressions were put by Sri Jodha and Smt. Jal Devi defendant-respondent nos.2 & 3 respectively, but over their thumb impressions (due to repetition of above inadvertent mistake) names of Sri Govind and Smt. Ram Devi were wrongly mentioned; that both parties to the sale deed dated 19.12.1985 were of real intention that sale deed in respect of land in dispute is being executed by Sri Jodha and Smt. Jal Devi, defendant-respondent nos.1 & 2 as vendors in favour of plaintiffs-appellants Sartaj and Sher Zaman Khan as vendors; that lower appellate court acted wrongly and illegally in ignoring the admitted facts; that judgment and decree passed by lower appellate court are based on wrong, illegal, arbitrary and perverse findings which are based on surmises and conjectures; that since impugned sale deed dated 6.3.1986 in favour of defendant Ayub Khan is not only in respect of disputed plot Khasra No.843 but also in respect of other plot numbers 907 & 910, the appellants do not seek cancellation of sale deed dated 6.3.1986 as a whole or in respect of land plot nos.907 & 910.

8. Per contra, learned counsel for defendant-respondent Ayub Khan supported the impugned judgment and decree and contended that Section 26 of Specific Relief Act provides for rectification of an instrument through fraud or mutual mistake of parties and since there is no allegation of fraud and

no mistake of parties so the relief of rectification may not be granted; that in any case sale deed dated 6.3.1986 executed by defendant-respondent nos.2 & 3 in favour of defendant no.1 Ayub Khan is in respect of their respective shares in plot Khasra No.843, 907 & 910 so even if the sale deed in favour of plaintiffs prevails upon rectification of sale deed dated 19.12.1985, the sale deed dated 6.3.1986 in favour of defendant no.1 in respect of plot Khasra Nos.907 & 910 may not be cancelled.

9. Upon hearing parties learned counsel and perusal of record as well as lower court record, I find that facts of the case are not disputed to the extent that plot Khasra nos.843-A & B originally belonged to Sri Govind and Smt. Ganga Devi @ Ram Devi wife of Maiku which devolved on Sri Jodha and Smt. Jal Devi defendant-respondent nos.2 & 3 being son of Sri Govind and daughter of Smt. Ram Devi respectively and after mutation of their names in revenue records, they transferred the same and executed a registered sale deed dated 19.12.1985 in favour of plaintiffs-appellants Sartaj and Sher Zaman Khan. It is clear from the evidence on record that without looking at mutation entry on right side margin on copy of extract of Khatauni, purchase of general stamps for sale deed was wrongly made in the name of Govind deceased in place of his son Sri Jodha and consequently sale deed dated 19.12.1985 was also scribed in the names of Sri Govind and Smt. Ram Devi (dead persons) instead of Sri Jodha and Smt. Jal Devi and over the thumb impressions put by Sri Jodha and Smt. Jal Devi over the sale deed, names of Sri Govind and Smt. Ram Devi were mentioned/transcribed by inadvertent and mutual mistake of scribe and thereafter in office of Sub-Registrar, when sale deed was presented by Sri Jodha and Smt. Jal Devi for registration, the same mistake was repeated under the wrong impression by presuming them to be Sri Govind and Smt. Ram Devi respectively. The uncontroverted report of handwriting and finger print expert duly proved by P.W.-1 also states that disputed thumb impressions over the impugned sale deed dated 19.12.1985 are identical to admitted thumb impressions of Smt. Jal Devi and Sri Jodha, the defendant nos.2 & 3.

10. It is pertinent to mention that in passing the impugned judgment and decree, dismissing suit of plaintiff lower appellate court has placed reliance on the fact that stamp paper of the impugned sale deed was also purchased in the name of Sri Govind, without considering that it was admitted to defendant that Sri Govind had died long ago. and further failed to consider that stamp could not have been purchased in the name of dead person. The defendant-respondent no.1 in para 1 of his written statement dated 19.3.1987 has specifically stated that Sri Govind and Smt. Ganga Devi @ Ram Devi were original tenure holders and co-sharers to the extent of equal shares in plot Khasra No.843-A & 843-B apart from which defendant no.3 Smt. Jal Devi had also 1/6th share in plot Khasra Nos.907 & 910. In para 2 he has stated that Govind died about 10 years back and it is admitted that his son Sri Jodha is his legal heir whose name has been mutated in place of Sri Govind in revenue records. In para 3 he has stated that Smt. Ganga Devi died about 12 years back and Smt. Jal Devi is her legal heir.

11. It is human nature that if a mistake occurs at one place, it gets repeated at subsequent places. The evidence on record shows that since due to above advertent mutual mistake and

mistaken identity of defendant-respondent nos.2 & 3, name of Sri Govind was mentioned at the time of purchase of requisite stamp paper for execution of impugned sale deed in place of Sri Jodha and the same mistake was repeated again and again. The above mistake could not be noticed due to wrong assumption and so could not be corrected and consequently in the impugned sale deed executed by Sri Jodha and Smt. Jal Devi, defendant-respondent nos.2 & 3 at every place and even over their thumb impressions, names of dead persons Sri Govind and Sri Ram Devi respectively were wrongly mentioned, pretending the execution of sale deed by Sri Govind and Smt. Ram Devi, who were not alive on the date.

12. It is undisputed that impugned sale deed dated 19.12.1985 was executed by Sri Jodha and Smt. Jal Devi and they presented it for registration before Sub-Registrar and accepted receipt of sale consideration and execution of sale deed before him, but on account repeatition of same mistake name of Sri Govind and Smt. Ram Devi was mentioned at every place instead of names of Sri Jodha and Smt. Jal Devi. Since admittedly Sri Govind and Smt. Jal Devi were not alive at the time of execution of impugned sale deed dated 19.12.1985, the sale deed could not have been executed by them under any stretch of imagination. There is no case by defendant-respondent no.1, that impugned sale deed dated 19.12.1985 was obtained through impersonations. Moreover there can be no intention of either party to sale deed (vendor or vendee) to deliberately get the names of dead persons mentioned as vendors in place of defendant-respondent nos.2 & 3. Trom above admitted facts and evidence on record it is crystal clear that it was a case of mutual clerical mistake on account of which in the impugned sale deeds executed by defendant-respondent nos.2 & 3 Sri Jodha and Smt. Jal Devi names of their predecessors (who were not alive) were wrongly mentioned as vendOrs. It also clearly shows that real intentions of parties to sale deed was to sell property in dispute by Sri Jodha and Smt. Jal Devi in favour of plaintiff-appellants.

13. It is pertinent to mention that Sri Jodha, defendant-respondent no.2 was examined as D.W.-3 wherein he admitted thumb impressions of himself and of Smt. Jal Devi on the disputed sale deed dated 19.12.1985 while Smt. Jal Devi, defendant-respondent no.3 was examined by trial court on 21.8.1987 under provisions of Order X Rule 2 of C.P.C. wherein she stated that sale deed in question was executed by her and Sri Jodha and since they are illiterate, names of their predecessors Sri Govind and Smt. Ram Devi were mentioned in place of their names due to mistake, without any intention.

14. The lower appellate court has referred to following case laws which were relied by defendant-respondent no.1, the appellant in First Appeal No.92 of 1989 ***(i) AIR 1957 Assam 49 'Santi Ranjan Das Gupta Vs. Dasuram Mirzamal Firm', (ii) AIR 1956 Orissa 83 'Bidyadhar Mohanty and another Vs. Ananta Hota and another', (iii) AIR 1921 Calcutta 730 'Bepin Krishna Ray and others Vs. Jogeshwar Ray and others' and (iv) AIR 1958 Rajasthan 276.***

15. In the case of Bepin Krishna Ray and others Vs. Jogeshwar Ray and others (supra) (relied by respondent no.1 before lower appellate court) a decree for

rectification was passed by trial court on account of mistake in description of property in the mortgage deed as well as decree also, and the appeal filed by defendant was dismissed with costs, by Division Bench of High Court Calcutta upholding the correctness of judgment and decree passed by subordinate court. The above decision fully supports the case of plaintiffs-appellants and lower appellate court taken absolutely wrong, illegal and perverse view in rejecting plaintiffs-appellants claim by placing reliance on above case law. The findings of lower appellate court in holding that there was no mutual mistake are absolutely wrong, illegal and perverse also.

16. In another case of Bidyadhar Mohanty and another Vs. Ananta Hota and another (supra), (relied by respondent no.1 before lower appellate court), in a suit for declaration of title and possession it was held that plaintiff was not under an obligation to seek rectification of the sale deed and court itself can grant the relief by way of putting him in possession. The facts of above case are entirely different from the case in hand and lower appellate court acted wrongly and perversely in allowing the first appeal of respondent by placing reliance on this case, which has no application to the case in hand.

17. Above decisions are prior in time to the replacement of old Act by new Specific Relief Act, 1963 and refers to provision of Section 31 of old Act relating to rectification of sale deed.

18. It is very unfortunate that without considering the law laid down in above decisions and their applicability to the facts of this case, the lower appellate court has taken a highly wrong and illegal view, adverse to plaintiff-appellant. The lower appellate court misguided itself by mentioning of names of Sri Govind and Smt. Ram Devi at every place as vendors in holding that there was no mutual mistake. Since it was proved rather admitted to defendant-respondent no.1 that Sri Govind and Smt. Ram Devi were not alive as on 19.12.1985 at the time of execution of sale deed in favour of plaintiffs-appellants, the lower appellate court erred in not considering the execution of sale deed by dead persons was impossible and it was a clear case of mutual mistake between the parties to sale deed who were of clear and true intention that plot Khasra No.843 was being sold by Sri Jodha and Smt. Jal Devi defendant-respondent nos.2 & 3 in favour of plaintiffs-appellants. Since Sri Govind and Smt. Ram Devi were not alive and the parties to sale-deed were illiterate, they were not aware of the mistake committed by scribe in mentioning names of dead persons Sri Govind and Smt. Ram Devi as vendors while sale deed was executed by Sri Jodha and Smt. Jal Devi, defendant-respondent nos.2 & 3.

19. It is pertinent to mention that Specific Relief Act, 1877 (hereinafter referred to as 'old Act') was replaced by Specific Relief Act, 1963 (hereinafter referred to as 'new Act') and the provisions with regard to rectification of instrument which were contained in Section 31 of old Specific Relief Act, 1877 were mentioned in corresponding Section 26 of new Specific Relief Act, 1963.

20. Before proceeding further it would be appropriate to reproduce the provisions of Section 31 of Specific Relief Act, 1977 and corresponding Section 26 of Specific Relief Act, 1963 regarding rectification of instrument:-

Section 31 of Specific Relief Act, 1877:-

"31. When instrument may be rectified- *When, through fraud or a mutual mistake of the parties, a contract, or other instrument in writing, does not truly express their intention, either party or his representative-in-interest, may institute a suit to have the instrument rectified; that if the Court finds it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may, in its discretion, rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.*

Section 26 of Specific Relief Act, 1963:-

"26. When instrument may be rectified.-

(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [not being the articles of association of a company to which the Companies Act, 1956 applies] does not express their real intention, then-

(a) either party or his representative-in-interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed."

21. From perusal of above mentioned provisions of Section 31 of old Act of 1877 and corresponding Section 26 of new Act of 1963 it is very much clear that scope of rectification of instruments has been made wider by the legislature under new Act and rectification of an instrument may be permitted when through fraud or a mutual mistake of parties, a contract or other instrument in writing does not express their real intention. As far as mutual mistake is concerned it has been interpreted as under:-

"If a mistake is averred, as the ground for the rectification of a contract, or instrument in writing, the evidence must prove a mistake common to all the parties, that is, -

(i) a common intention different from the expressed intention, and

(ii) a common mistaken supposition that it is rightly expressed.

There is no mistake as to what was agreed, but the mistake is in the expression of the agreement in writing. If there were a mistake in the agreement itself, that would preclude a consensus ad

idem, and no contract would be formed, and there would be nothing to rectify the instrument."

22. It was held by Division Bench of Privy Council in the case of ***M/s. Siddique and Co. v. M/s. Utoomal and Assudamal Co., AIR1946 PC 42,*** that:-

"In a suit for rectification of a contract or instrument, the plaintiff must prove that it was through a mutual mistake of the parties, or their agent, or otherwise that the contract for instrument in question did not truly express the intention of the parties, and the court, before it can rectify the contract or instrument, must-

(1) find it clearly proved that there has been mistake in framing the instrument, and

(2) ascertain the real intention of the parties in executing the instrument. It is only when the court is satisfied of these two elements, that it can, in the exercise of its discretion, grant rectification."

23. In the case of ***Bepin Krishna Ray Vs. Jogeshwar Ray, AIR 1921 (Calcutta) 730,*** it was held by Division Bench that the party seeking rectification must clearly prove-

(1) there was a prior complete agreement, which

(2) according to the common intention was embodied in writing, but

(3) by reason of the mistake in framing the writing,

(4) the writing did not express, or give effect to, the agreement.

24. The Madras High Court in the case of ***Natarajan Asari Vs. Pichamuthu Asari, AIR 1972 (Madras) 192***, that in a suit rectification of an instrument-

"it must clearly and satisfactorily appear that- (1) the precise terms of the contract had been orally agreed upon; and

(2) the writing afterwards signed failed to be, as it was intended, an execution of such previous agreement, but, on the contrary, expressed a different contract.

The mistake may be either as to the contents, or the effect, of the instrument, but it must be a mistake of both parties, in regard to the same matter.

Where the vendor was owner of only western portion of a house and both parties, vendor and vendee, intended that to be transferred but by mistake the sale deed recited Eastern portion on the property sold, it was a case of mutual mistake and suit for rectification was maintainable."

25. In the case in hand there is no whisper of fraud by either party to the impugned sale deed dated 19.12.1985. It is also noteworthy that where mistake is proved as a fact, in a case of rectification, the plaintiffs negligence cannot be pleaded as a bar to relief.

26. It is crystal clear from the undisputed/admitted facts and evidence on record that there was a prior contract between Sri Jodha and Smt. Jal Devi on one side (first party) and Sri Sartaj and Sher Jaman Khan on the other (second party), according to which there was a prior complete agreement with common intention between the parties that land plot Khasra No.843-A and 843-B belonging to Sri Jodha and Smt. Jal Devi,

the defendant-respondent nos.2 & 3, (devolved upon them on death of their father and mother Sri Govind and Smt. Ram Devi, respectively), is to be sold by them in favour of Sartaj and Sher Jaman Khan through registered sale deed and in furtherance of their common intention, the impugned sale deed dated 19.12.1985 was reduced into writing/executed by Sri Jodha and Smt. Jal Devi in favour of plaintiffs-appellants but due to mutual mistake at the time of framing and reducing the sale deed in writing, in place of vendors Sri Jodha and Smt. Jal Devi, names of their predecessors Sri Govind and Smt. Ram Devi were wrongly mentioned. Admittedly Sri Govind and Smt. Ram Devi were not alive at that time, and the impugned sale deed did not express real/correct intention of contract which did take place between the parties mentioned above.

27. In view of the discussions made above, I find that the precise terms of contract of sale had been orally agreed between plaintiff-defendants no.2 & 3 but due to mutual mistake as mentioned above the sale deed which was reduced into writing and registered did not express real intent of parties to contract of instrument in question. I am of the considered view that (i) the Additional Civil Judge, lower appellate court did not at all consider the material issues involved in the case and based its judgment on irrelevant considerations and findings recorded by it are wrong, illegal and perverse, (ii) the Additional Civil Judge, lower appellate court committed illegality in rejecting the admitted facts by misreading and misappreciating the evidence on record and its decision with arbitrary and perverse findings is based on surmises and conjectures and (iii) Additional Civil Judge/lower appellate court acted wrongly, illegally and perversely in holding that there was no mutual mistake between parties to impugned sale deed dated 19.12.1985.

28. I am of the considered view that lower appellate court has acted wrongly, illegally, arbitrarily and perversely in allowing the appeal in toto and dismissing the suit of plaintiffs.

29. In view of the facts and circumstances of the case and discussions made above, the appeal is liable to be allowed, the impugned judgment and decree dated 30.9.1991 passed by lower appellate court of Additional Civil Judge, Etah in Appeal No.92 of 1989 are liable to be set-aside and judgment and decree passed by trial court are liable to be restored.

30. The appeal is accordingly allowed with costs throughout. The impugned judgment and decree dated 30.9.1991 passed by Additional Civil Judge, Etah in Civil Appeal No.92 of 1989 (Ayub Khan Vs. Sartaj and others) are set-aside and the judgment and decree dated 17.7.1987 passed by trial court i.e. VIth Additional Munsif, Etah in Civil Suit No.467 of 1987 stands restored with the modification that impugned sale deed dated 6.3.1986 in favour of defendant-respondent no.1 Ayub Khan as per particulars given in the judgment and decree dated 17.7.1989 stands cancelled only to the extent of and in respect of plot Khasra No.843 and stands valid in respect of other plot nos.907 & 910.

31. Interim orders, if any, stand vacated.

32. Let lower court record be sent back to court below along with a copy of this judgment for necessary compliance, if any.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

SECOND APPEAL No. 752 of 1999

Ramesh Chandra Sharma ...Appellant
Versus
Ramji Das Agarwal ...Respondent

Counsel for the Appellant:
Sri Ramji Das Agarwal.

Counsel for the Respondent:
Sri R.P. Tiwari, Sri Rishikesh Tripathi.

A. Second Appeal - Or. VI Rule 2 C.P.C.- Admissibility of judgment rendered in earlier suit between parties - Principle of pleading is to set out the material facts, which constitute claim and state cause of action - Evidence not required to be pleaded - Adversary party has opportunity to refute the evidence of other party - Documentary evidence of earlier judgement to fortify landlord-tenant relationship need not to be pleaded - Trial court lawfully received judgement as evidence - Lower appellate court, having contrary view erred - Substantial question of law answered posit ively - Appeal allowed. (E-1)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This second appeal arises out of judgment and decree dated 12.02.1999 in Civil Appeal No. 179 of 1994 (Ramji Das Agarwal Vs Ramesh Chandra Sharma) rendered by the learned Additional District Judge IV, Jhansi, which set aside the judgment and decree dated 22.11.1994 entered by Additional Munsif 3rd, Jhansi.

2. The plaintiff-appellant brought civil action for eviction, of the defendant-respondent, from the premises in dispute, by instituting Original Suit No. 260 of 1989 (Ramesh Chandra Sharma Vs Ramji Das Agarwal) before the III Additional Munsif, Jhansi.

3. The case of the plaintiff-appellant, as set out in the plaint, was that the plaintiff is the landlord of the property in dispute. The defendant-respondent is a tenant in the disputed property. The rent of the property which was payable by the defendant tenant was at the rate of Rs. 300/- per month. A notice terminating the tenancy was served upon the defendant-respondent by the plaintiff-appellant.

4. The defendant-respondent refuted the contents of the plaint and filed a written statement. He denied the landlord tenant relationship, with the plaintiff-appellant.

5. The learned trial court framed various issues after exchange of pleadings. The issue which remains relevant to date, is issue no. 1 framed by the learned trial court, "whether the defendant is a tenant of the plaintiff in the property in dispute, and was liable to pay a rent of Rs. 300/- per month, in his capacity as the tenant?" The learned trial court considered the pleadings of the parties, adverted to the evidences tendered and returned a finding on the aforesaid issue.

6. The learned trial court, noticed the oral evidence of the plaintiff-appellant PW-1 Ramesh Chand, wherein he called reference to the suit between the defendant and the father of the plaintiff, registered as Original Suit no. 738 of

1969 (Ram Swaroop Sharma Vs Ramji Das Agarwal). In the said suit a compromise was executed between the parties on 01.03.1987. In terms of the compromise the defendant-respondent, was required to pay a rent of Rs. 300 per month, in regard to the disputed property. The plaintiff further testified, that the defendant did not pay the rent as agreed to between the parties, in the compromise. It was specifically asserted, before the learned trial court, by the plaintiff, that the defendant Ramji Das Agarwal was the tenant in the disputed property, and the plaintiff was the landlord/owner thereof. The stand of the defendant was also considered.

7. The judgment of the trial court, in Original Suit no. 738 of 1969 (Ram Swaroop and others Vs Ramji Das and others), was received in evidence, to prove the landlord tenant relationship between the plaintiff-appellant and the defendant-respondent.

8. The defendant admitted receipt of the notice, terminating the tenancy. The testimony of the defendant, before the learned trial court, denying the compromise which was numbered as Paper no. 90-A, was disbelieved by the learned trial court.

9. In the wake of the aforesaid pleadings and evidence the learned trial court, found that the landlord tenant relationship between the plaintiff and the defendant stood established. The rent of Rs. 300/- per month was held payable by the defendant to the plaintiff towards rent. The defendant-respondent had defaulted in payment of the rent to the landlord (plaintiff-appellant) and he was liable to be evicted. The stand of the defendant that he was not the tenant in the premises in question was invalidated by the learned trial court.

10. On these terms the learned trial court rendered a judgment and decreed the suit on 22.11.1994.

11. Aggrieved the defendant took the judgment and decree of the learned trial court in appeal, by instituting Civil Appeal no. 179 of 1994 (Ramji Das Agarwal Vs Ramesh Chandra Sharma).

12. The only point for determination, before the learned first appellate court, was the admissibility of the judgment of Original Suit no. 738 of 1969 (Ram Swaroop and others Vs Ramji Das and others), in evidence. The learned first appellate court, found that the plaint made no reference of the judgment of the trial court rendered in Original Suit no. 738 of 1969 (Ram Swaroop and others Vs Ramji Das and others). The learned appellate court, ruled that the said judgment was not liable to be admitted in evidence, on the foot, that no pleading in regard thereto was taken in the plaint.

13. Sri Rishikesh Tripathi, learned counsel for the appellant, submits that the learned appellate court, had misdirected itself in law by discarding the judgment in Original Suit no. 738 of 1969 (Ram Swaroop and others Vs Ramji Das and others) between the parties. The judgment was admissible in evidence. The plaintiff was only required to plead the facts and not evidence. He calls attention to Order VI Rule2 CPC.

14. Per contra, Sri Mangala Prasad Rai, learned Senior Counsel on behalf of the defendant-respondent, assisted by Sri Ashok Kumar Rai, learned counsel,

submits that the plaintiff had not taken any pleading in regard to the judgment in Original Suit no. 738 of 1969. In absence of such pleading the learned appellate court rightly declined to receive the same in evidence.

15. The substantial question of law is being framed with consent of parties.

16. The following substantial question of law arises for determination in this appeal:

"Whether the appellate court, misdirected itself in law by holding that the judgment in Original Suit no. 738 of 1969, which was appended to the plaint, was inadmissible in evidence, on the foot that no pleadings in regard to the said judgment were made in the plaint?"

17 . The basic and cardinal rules of pleadings are set out in Order VI CPC. The rules of Order VI which are relevant are extracted hereunder:

"2. Pleading to state material facts and not evidence

(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph."

18. The purpose of pleadings in the relevant provisions of CPC extracted earlier is clear, while scope of tendering evidence is also well settled. The rule of pleadings embodied in Order VI CPC, was considered by the Hon'ble Supreme Court, in **Popat and Kotecha Property Vs State Bank of India Staff Association, reported at (2005) 7 SCC 510**. Essentially reiterating the statutory mandate the Hon'ble Supreme Court held thus:

"21. Order VI Rule 2(1) of the Code states the basic and cardinal rule of pleadings and declares that the pleading has to state material facts and not the evidence. It mandates that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."

19. The purpose of plaint, is to set out the material facts which constitute the claim, and state the cause of action of the suit. Apart from this, the rules regarding pleadings, serve another salutary purpose. The pleadings alert the opposite party to the case of the adversary (plaintiff in this case).

This enables the opposite party to refute the case of the plaintiff and/or to tender its defence and evidence in that regard. The rule of pleadings, thus precludes a party from springing a surprise on its adversary, by bringing a case which the latter was not aware of and hence could not defend against.

20. Evidence, on the other hand, is tendered by a party in support of or to establish its case set out in its pleadings (in this case the plaint). Hence evidence is not required to be pleaded. However, as regards the evidence tendered by a

plaintiff or any party, the adversary (in this case the defendant-respondent), has ample opportunity to meet or refute the same. Oral evidence of witnesses, can be impeached during cross examination. In case of documentary evidence, the adversary party can challenge the admissibility or disprove the document before the court.

21. Coming to the established facts of the case, the plaint clearly stated that there was a landlord tenant relationship between the plaintiff-appellant and the defendant-respondent. The judgment of the trial court in Original Suit No. 738 of 1969 (Ramesh Chandra Sharma Vs Ramji Das Agarwal) was appended to the list of documents attached to the plaint.

22. The judgment of the trial court in Original Suit No. 738 of 1969 (Ramesh Chandra Sharma Vs Ramji Das Agarwal) was passed on the foot of compromise between the parties. The judgment and the compromise therein, evidenced the landlord tenant relationship between the plaintiff-appellant (his predecessors in interest) and the defendant-respondent.

23. The documentary evidence in the shape of judgment of the trial court in Original Suit No. 738 of 1969 (Ramesh Chandra Sharma Vs Ramji Das Agarwal) is consistent with the pleadings made in the plaint. The judgment of the trial court in Original Suit No. 738 of 1969 (Ramesh Chandra Sharma Vs Ramji Das Agarwal) was introduced as documentary evidence to fortify the landlord tenant relationship between the plaintiff-appellant and defendant-respondent, as set out in the plaint and to prevent the defendant-respondent from resiling from his earlier admission.

24. In light of the established state of facts and statement of law narrated in the preceding paragraphs, the judgment of the court rendered in Original Suit No. 738 of 1969 (Ramesh Chandra Sharma Vs Ramji Das Agarwal) was admissible in evidence. There was no requirement, to take a pleading in the plaint, with regard to such documentary evidence introduced by the plaintiff-appellant. The learned appellate court erred in not receiving the said judgment in evidence.

25. The learned trial court, in its judgment dated 22.11.1994, rightly found the landlord tenant relationship between theplaintiff-appellant and defendant-respondent. Trial court lawfully received the judgment in Original Suit No. 738 of 1969 in evidence. Finding of the trial court, that the defendant-respondent had defaulted in payment of rent, and the consequent order of his eviction, from the disputed premises, are impeccable and cannot be faulted with. The judgment and decree dated 22.11.1994, of the trial court, does not suffer from any infirmity, and is liable to be upheld.

26. The substantial question of law is answered as follows:

The first appellate court, misdirected itself in law, by finding that the judgment in Original Suit No. 738 of 1969 (Ramesh Chandra Sharma Vs Ramji Das Agarwal), was not admissible in evidence and erred by not considering the same, on the foot that no pleadings in that regard to the said judgment were made in the plaint.

27. The substantial question of law, is thus answered in the affirmative, in favour of the plaintiff-appellant. The judgment of the learned appellate court is unsustainable in law and cannot stand.

The judgment and decree of the appellate court, dated 12.02.1999, passed by IV Additional District Judge, Jhansi in Civil Appeal no. 179 of 1994 (Ramji Das Agarwal Vs Ramesh Chandra Sharma) is set aside. The judgment and decree dated 22.11.1994 rendered by the learned IIIrd Additional Munsif, Jhansi in Original Suit No. 260 of 1989 (Ramesh Chandra Sharma Vs Ramji Agarwal alias Ramji Das Agarwal) is affirmed.

28. The second appeal is allowed.

APPELLATEJURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

SECOND APPEAL No.2 of 1983

Laxman Singh ...Appellant
Versus
Bhagwati Singh ...Respondent

Counsel for the Appellant:
Sri Ramesh Singh,Sri Kunal Ravi Singh, Sri R.S. Maurya, Sri V.K.S. Chaudhary.

Counsel for the Respondent:
Sri G.M. Tripathi, Sri C.M. Shukla, Sri Indra Raj Singh, Sri Prabhakar Dubey

A. Second Appeal – Section 100 C.P.C. - Absence of jurisdiction in Civil Court - Bar imposed by Section 331 of U.P.Z.A & L.R. Act, 1951 - Decree of declaration of cancellation of will by both court below - Status of tenure holders involved - Though cancellation of will-deed was the main relief, but real relief was transfer of property from possession of defendant to plaintiff - Declaration of tenancy right is real relief, which can be granted by revenue court - Substantial question of law answered positively holding Civil suit is not maintainable - Second Appeal allowed.

B. Second Appeal - Section 331 of U.P.Z.A. & L.R. Act, 1951 - Determining factor to decide the jurisdiction is real cause of action - It is the pith and substance, which is to be seen, not the language used, to oust jurisdiction, is to be seen - Principle laid down.

C. Second Appeal - Expression 'any relief' used in s. 331 of U.P.Z.A. & L.R. Act - is of wide import. It means not only relief claimed, but also includes relief arising out of cause of action, which led Plaintiff to invoke jurisdiction of a court of law - Principle laid down.

D. Second Appeal - Determining factor for a matter to be entertained only by revenue court - More than one relief sought, but no such relief can be granted without declaring tenancy right - relief of injunction and possession sought. Name of plaintiff not recorded. Without declaration of tenancy right no further relief can be granted - Suit is cognizable by Revenue court - Principle laid down.

(E-1)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Kunal Ravi Singh, Advocate, for appellant. None appeared on behalf of respondents despite the case having been called in revise. Hence, I proceed to hear and decide this case finally after hearing learned counsel for appellant.

2. This is defendant's appeal filed under Section 100 Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") arising from judgment and decree dated 12.05.1978 passed by Sri S.C. Bose, Munsif, Basti in Original Suit No. 213 of 1972 decreeing the suit which has been confirmed by judgment

and decree dated 19.10.1982 passed by Sri H.C. Lal, 1st Additional District Judge, Basti in Civil Appeal No. 177 of 1978 by dismissing the same.

3. Initially, this appeal was admitted on following four substantial questions of law:

(a) Whether ***Civil Court had jurisdiction to try the suit?***

(b) Whether suit was maintainable in the absence of State of U.P. and Gaon Sabha as defendants?

(c) ***Whether i****n view of the allegation in the plaint that 'Will' was void,* ***suit was cognizable by Revenue Court alone?***

(d) Whether Smt. Dhrupraji became absolute owner of bhumidhari rights under Section 14 of Hindu Succession Act?

(emphasis added)

4. Subsequently, vide order dated 22.05.2018 one more substantial question of law was formulated as under:

(e) Whether in view of the fact that Dhrupraji inherited property from Matwar Singh in 1945, prior to enforcement of U.P.Z.A. & L.R. Act, the claim on the basis of succession can be entertained in view of the Section 174 of U.P.Z.A.&L.R. Act?

5. Facts in brief giving rise to this appeal are that Bhagwati (now deceased and substituted by legal heirs) instituted Original Suit No. 213 of 1972 in the Court of Munsif, Basti against sole defendant-appellant Lakshman (now deceased and substituted by legal heirs), son of Shohrat Singh, praying for cancellation of 'Will' dated 20.06.1948 and delivery of possession of disputed property to plaintiff.

6. Plaint Case set up vide plaint dated 19.07.1972 is that Bhagwati is real brother of Matwar Singh (deceased) and both are sons of Bal Karan. Bal Karan had other sons also namely Tahsildar, Shohrat and Vikrmaditya alias Uma Shanker. Dhrupraji is wife of Matwar Singh and one Hanuman is son of Tahsildar. Defendant Lakshman was son of Shohrat and Indira is wife of Vikrmaditya. That is how defendant Lakshman became real nephew of plaintiff Bhagwati. For better understanding I may provide family tree as under:

Bal Karan

Bhagwati (Plaintiff)	Matwar Singh (Dhrupraji-wife)	Tahsildar	Shohrat	Vikrmaditya alias Uma Shankar (Indira-wife)
	Hanuman			
(Defendant)		Lakshman		

7. Matwar Singh was Sirdar and Khudkasht holder of property stated in List-A at the bottom of plaint and tenant in the plots stated in List-B, and, in possession thereof. He died issueless in 1945 AD. Consequently, Dhrupraji, wife of Matwar Singh, entered into possession of aforesaid property. After enforcement of U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) (hereinafter referred to as "Act, 1951"), on the date of vesting, i.e., 01.07.1952 she became Bhumidhar of plots mentioned in List-A and Sirdar of plots mentioned in List-B. Dhrupraji died in 1970 AD. Other sons of Bal Karan, having predeceased Matwar

Singh, on the death of Dhrupraji, plaintiff became sole heir of entire property and applied for mutation in respect of plots of Lists-A and B. Defendant contested Mutation application on the basis of a 'Will' alleging that Matwar Singh executed the same. Revenue Court while deciding mutation application, relied on 'Will', and though ordered for mutation of plaintiff's name over plots mentioned in List-B as Sirdar, but rejected his claim with respect to Bhumidhar of plots mentioned in List-A. In the circumstances, plaintiff challenged 'Will' dated 20.06.1948 on the ground that it is forged and fictitious and liable to be cancelled and possession over the plots in dispute be handed over to him.

8. Defendant contested the suit stating that 'Will' was actually executed in his favour. He further pleaded that Matwar Singh had 1/5 share in the property of Bal Karan. He had separated from other brothers during his lifetime. He was in possession of disputed property during lifetime and executed 'Will' dated 20.06.1948 in favour of defendant in lieu of services rendered by defendant to Matwar Singh. 'Will' was executed by Matwar Singh and contained his signature. It was kept in the custody of Smt. Dhrupraji. Subsequently, 'Will' was handed over by Smt. Dhrupraji to defendant's wife. Plaintiff has no right to get the 'Will' cancelled and suit was barred by Section 331 of Act, 1951.

9. An additional written statement was also filed claiming that Smt. Dhruprati had only a Life Estate in the property as stated in the 'Will'.

10. Trial Court formulated following four issues:

(1) Whether the will deed Dated 20-6-48 is liable to be cancelled as alleged, if so, its effect?

(2) To what relief, if any, is the plaintiff is entitled?

(3) Whether the defence is barred by Section 49 CH Act?

(4) Whether the Court has no jurisdiction to try the suit?

11. Trial Court held that suit is not barred by Section 49 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act, 1953") and, therefore, issue-3 was answered in favour of plaintiff. Thereafter, issue-1 was considered and it held that 'Will' is dated 20.06.1948 while Matwar Singh died on 20.10.1945 hence claim of defendant that 'Will' was executed on 20.06.1948 is not correct and it is forged and fictitious. Consequently it answered Issue-1 in favour of plaintiff. It answered Issue-4 also in favour of plaintiff and consequently suit was decreed by issuing a declaration of cancellation of 'Will' dated 20.06.1948 and defendant was directed to hand over possession of disputed property mentioned in List-A to plaintiff.

12. Aggrieved by the aforesaid judgment and decree, defendant Lakshman preferred Civil Appeal No. 177 of 1978. Lower Appellate Court (hereinafter referred to as "LAC") formulated three points for determination, as under:

*(1) Whether t**he will in dispute is genuine and really executed by Matwar Singh?** This point i**ncludes the consideration of the fact whether the will has been executed on 20.6.48 or 20.6.42?***

(2) Whether the suit is not cognizable by Civil Court?

(3) Whether the plaintiff has right of suit? (emphasis added)

13. Concurring with the findings of Trial Court, LAC answered issue-1 in favour of plaintiff and against defendant-appellant holding that 'Will' was not genuine. It also held that suit is not barred and consequently Issue-2 was also answered in favour of plaintiff holding that Civil Court had competence to entertain the suit and decide the same. Thereafter it answered Issue-3 again in favour of plaintiff-respondent and against defendant-appellant. As a result thereof, appeal was dismissed vide judgment and decree dated 19.10.1982.

14. Sri Kunal Ravi Singh, learned counsel for appellant, commencing his argument stated that Village in question, i.e., Village Vangarh undergone consolidation operations on 16.02.1991. Thereupon defendant-appellant filed an application under Section 5(2) of Act, 1953 on 16.02.1994 stating that proceedings of Suit have abated. The said application was registered as Application No. 719 of 1994 but dismissed vide order dated 16.11.1994.

15. The first aspect which has to be examined in this appeal is "whether plaintiff's suit in question was barred by Section 331 of Act, 1951." This will cover the substantial questions of law-(a) and (c) both.

16. The contention of learned counsel for appellant is that 'Will' was relied and accepted by Revenue Court in mutation proceedings and pursuant thereto application was partly allowed and mutation was made. The suit in question basically challenges Revenue entry which is in respect to possession of the property for which mutation was allowed and, therefore, it is barred by Section 331 of Act, 1951.

17. From the facts discussed above, it is evident that property in dispute i.e. List-A, was in possession of defendant throughout since plaintiff sought relief of directing defendant to hand over possession of property mentioned in the Plaint to plaintiff. It is not the case of plaintiff that after death of Dhrupraji in 1970, plaintiff got possession over entire property including that mentioned in Plaint or that even at the time of death Dhrupraji was in possession of the said property. The issue, therefore, who was in cultivatory possession on the date of vesting and what status stood conferred upon such person vis-a-vis Dhrupraji was an issue which could have been decided by Revenue Court.

18. Revenue Authorities on the mutation application, though apparently it is said that relied on 'Will' dated 20.06.1948 in non suiting the plaintiff for mutation of his name in respect to properties mentioned in List-A, but the facts as pleaded including that plaintiff had sought a relief of handing over possession to plaintiff by defendant, show that at no point of time plaintiff was in possession of property in dispute. The status of Dhrupraji on the date of vesting vis-a-vis defendant, therefore, was the basic issue since only thereafter plaintiff could have claimed any right after death of Dhrupraji on the ground that there is no other legal heir to succeed property of Dhrupraji.

19. In the present case, cancellation of 'Will' though appears apparently the

main relief, but real relief is, possession of disputed property to be transferred from defendant to plaintiff.

20. Construing Section 331 of Act, 1951, a Full Bench of this Court in **Ram Padarath and others Vs. Second Additional District Judge and others 1989 AWC 290 (All)** observed that it is the real 'cause of action' which determines jurisdiction of Court to entertain particular action notwithstanding the language used in plaint or relief claimed. The strength on which Plaintiff comes to Court does not depend upon the defence or relief claimed which could determine the Forum for the entertainment of claim and grant of relief. It is the pith and substance which is to be seen and not the language used which may have been so used to oust jurisdiction of a particular Court.

21. Expression 'any relief' used in Section 331 of Act, 1951 is of too wide import. It not only means the relief claimed but would also include any relief arising out of the cause of action which led the Plaintiff to invoke jurisdiction of a Court of law. The word 'relief' is not part of cause of action nor the same is related to the defence set up in the case. The relief is a remedy which a Court grants from the facts asserted and proved in an action. The 'relief' in other words means 'remedy' which a Court of justice may afford in regard to such actual or apprehended wrong or injury. Such remedy being large or small, as the case may be, but it is not synonymous with 'cause of action'.

22. Full Bench further observed that Section 331 of Act, 1951 has enlarged scope in regard to jurisdiction of Revenue Court. The provision is not confined to specified reliefs claimed which are mentioned in Schedule-II to Act, 1951, but Explanation to it has enlarged its scope further by using the word 'any relief'. It is the cause of action alone which determines the Forum and keeps the jurisdiction of Revenue Court intact in matters referred to in respect of suit, application or proceeding mentioned in Schedule-II to Act, 1951 to the exclusion of Civil Court. The jurisdiction of Civil Court is not concurrent with that of Revenue Court by means of such suit, application or proceeding. The reliefs of the nature mentioned in Schedule-II can be obtained from Revenue Court which will take cognizance of such suit, application or proceeding notwithstanding the fact that relief provided in a different language can also be granted by the Civil Court.

23. A Revenue Court may grant a relief in present, but so far as relief for future is concerned Revenue Court may not be in a position to grant such a-relief as the same may travel beyond the relief which could be granted by it mentioned in Schedule-II to Act, 1951.

24. It is the alleged injury or apprehended injury or cloud on the right and title of a person by some action on the part of any other person, or interference or attempt to interfere or encroach upon the right and title of a person over a particular property by any positive or negative act or declaration etc., which give a Suitor, cause of action, to approach a Court of law for relief or reliefs against the same. The dispute as to jurisdiction arises when more than one reliefs are claimed in an action on the same cause of action one of which can be granted by a Civil Court. If the principal or real relief can be granted by Revenue Court, then ancillary relief or the relief which flows out from principal relief

can also be granted by Revenue Court notwithstanding the fact that all the reliefs can be granted by Civil Court. If things are in reverse direction, then all the reliefs can be granted by Civil Court, but if so-called main relief is redundant or mere surplusage then it is the real relief involved in the matter which may or may not have been claimed as ancillary relief will determine the jurisdiction of Court which is to entertain a particular action. Even if a plaint or application is couched in such a language so as to oust jurisdiction of a particular Court, then it is the cause of action and relief flowing out of such cause of action which would determine the Forum for entertaining the said action and not the so-called relief claimed.

25. In order to determine, therefore, as to what matter can be entertained only by Revenue Court, it is said that if more than one reliefs are claimed by a particular person, no relief can be granted to that person unless declaration of his tenancy right is made and in that situation suit will be cognizable by Revenue Court as declaration can be granted by Revenue Court. Similarly if a person claims relief of injunction and in the alternative for possession if he is found to be out of possession and his name is not on the record then without declaration that in fact he is the tenant or he is in possession of the tenancy rights no further relief can be granted and the suit is cognizable by Revenue Court. That is what has been held very categorically by Full Bench in para 18 of judgment in **Ram Padarath and others Vs. Second Additional District Judge and others (supra)**. It is further said that in case, suit is for injunction and/or possession, if he is out of possession, then suit will be cognizable by Revenue Court notwithstanding the fact that relief for injunction is to be granted by Civil Court. Full Bench further said:

*"The **Civil Court would have no jurisdiction as the case first involved declaration of right as tenure-holder which could be granted by the revenue court only and thereafter relief could have been granted only** if he was held to be tenure-holder by succession." (emphasis added)*

26. In order to determine the Forum, when validity of a document is challenged, Court in para-19 said as under:

*"19. The forum for action in relation to void documents or instruments regarding agricultural land **depends on the real cause of action with reference to the facts averred.** Void documents necessarily do not require cancellation like voidable documents. A simple suit for cancellation of a document or instrument if the same casts cloud on one's right and title or is likely to cast cloud over it or affects the same adversely in respect of agricultural property, that is, 'land' poses no difficulty provided further it does not necessitate any declaration as to the claimant's right and title over the land i.e. tenancy rights under the existing law. The difficulty arises when more than one reliefs are involved or claimed. It may be that one may get effective relief in presenting without cancellation of the document, but if a document remains uncancelled for several years its existence may give rise to new trouble and litigation. The decree of a court in which a document is declared to be void and is avoided is obviously a decree in personam and the same undoubtedly binds a party but it will not be binding to each and every person as no note of such a decree can be made in the Sub-Registrar's register as provided in Section 31 of the Specific Relief Act. Such a*

document may mislead many and may give rise to various transactions and litigations."

27. Full Bench also held that while interpreting provisions of Act, 1951, no help can be taken from the provisions of Act, 1953 for the reason that jurisdiction of consolidation authorities or Courts is wider than that of Civil or Revenue Court and adjudication by them is final and cannot be responded by any Civil or Revenue Court in view of bar for the same contained in Section 49 of Act, 1953 which even bars the case which should have been raised before consolidation authorities, but not raised. In the operative part of the judgment, Court ultimately laid down the following law:

"Suit or action for cancellation of void document will generally lie in the civil court and a party cannot be deprived of his right getting (his relief permissible under law except when a declaration of right or status of a tenure-holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. A recorded tenure-holder having prima facie title in his favour can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of a void document which made him to approach the court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue court."

28. In the present case status of Tenure Holder was necessarily involved. Therefore, in my view, in respect to property in dispute which admittedly was in possession of defendant, remedy was available only in Revenue Court and not in Civil Court, more so, when plaintiff himself pleaded that 'Will' is void. Therefore, I answer substantial questions of law-(a) and (c) holding that suit was not maintainable before Civil Court and therefore both substantial questions of law are answered in favour of appellant.

29. Now coming to substantial question of law-(b), counsel for appellant could not show as to why State of U.P. or Gaon Sabha was necessary party so as to render suit, not maintainable. Hence, I answer substantial question of law-(b) against appellant.

30. Now coming to substantial question of law-(d), I find that plaint case set up by plaintiff was that Bal Karan had five sons including Matwar Singh and after death of Matwar Singh in 1945, his holding was succeeded by his wife Dhrupraji, while defendant contended that Matwar Singh had already separated during his life time and thereafter executed a 'Will' in favour of defendant. It is admitted case of plaintiff that property in dispute was in possession of defendant and that is why relief of delivery of possession by defendant to plaintiff was sought. In these circumstances, it was necessary for Courts below to formulate an issue, "whether Dhrupraji's heir got any right over property in dispute since application of Section 14 of Hind Succession Act, 1956 (hereinafter referred to as "Act, 1956") could have arisen only thereafter", but both the Courts below have ignored this aspect and neither any issue has been framed on this aspect nor any finding has been recorded. However, since I have already answered substantial questions of law-(a) and (c) holding that Civil Court had no jurisdiction in the matter, I do not find that it is necessary to

answer substantial question of law-(d) in this appeal since judgments in appeal have to be set aside on the ground of lack of jurisdiction and whenever any adjudication is initiated in a competent Court of jurisdiction, it will always be open to such Court to examine all relevant aspects therein. Therefore, I refrain from answering substantial question of law-(d) either way.

31. In the result, appeal is allowed. Impugned judgments dated 12.05.1978 passed by Munsif, Basti and dated 19.10.1982 passed by 1st Additional District Judge, Basti are set aside. Original Suit No. 213 of 1972 is dismissed as not maintainable.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

CRIMINAL APPEAL No. 4281 OF 2002
&
JAIL APPEAL No. 6316 OF 2003

Dharam Veer @ Kaiya and Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri K.K. Dwivedi, Sri B.K. Solanki, Sri R.P. Dwivedi, Sri Yogesh Srivastava, Sri Noor Mohammad.

Counsel for the Opposite Party:
A.G.A., Sri Hemendra Pratap Singh.

A. Indian Penal Code, 1860–Sections 302/34 IPC – Appellants sentenced to life imprisonment – Motive - Weight of- Where direct evidence is worthy of acceptance – absence of strong motive does not carry much weight.
(Para 26 and 27)

B. Relatives of victim as prosecution witnesses and non-examination of independent witnesses – It is settled law that merely because witnesses are close relatives of the victim, their testimonies cannot be discarded. However, in such a case the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence. (Para 28,29,30,31 and 32)

C. Section 134 Evidence Act 1872 - Non-examination of wife of the first informant, mentioned as a witness in the F.I.R, by the prosecution in the trial. Held - Prosecution is not obliged to adduce all witnesses mentioned in the F.I.R or in the charge-sheet. Law is well settled that the Court can and may act on the testimony of a single witness provided the witness is wholly reliable but if there are doubts about the testimony, the Court will insist on corroboration. It is the quality and not quantity that is material.
(Para 33, 34,35,36,37,38)

D. Contradictions, discrepancies and variations in the case of prosecution- All witnesses supported the prosecution case. Despite lengthy cross-examinations, no material exists to disbelieve their statements or render their statements doubtful. Held - minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not effect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.
(Para 39,40,41,42,43and 44)

E. Question of awarding sentence and consideration of aggravating and mitigating circumstances-Settled legal position that appropriate sentence should be awarded after giving due consideration to the facts

and circumstances of each case, nature of the offence and the manner in which it was executed or committed. Object of sentencing should be to protect society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which criminal and victim belong. Hence, applying the aforesaid principles and having regard to the totality of facts and circumstances of the case, motive, nature of the offence, weapon used in commission of murder and the manner in which it was executed or committed, the punishment awarded by the Trial Court is just and proper and requires no interference. Resultantly both appeals dismissed.(Para 51,52 and 53)

Case law discussed/relied upon: -

1. (2012) 3 SCC 196, Lokesh Shivakumar v. State of Karnataka

2. AIR, 1953, SC 364, Dalip Singh v. State of Punjab

3. (2010) 7 SCC 759, Dharnidhar v. State of Punjab

4. 2013 (15) SCC 298, Ganga Bhawani v. Rayapati Venkat Reddy &Ors.

5. (2007) 14 SCC 150, Namdeo v. State of Maharashtra

6. AIR 2008 SC 1381, Kunju @ Balachandran v. State of Tamil Nadu.

7. (2004) 12 SCC 229, Yakub Ismailbhai Patel v. State of Gujarat.

8. (2002) 9 SCC 537, State of Haryana v. Inder Singh and Others.

9. (2012) 4 SCC 124, Sampath Kumar v. Inspector of Police, Krishnagiri.

10. Criminal Appeals Nos. 473-474 of 2019 decided on 12.03.2019,

11.Sachin Kumar Singraha v. State of Madhya Pradesh.

12. Criminal Appeal No. 56 of 2018, Smt. Shamim vs. (State of NCT of Delhi) decided on 19.09.2018.

13. AIR 2009 SC 152 State Represented by Inspector of Police V. Saravanan &Anr.

14. AIR 2009 SC 331, Arumugam v. State.

15. (2009) 11 SCC 334, Mahendra Pratap Singh v. State of Uttar Pradesh.

16 .JT 2010 (12) SC 287, Dr. Sunil Kumar Sambhudayal Gupta &Ors. V. State of Maharashtra.

17. (2014) 7 SCC 323, Sumer Singh v. Surajbhan Singh &Ors.

18. (1990) 4 SCC 731, Sham Sunder v. Puran.

19. (2005)5 SCC 554, M.P v. Saleem.

20. (1996) 2 SCC 175, Ravji v. State of Rajasthan (E-3)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Both the aforesaid appeals arise out of a common judgement and order dated 03.09.2002 passed by Sri Vijay Kumar, Additional Sessions Judge, Hathras in Session Trial No. 169 of 2001 (State versus Dharamveer @ Kaiya and others), Police Station Shahpau, District Hathras convicting all the accused-appellants under Sections 302 read with 34 IPC and sentencing each of them to undergo rigorous imprisonment for life and also to pay a fine of Rs.2000/- each. In the event of default of payment of fine, they have to undergo six months additional rigorous imprisonment.

2. From the record it appears that initially Criminal Appeal No.4281 of 2002

was filed under Section 374(2) Cr.P.C. by all the three accused-appellants, namely, Dharam Veer @ Kaiya, Radhey Shyam and Choiya @ Khajan Singh, which was admitted by this Court on 01.10.2002. Subsequently Radhey son of Gauri Shanker Pal also filed Jail Appeal No.6316 of 2003, under Section 383 Cr.P.C., through Senior Superintendent Central Jail, Agra which was admitted on 09.12.2003. It is also on record that vide order dated 30.03.2016 this Court granted bail to Dharam Veer @ Kaiya appellant in Criminal Appeal No.4281 of 2002 and Radhey (mentioned as appellant no.2 in Criminal Appeal No.4281 of 2002 and also appellant in Jail Appeal No.6316 of 2003). The prayer for bail of appellant Choiya @ Khajan Singh was declined.

3. Brief facts giving rise to the present appeal may be stated as under:-

4. A written report Ex.Ka-1 dated 15.04.2000 was presented by PW-1 Vinod Kumar, before Station Officer of Police Station Shahpau, District Hathras, stating that accused-appellants Kaiya @ Dharamveer, Radhey and Choiya @ Khajan Singh (brother-in-law of Tula Ram, resident of village Samai) were creating nuisance in drunken state after taking liquor. Chandrapal Sharma uncle of PW-1, Informant, tried to prevent them whereupon the aforesaid three persons hurled abuses and also pelted stones. Certain persons intervened and got the matter subsided. In the night intervening 14/15 April, 2000 at about 2:00 AM, the aforesaid accused-appellants indulged in filthy abuses after consuming liquor. Uncle of PW-1 when resisted, they got inclined to fight. In the meantime, villagers approached there and took them away from the scene of occurrence persuading and pushing them. While departing, accused-appellants were saying that on the occasion of Holi also he (uncle of Informant) had quarrelled, so they will not spare him. At about 2:30 AM, on 14/15 April, 2000 the aforesaid three accused persons reached the *Baithak* of Chandrapal Sharma. Kaiya and Radhey, each, had a knife with them while Choiya had a *Danda*. Suddenly, all of them assaulted Chandrapal Sharma with their respective weapons. Hearing his shrieks, Informant, his wife Gayatri, Mukesh son of deceased Chandrapal Sharma and one Puran Chandra Sharma reached the *Baithak*. Seeing them, the three accused-appellants fled away from the scene. Chandrapal Sharma was groaning badly and while making arrangement for carrying him to the Hospital, he breathed his last.

5. On the basis of said report, PW-8 Head Constable Nasir Khan prepared chick report Ex.Ka-13 and made an entry of the same in General Diary (hereinafter referred to as "GD") at report No.7 at 6:45 AM on 15.04.2000. A copy of relevant GD entry as Ex.Ka-14 is on record. Investigation of case was undertaken by PW-7 SI Ashok Kumar Singh, the then Station Officer of Police Station Shahpau, who visited the spot and prepared inquest Ex.Ka-2 in respect of deceased Chandrapal Sharma in his own handwriting. He prepared site plan Ex.Ka-6; recovery memo Ex.Ka-3 in respect of articles found in the pocket of deceased and recovery memo Ex.Ka-4 pertaining to blood stained shirt. He also recorded statements of Informant and other witnesses of village. Subsequently, he sent the clothes and articles recovered from the person of deceased for Forensic Examination.

6. Autopsy on the dead body of the deceased Chandrapal Sharma was

conducted by PW-6, Dr. Nepal Singh, on 15.04.2000 at about 4:20 PM. According to him, deceased was aged about 50 years, and at the time of post-mortem about half a day had passed. On External examination, he noticed that rigor mortis was present all over the body and eyes were closed. He found following ante-mortem injuries on the body of the deceased:-

1. Lacerated wound 4cm x 1cm cartilage deep, front and upper part of left ear.

2. Lacerated wound 3cm x 1cm x bone deep on left side far head just lateral to left forehead just lateral to left eyebrow, surrounded by swelling 8cm x 4cm, bone underneath was fractured.

3. Incised wound 1cm x 0.5cm x muscle deep on left side forehead, just above left eyebrow.

4. Incised wound 3cm x 1cm x bone cavity deep on left side head 4cm above behind left eyebrow. Underneath bone fractured.

5. Incised wound 3cm x 0.5cm x bone deep on left side head, 2cm away behind from injury no. 4.

6. Lacerated wound 0.5cm x 0.3cm x muscle deep on middle of left eyebrow.

7. Traumatic swelling 5cm x 3cm on right eye.

7. On internal examination frontal and parietal bone of head was found fractured; membranes were lacerated; brain was lacerated with haematoma; both lungs were congested; right side chamber of heart was full and left side empty; stomach contained 100 gm food; gallbladder was congested and half full; spleen and kidneys were congested; urinary bladder was empty. In the opinion of doctor, death was caused due to coma as a result of head injury. Doctor prepared post-mortem report Ex.Ka-5.

8. After conclusion of investigation, PW-7 SI Ashok Kumar Singh submitted charge sheet Ex.Ka-12 in Court against all the three accused-appellants under Section 302 IPC.

9. Cognizance of the offence was taken by Chief Judicial Magistrate, Hathras on 14.06.2006. Since the case was exclusively triable by Court of Sessions, the same was committed by Chief Judicial Magistrate, Hathras to the Court of Sessions for trial on 21.07.2001, where it was registered as Sessions Trial No. 169 of 2001. Subsequently Sessions Trial was transferred to the Court of Additional Sessions Judge, Hathras, who framed charge against the accused-appellants Kaiya @ Dharamveer, Radhey and Choiya on 01.11.2001 as under:

"मै विजय कुमार, अपर सत्र न्यायाधीश, हाथरस आप कईया उर्फ धर्मवीर, राधे व चोइया पर निम्न आरोप लगाता हूँ-

प्रथम- यह कि दिनांक14/15.4.2000 की रात्रि में समय करीब दो बजे स्थान बहद ग्राम रसगवां अंतर्गत थाना सहपऊ जनपद हाथरस की सीमा में आप लोग ने अपने सामान्य आश्य को अग्रसारित करते हुये वादी मुकदमा विनोद कुमार के चाचा चन्द्र पाल पर छुरा, चाकू व डंडो से हमला करके घायल किया जिससे बाद में चन्द्र पाल की मृत्यु हो गयी। इस प्रकार आपने धारा 302/34 भारतीय दंड संहिता के अंतर्गत दंडनीय अपराध कारित किया जो मेरे प्रसंज्ञान में है।

और मै एतद् द्वारा आपको निर्देश दिया जाता है कि आपका विचारण उक्त आरोप में मेरे न्यायालय द्वारा किया जायेगा।"

"I Vijay Kumar, Additional Sessions Judge, Hathras charge you Kaiya @ Dharamveer, Radhey and Choiya as follows:

First: That in the night intervening 14/15 April, 2000 at about 2:00 AM in furtherance of your common intention you caused death of Chandrapal uncle of Vinod Kumar by inflicting with Knives and Danda in the Baithak of deceased Chandrapal Sharma wherein the territory of village Rashgawan under Police Station Sahpau, District Hathras. Thus you have committed an offence punishable under Section 302 read with 34 IPC and within the cognizance of this Court.

I hereby direct you be tried for the aforesaid charge by this Court." ***(English Translation by Court)***

10. The accused pleaded not guilty and claimed trial.

11. To substantiate its case, prosecution examined as many as eight witnesses, out of whom PWs-1, 2 and 3 are witnesses of fact. Rest are formal witnesses of Police and Health Department. PW-1 Vinod Kumar is nephew of deceased Chandrapal Sharma and PW-3 Mukesh Kumar is deceased son, PW-2 Puran Chandra Sharma is cousin of deceased and resident of same village. They have given factual account of the incident.

12. PW-4 SI Shailendra Singh is a witness of inquest Ex.Ka-2, recovery memo Ex.Ka-3 of articles and clothes of deceased and recovery memo Ex.Ka-4 in respect of blood stained shirt. He has also proved material exhibits i.e. Ex-1 underwear, Ex-2 Banyan and Ex-3 shirt of Choiya accused. PW-5 Constable Jabaran Singh had taken the dead body of deceased along with other Constable Harendra Singh to the DistrictHospital for post-mortem. PW-6, Dr. Nepal Singh had conducted autopsy on the dead body of Chandrapal Sharma and has proved post-mortem report Ex.Ka-5. PW-7 SI Ashok Kumar Singh is the Investigating Officer and has proved Panchayatnama Ex.Ka-2, site plan Ex.Ka-6, recovery memo Ex.Ka-3 in respect of articles recovered from the pocket of deceased, recovery memo Ex.Ka-4 in respect of shirt of Choiya sealed by him and charge sheet Ex.Ka-12. PW-8 Head Constable Nasir Khan appeared before the Trial Court to prove chick FIR Ex.Ka-13 and copy of GD entry Ex.Ka-14.

13. On closure of prosecution evidence, statements of accused-appellants under Section 313 Cr.PC. was recorded. All of them have stated that they have been falsely implicated due to enmity and the entire prosecution evidence as well as investigation is false. They did not adduce any evidence in defence.

14. At the stage of arguments Trial Court found that in charge dated 01.11.2001 time of incident has been mentioned at night 02:00 hours in place of 02:30 hours at night, therefore, Court framed amended charge against the accused-appellants on 29.08.2009. Since entire evidence of both the parties had already been adduced and no party desired to produce any other evidence or to cross examine the witness, therefore, Trial Court proceeded the trial on previous evidence.

15. On appraisal of evidence on record and after hearing learned state counsel and counsel for accused, learned Trial Judge recorded verdict of conviction and sentence against all the accused-appellants, as stated above.

16. Feeling aggrieved with the impugned judgment and order dated 03.09.2002, accused-appellants are before this Court through Jail appeal No. 6316 of 2003 and Criminal appeal No. 4281 of 2002, challenging their conviction and sentence.

17. We have heard Ms. Somya Chaturvedi, Amicus Curiae for appellant in Jail Appeal No. 6316 of 2003 as well as Sri Noor Mohammad, learned Counsel for appellants in Criminal appeal No. 4281 of 2002 and Sri Syed Ali Murtuza, learned AGA for State at length and have gone through the record carefully with the valuable assistance of learned Counsel for parties.

18. Learned Counsel appearing for appellants has challenged conviction and sentence of accused-appellants, advancing their submissions, in the following manners :-

(i) There is no motive to accused-appellants to commit the present crime.

(ii) There is no independent witness of prosecution in support of its case.

(iii) All the three witnesses are relatives of deceased, therefore, their evidence cannot be trustworthy.

(iv) Smt. Gayatri, named in FIR, has not been produced from the side of prosecution in support of its case, therefore, presumption under Section 114 (G) of Indian Evidence Act goes against prosecution.

(v) There are many major contradictions which affect the root of case and accused persons are entitled to benefit of doubt.

(vi) Medical evidence does not go with the prosecution version.

(vii) Trial Court has not rightly convicted accused-appellants and prosecution has failed to prove its case beyond reasonable doubt. Accused-appellants are liable to be acquitted.

19. Per contra learned AGA opposed submissions and urged that PWs-1 to 3 are witnesses of fact, who had supported prosecution case; witnesses are natural and reliable; and medical evidence is totally compatible with the ocular evidence. The weapons involved in the offence have been recovered by Investigating Officer on pointing out of accused-appellants.

20. Although time, date, place and nature of injuries found on the person of deceased could not be disputed from the side of accused-appellants but according to learned counsel for appellants, they are not responsible for committing murder of Chandrapal Sharma. Thus only the question up for consideration is, "whether accused-appellants committed murder of Chandrapal Sharma by inflicting knife and *danda* on his body and Trial Court has rightly convicted them or not?"

21. We now proceed to consider rival submissions on merit. It will be appropriate to briefly consider the evidence of prosecution as well as defence available on record.

22. PW-1 Vinod Kumar, nephew of deceased Chandrapal, supported prosecution case and deposed that on the occasion of Holi festival accused-appellants namely, Dharam Veer @ Kaiya, Radhey Shyam and Choiya @ Khajan Singh were creating nuisance after taking liquor. His (PW-1 Vinok Kumar) uncle Chandrapal Sharma tried to prevent

them where upon all the three accused pelted stones and hurdled abuses, certain persons intervened and got matter subsided. Thereafter in the intervening night on 14/15 April, 2000 at about 02:00 AM all the three accused started abusing in filthy languages after consuming liquor. When his uncle (victim) resisted them, they got inclined to fight. In the meantime, villagers approached there and took them away from the spot. While departing there from accused-appellants were saying that on the occasion of Holi he (victim) had quarrelled. After half an hour at about 02:30 AM accused persons reached the *Baithak* of Chandrapal Sharma where he (victim) slept and started beating him with their respective weapons. On hearing his shriek, Informant himself, his wife Gyatari Devi, PW-2 Puran Chandra and PW-3 Mukesh Kumar reached the *Baithak* where accused persons were beating his uncle Chandrapal Sharma (victim). He further deposed that accused-appellant Dharam Veer @ Kaiya and Radhay Shyam had knife (*chura*) while Choiya @ Khajan Singh was having a *danda*. On seeing them all the accused persons ran away from spot, victim was groaning badly, while making arrangement for carrying victim to Hospital he succumbed to injury. He has further deposed that a written report Ex.Ka-1 regarding the incidence was presented by him.

23. PW-2 Puran Chandra Sharma, cousin of deceased Chandrapal Sharma, deposed that in the intervening night of 14/15 April, 2000 at about 02:30 AM on hearing the shriek of Chandrapal Sharma came out of his house, PW-1Vinod, his wife Gyatri Devi and PW-3 Mukesh met him in the way while going towards the *Baithak* of Chandrapal Sharma. They saw that accused-appellants were assaulting victim with their respective weapons. Accused-appellants Radhey Shyam and Dharam Veer @ Kaiya were having knife (*chura*) and accused-appellant Choiya @ Khajan Singh was having *danda* in their hand. On seeing them accused-appellants ran away from spot. Chandrapal Sharma received serious injuries and succumbed to death. Before this incident, at about 02:00 AM in the night accused-appellants had a quarrell and abused after taking liquor. Accused-appellants extended threat Chandrapal Sharma to see him. At that time Vinod and his wife were present there.

24. PW-3 Mukesh Kumar, happens to be son of deceased deposed that on the occasion of Holi festival, accused-appellants, after taking liquor were abusing then he (PW-3) himself, Vinod, his wife Gayatri and other villagers have subsided the matter due to festival. In the intervening night 14/15 April, 2000 at about 02:00 AM all three accused-appellants were abusing in filthy languages in front of *Baithak* whereupon his father objected them. After half an hour at about 02:30 AM in the night, he heard shriek of his father, immediately rushed to *Baithak*, Vinod and Puran Chandra also came there, they saw that accused-appellants were assaulting his father with their respective weapons. On seeing them, accused-appellants ran away from spot towards Pipal Wali Gali, his father was groaning badly. While making arrangement of vehicle to Hospital his father succumbed to death.

25. PWs-1, 2 and 3 withstood lengthy cross-examination by defence but nothing material could be brought so as to disbelieve their statements on oath. PWs-

1, 2 and 3 established that accused persons assaulted victim Chandrapal Sharma with their respective weapons and caused serious injuries to him due to which he succumbed to death.

26. So far as argument made by learned Amicus Curiae regarding the motive is concerned, we are not impressed with the submission advanced by learned Amicus Curiae for the reasons that it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because there was no strong motive to commit offence, prosecution case cannot be disbelieved.

27. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."
(emphasis added)

28. So far as the question of relative witness and non-examination of any independent witness is concerned, we are not impressed with the submissions of learned Counsel for appellants for the reasons that it is often seen that in heinous offences like murder, no villagers or independent witness come forward to give evidence in support of prosecution against accused-appellants due to fear of evil.

29. So far as relative witness is concerned, it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364.** Where Court has held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

30. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this*

Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"

31. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: ***Bhagalool Lodh &Anr. v. State of UP, AIR 2011 SC 2292; and Dhari &Ors. v. State of U. P., AIR 2013 SC 308)****."*

32. It is settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

33. So far as the next argument of learned Counsel for appellants regarding non-examination of Gayatri Devi is concerned, we of the view that this submission is thoroughly misconceived for the reasons that prosecution is not obliged to adduce witness mentioned in FIR or charge-sheet, in view of Section 134 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872'),

34. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

35. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

36. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing

reliance on earlier judgments including **Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.**

37. In ***Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,*** Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

38. In ***State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,*** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

39. So far as discrepancies, variation and contradiction in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel's and all the witnesses PWs 1, 2 and 3 supported the prosecution case as eye witnesses. All the three witnesses withstood lengthy cross-examination but nothing adverse material could be brought on record so as to disbelieve their statements. There is nothing in cross-examination which may render their statements doubtful. Naturally some minor contradictions and discrepancies have occurred in their examination-in-chief but they do not go to the root of case.

40. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

41. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh*** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

42. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference

may be made to a recent decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

43. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

44. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [**Vide: State Represented by Inspector of Police v. Saravanan &Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta &Ors. v. State of Maharashtra, JT 2010 (12) SC 287**].

45. Learned Counsel for appellants advanced his arguments by submitting that medical evidence does not support the ocular version, therefore, accused-appellants are entitled to benefit of doubt and they are liable to be acquitted.

46. We have perused the medical evidence along-with the ocular version. PW.6 Dr. Nepal Singh deposed that on 15.04.2000, he was posted in DistrictHospital, Mathura and on duty on that day. At about 04:00 PM he conducted the autopsy over the dead body of

Chandrapal Sharma and found following ante mortem injuries:

1. Lacerated wound 4 cm x 1 cm cartilage deep, front and upper part of left ear.

2. Lacerated wound 3 cm x 1 cm x bone deep on left side far head just lateral to left forehead just lateral to left eyebrow, surrounded by swelling 8 cm x 4 cm, bone underneath was fractured.

3. Incised wound 1 cm x 0.5 cm x muscle deep on left side forehead, just above left eyebrow.

4. Incised wound 3 cm x 1 cm x bone cavity deep on left side head 4 cm above behind left eyebrow. Underneath bone fractured.

5. Incised wound 3 cm x 0.5 cm x bone deep on left side head, 2 cm away behind from injury no. 4.

6. Lacerated wound 0.5 cm x 0.3cm x muscle deep on middle of left eyebrow.

7. Traumatic swelling 5 cm x 3 cm on right eye.

47. Doctor opined that death might have been occurred due to coma on account of ante mortem injuries and death was possible half day prior to post-mortem. He proved post-mortem as Ex.ka-5.

48. Pws 1, 2 and 3 categorically stated in his testimonial statement that accused-appellants assaulted victim with lathi and knife. As per Doctor report there were three injuries of sharp edged weapon and four injuries of blunt object which might be caused by *danda*. In this way medical evidence is compatible with the ocular version, therefore, we reject the submissions of learned Counsel for appellants.

49. In the entirety of the facts and circumstances and legal preposition discussed herein before, we are satisfied that prosecution has successfully proved its case beyond reasonable doubt against accused-appellants and Trial Court has rightly convicted him for having committed an offence under Section 302 read with 34 IPC. Both the appeals are devoid of merit and liable to be dismissed.

50. So far as sentence of accused-appellants is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

51. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim

belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175**].

52. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence, weapon used in commission of murder and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellants by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no ground appears to interfere in the matter on the point of punishment imposed upon him.

53. In view of above discussion, **both the appeals lacks merit and is dismissed.**

54. Lower Court record alongwith a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action and to apprise the accused-appellant through Jail Authority.

55. Before parting, we provide that Ms. Somya Chaturvedi, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.05.2018

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAJIV GUPTA, J.

CRIMINAL APPEAL No. 991 OF 2013
Connected With
CRIMINAL APPEAL No. 1893 OF 2013

Ajay and Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ramesh Singh, Sri Achint Ranjan Singh, Sri Apul Mishra, Sri Mohammad Umar Khan, Sri Yogesh Kumar Srivastava, Sri Raghuraj Kishore, Sri Rajesh Pathik, Sri Harish Chandra Tiwari.

Counsel for the Opposite Party:
A.G.A., Sri Chetan Chaterjee.

A. Evidence Act - Section 32- Multiple Dying Declarations - Three dying declarations. Inconsistencies in dying declarations and since the third dying declaration also substantially differs from the prosecution version hence held that reliance placed by the learned trial judge on the same for the purpose of convicting the appellants is per se illegal.
The First Dying Declaration was given by the victim immediately after admission in hospital on 22.03.2010 at 7.45 p.m. before D.W.2 Dr. Karamvir Singh in which she stated that she had set herself ablaze. The second Dying Declaration was recorded by the policeman of police outpost– Ambehata at about 9 a.m. on 23.03.2010 after the victim regained consciousness was suppressed by the

prosecution. The Third Dying Declaration was recorded by P.W.7 Naib Tehsildar on 23.03.2010 at about 12.15-12.30 p.m. No signatures of the deceased on the Third Dying Declaration and it was also not noted in the said dying declaration that the deceased was not in a condition to sign her Dying Declaration. The certificate of fitness was also not proved by the Emergency Medical Officer as a witness during the trial. No question was put by P.W.7 to the deceased to satisfy himself whether she was giving the Dying Declaration voluntarily. (Para 29 to 45)

B. Delay in lodging the F.I.R- Inordinate and unexplained delay of almost 24 hours in lodging the F.I.R by P.W.1. Hence, the possibility of the F.I.R having been prepared after due deliberations and consultations on the advice of the police to falsely implicate the appellants cannot be ruled out.

Although as per the evidence the police had arrived at the place of the occurrence and had immediately taken the deceased with her parents, P.W.1 and P.W.2 to the hospital. D.W 1 Om Prakash was named as a witness in the F.I.R but was not produced as a prosecution witness and his evidence remained consistent and clinching to the effect that the parents of the deceased had set her ablaze. (Para 46 and 47)

Conviction of the appellants set aside. Appeals allowed. (E-3)

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. The argument of this case was concluded on 28.05.2018. We then made the following order :-

"Heard Sri Rajesh Pathik and Sri Harish Chandra Tiwari, learned counsel for the appellants, Sri Chetan Chaterjee, learned counsel for the informant and Sri J. K. Upadhyay as well as Sri Deepak Misra,learned A. G. As. appearing for the State.

We will give reasons later on, but we make the operative order now:

"The impugned judgement and order dated 26.2.2013 passed by the Special Judge (E. C. Act) / Additional Sessions Judge, Court No. 5, Saharanpur in S. T. No. 429 of 2010; State of U. P. Versus Sonu and others convicting the appellants under Sections-302/34, 365 and 506 IPC, P. S.-Nakud, distrtict-Saharanpur and sentencing them to undergo rigorous imprisonment for life with fine of Rs. 10000/- each for offence under Section-302/34 I. P. C., five years' R. I. together with fine of Rs. 5000/- each for offence under Section-365 I. P. C. and one year's R. I. coupled with fine of Rs. 1000/- each for offence under Section-506 I. P. C. along with default clauses, is hereby set-aside and the appeal is allowed. The accused-appellants are acquitted of all the charges framed against them. The accused-appellants who are in jail, shall be released forthwith unless they are wanted in some other case subject to their complying with the provisions of Section 437 A Cr. P. C."

2. Here are the reasons :-

The prosecution case as unfolded during the trial is that P.W.1 informant Ramesh Chandra son of Jai Singh, resident of village- Ambehatapeer, police outpost- Ambehatapeer, P.S.- Nakud, District- Saharanpur gave a typed complaint on 23.03.2010 addressed to S.S.P., Saharanpur stating therein that when on 19.03.2010 at about 10.30 a.m., his daughter Sumita (deceased) who was studying in B.Sc. Ist year, was going from her house to her school Puran Mal Degree College, Gangoh to find out the dates fixed for holding practical examination,

accused Sonu (deceased), son of Mamchand, Ajay (A1) son of Angoora and Jagveer (A3) son of Jai Singh threatened her with a revolver and forcibly pushed her into their maruti van. They kept his daughter in different places for two days and committed rape upon her. On 21.03.2010 at about 2.30 p.m., they pushed his daughter out of their van in front of "*aaraht*" of Raj Kumar Khurrana in a perturbed condition. On being informed about the incident by the villagers, he brought his daughter to his house. After sometime, the family members of accused Sonu (deceased) etc. along with some other respectable persons of the village came to the house of P.W.1 informant Ramesh Chandra and threatened him that they would not let his daughter marry in case he dared to inform the police about the incident. On account of fear, he did not take any action. On 22.03.2010 at about 5 p.m., accused Sonu (deceased), Ajay (A1) and Jagveer (A3) came to the dump yard of his house and caught his daughter with the intention of burning her alive, Ajay (A1) who was carrying a canister containing kerosene oil on his shoulder, poured the same on his daughter as a result of which, she ran within the dump yard raising cries for help on which Jagveer (A3) and others threatened to shoot her in case she went to the police. On hearing the noise, Satpal, Om Prakash, Zahoor Ahmad etc. also reached the place of occurrence and tried to douse the fire by sprinkling water on her. Sumita (deceased), daughter of the informant had received 80 per cent burn injuries. The informant and the other villagers took Sumita to the hospital where she remained unconscious throughout the night. When at about 9 a.m. on the next day, she regained consciousness, the incharge of police outpost, recorded the statement of his daughter and the informant then went to the police station to lodge the report of the occurrence along with the statement of her daughter. In the complaint it was also mentioned that an order be passed directing the P.S.- Nakud to register a case against Sonu (deceased), Ajay (A1) and Jagveer (A3) as his daughter's life was in danger.

3. On the basis of the written report (Ext.Ka.1), Case Crime No. 31/137/2010 u/s 363, 366, 376, 307 and 506 I.P.C. was registered against the accused and relevant G.D. Entry vide rapat no. 20 time 17.10 hours was prepared. The investigation of the case was entrusted to P.W.6 S.I. Samarpal Singh.

4. One day before the F.I.R. was registered i.e. on 22.03.2010, the informant had brought his daughter Sumita (deceased) to DistrictHospital, Saharanpur with severe burn injuries at about 7.45 p.m. where she was medically examined and admitted for treatment in the hospital. On 23.03.2010, P.W.6 S.I. Samarpal Singh wrote a letter to City Magistrate, Saharanpur with a request for getting the dying declaration of the deceased recorded on which P.W.7 Rajnikant Pandey, Naib Tehsildar was ordered to record the dying declaration of the deceased. He recorded the dying declaration of the deceased on 23.03.2010 between 12.15 and 12.30 p.m. in the burn unit of the hospital after the Emergency Medical Officer present there had stated that the deceased was in a fit condition to give her dying declaration. The victim was read over her statement and her thumb impression was also obtained thereon. The dying declaration of the deceased is being reproduced hereinbelow :-

क्या नाम है?
सुमिता

पिता का क्या नाम है?
श्री रमेश चंद
कहॉ रहती हो?
अम्बेहटा पीर तहसील नकुड
कितनी उम्र है?
उन्नीस साल जून में हो जायेगी
कैसे जल गई?
सोनू पुत्र मामचंद अजय पुत्र अंगूरा, मोनू पुत्र अंगूरा, और जसबीर पुत्र जय सिंह ने जब मैं कालेज से आ रही थी, मेरा अपहरण कर लिया और मुझे शाकुम्भर ले गए। वहॉ से मैं किसी तरह छुटकर घर आई शुक्रवार को। कल फिर मैं अपने मकान के पिछवाड़े खड़ी थी तो उन चारो लड़को ने मेरे उपर मिटटी का तेल डाल दिया। मैं भाग कर बाथरूम में गई तो सोनू ने माचिस की तिल्ली लगा दी। अपहरण के सम्बन्ध में पुलिस में रिपोर्ट नही कराई। पहले तो पापा जी ने

आग लगने की घटना कितने बजे की है?
शाम 6–30 बजे लगभग
अस्पताल कौन लाया?
मेरे पापा लाए है,

5. On 24.03.2000, Ajay (A1), Jagveer (A3) and accused Sonu (deceased) were arrested by the Investigating Officer on the information given to him by the police informer. Sumita died on 27.03.2010 at about 8.30 p.m. whereafter Section 302 I.P.C. was added vide rapat no. 24 time 19.20 hours.

6. The inquest on the body of Sumita (deceased) was conducted by P.W.4 S.I. Ajay Pal Gautam in the mortuary of District Hospital, Saharanpur who prepared the inquest report and other connected documents namely letter addressed to R.I., letter addressed to C.M.O., challan lash, photo lash. The body of the deceased was thereafter sent for postmortem examination through Constables Yashpal and Homeguard Ishwar Singh.

7. The autopsy on the body of deceased was conducted by P.W.3 Dr. Keshav Swami on 27.03.2010 at about 5.15 p.m. who also prepared and proved her postmortem report as (Ext.Ka.2). He noted following ante-mortem injuries on the person of Sumita (deceased) :-

1) Superficial burn injuries present all over the body, front of face, feet and sole, present on right forearm.

2) Skin peeled off at places.

3) Red line of demarcation present in between burnt and burned areas.

4) Singeing of all body hair.

8. In the opinion of P.W.3 Dr. Keshav Swami, the cause of death was shock due to ante-mortem burn injury.

9. Monu (A2) was arraigned as an accused in the case on the basis of the facts stated by the deceased in her dying declaration. The investigation of the case was transferred on 02.04.2010 to S.I. Madan Pal Singh Ashok, who recorded the statements of the informant and other witnesses. He also seized green colour plastic jerrican of two litres capacity and prepared its memo on 11.04.2010 (Ext.Ka.14). The Investigating Officer filed charge-sheet against all the four accused including the appellants before the Chief Judicial Magistrate, Saharanpur who committed the case for the trial of the accused to the Court of Sessions Judge, Saharanpur where it was registered as S.T. No. 429 of 2010, State Versus Sonu and three others and transferred for disposal from there to the Court of Special Judge (E.C. Act)/Additional Sessions Judge, Court No. 5, Saharanpur who on the basis of the material on record and after affording opportunity of hearing to the prosecution as well as the accused, framed charge u/s 363,

366, 302/34 and 506 I.P.C. The appellants abjured the charge and claimed trial.

10. The prosecution in order to prove the charge framed against the appellants examined P.W.1 informant Ramesh Chandra and P.W.2 Kusum Lata, parents of the deceased as witnesses of fact while P.W.3 Dr. Keshav Swami who had conducted the postmortem on the body of the deceased, prepared and proved the postmortem report as (Ext.Ka.2), P.W.4 S.I. Ajay Pal Gautam, the first Investigating Officer of the case, P.W.5 Head Constable Rajpal Singh who had prepared the check F.I.R. and the G.D. Entry (Ext.Ka.9), P.W.6 S.I. Samarpal Singh, the second Investigating Officer who had completed the investigation and filed charge-sheet against the accused, P.W.7 Rajnikant Pandey, Naib Tehsildar who recorded the dying declaration of the deceased and P.W.8 S.I. Madan Pal Singh Ashok, who recorded the statements of the informant and other witnesses, were produced as formal witnesses.

11. The prosecution also adduced documentary evidence comprising of written report of the incident (Ext.Ka.1), postmortem report (Ext.Ka.2), death memo (Ext.Ka.3), inquest report (Ext.Ka.4), letter addressed to R.I. (Ext.Ka.5), letter addressed to C.M.O. (Ext.Ka.6), photo lash (Ext.Ka.7), challan lash (Ext.Ka.8), check F.I.R. (Ext.Ka.9), copies of G.D. (Ext.Ka.10 and Ka.11), dying declaration of Sumita (deceased) (Ext.Ka.12), site plan (Ext.Ka.13), recovery memo of jerrican (Ext.Ka.14) and charge-sheet (Ext.Ka.15).

12. After recording of the evidence of the prosecution was closed, the appellants were examined u/s 313 Cr.P.C. on 22.06.2012. Accused Sonu (deceased) on being read over the statements of P.W.1 informant Ramesh Chandra and P.W.2 Kusum Lata, described the contents thereof as false. He further alleged that he had been arrested from his house and falsely implicated in this case. As regards, the dying declaration of the deceased, he expressed his ignorance and stated that all the witnesses had given false evidence against him. He also filed a written statement u/s 313 Cr.P.C. paper nos. 95 Ka/3 and 95 Ka/4 in which he stated that he was having an affair with the deceased and they had physical relations. Before the incident, Sumita (deceased) had called him on phone asking him to meet her outside the town. At that time, he was earning his livelihood by working as woodcutter. He disclosed the aforesaid fact to Neetu. Neetu called his uncle on phone and thereafter Sumita (deceased) was handed over by them to her parents. On 19.03.2010 at about 4 p.m., Sumita (deceased) asked him on phone to reach Behat bus stand for going from there to Shakumbhari. He reached there and tried to remonstrate with Sumita (deceased) by saying that he was earning his livelihood by working as labourer and he did not have time to go with her to Shakumbhari but on her insistence, he was forced to go with Sumita (deceased) to Shakumbhari. On 21.03.2010, they returned from Shakumbhari and went to their respective homes. The parents of Sumita (deceased) maltreated and tortured her for the insult suffered by them on account of her having gone with accused Sonu (deceased) and thereafter on 22.03.2010, her own parents set her ablaze after pouring kerosene oil on her. One Om Prakash had telephonically informed the police outpost about the occurrence by his cellphone on which the policemen had

arrived at the spot and had taken Sumita and her parents along with them. Sumita was admitted in GovernmentHospital where she died on 27.03.2010. Sumita had got herself photographed with him and had also written love letters to him. Ajay (A1), Monu (A2) and Jagveer (A3) had not accompanied him. Accused Sonu (deceased) had appended two photographs and copies of purported love letters along with his written statement filed by him u/s 313 Cr.P.C.

13. Ajay (A1), Monu (A2) and Jagveer (A3) in their statements recorded u/s 313 Cr.P.C. denied the prosecution case as false and alleged false implication on account of their being the sons of the uncles of accused Sonu (deceased). The accused examined D.W.1 Om Prakash and D.W.2 Dr. Karamvir Singh. They also filed a photocopy of medico-legal report of the Sumita (deceased) (Ext.Kha.1) and her dying declaration (Ext.Kha.2).

14. Learned Special Judge (E.C. Act)/ Additional Session Judge, Court no. 5, Saharanpur after considering the submissions made by learned counsel for the parties before him and scrutinizing the evidence on record, both oral as well as documentary, convicted all the appellants and awarded aforesaid sentences to them.

15. Hence, these two appeals.

16. Record shows that the appeal preferred by accused Sonu (deceased) against the judgement and order dated 26.02.2013 namely Criminal Appeal No. 1893 of 2013 was dismissed as abated on account of his having died during the pendency of the appeal.

17. Sri Rajesh Pathik, learned counsel for the appellants has submitted that the inordinate and unexplained delay of more than 24 hours in lodging the F.I.R. of the occurrence is in itself indicative of the fact that the written report of the incident was prepared after due deliberations and consultations with the police falsely implicating the appellants, who are closely related to each other, as a measure of vendetta by the informant on account of his daughter Sumita (deceased) having an affair with the accused Sonu (deceased). He next submitted that despite the fact that the written report of the incident contains a specific recital that the Investigating Officer of the case had recorded the statement of Sumita (deceased) after she had regained consciousness in the morning of 23.03.2010 and P.W.1 informant Ramesh Chandra had gone to the police station to lodge the F.I.R. of the occurrence along with the statement of the deceased recorded by S.I. P.W.7 Rajnikant Pandey but the said statement of the deceased was deliberately suppressed by the prosecution presumably because the same did not corroborate the prosecution story as narrated in the written report (Ext.Ka.1). He further submitted that material contradictions with regard to the named perpetrators of the crime and the place and the manner in which the deceased was set ablaze as narrated in the written report and later testified by the two witnesses of fact vis-a-vis the dying declaration of the deceased which itself appears to be a manufactured document render the oral evidence on record as well as the deceased's dying declaration wholly unreliable and untrustworthy and the reliance placed by the trial court on the same for fastening the guilt on the appellants is per se illegal. He further submitted that there are irreconcilable discrepancies with regard to the first part

of the occurrence which constituted the alleged kidnapping of the deceased by the appellants and accused Sonu (deceased), her being raped by them for two days and thrown out of the maruti van and the manner of her recovery vis-a-vis the dying declaration and the F.I.R. of the incident. The time of incident mentioned in the F.I.R. is 5.10 p.m. while the deceased in her dying declaration had stated that she had been set ablaze at about 6.30 p.m. Moreover, the failure of P.W.1 informant Ramesh Chandra to lodge any complaint with regard to the alleged kidnapping and rape of the deceased by the appellants further belies the prosecution story in that regard. He next submitted that the learned trial Judge illegally discarded the defence version of the occurrence which stood fully corroborated from the evidence of D.W.1 Om Prakash and D.W.2 Dr. Karamvir Singh and the documentary evidence brought on record by the accused-appellant which clearly indicated that the appellants were innocent and had nothing to do with the alleged kidnapping of the deceased or her being set ablaze. He lastly submitted that such being the state of evidence and the role of setting the deceased ablaze having been specifically ascribed to accused Sonu (deceased) and the prosecution having miserably failed to prove that the appellants had also aided accused Sonu (deceased) in the alleged kidnapping of the deceased, their conviction recorded by the trial court by invoking aid of Section 34 I.P.C. is per se illegal and is liable to be set-aside.

18. Per contra Sri J. K. Upadhyay, learned A.G.A appearing for the State submitted that it is fully proved from the evidence of the two witnesses of fact examined by the prosecution during the trial that the deceased was kidnapped by the appellants and accused Sonu (deceased) while she was going to her school to find out the dates fixed for holding practical examination and illegally confined in a maruti van and that the accused after committing rape on her for two days by taking her to different places, had thrown her out of the maruti van in front of "*aaraht*" of Raj Kumar Khurrana, and after the first informant had brought back his daughter to his house, the parents of accused had come to his house and threatened that they would see that his daughter was never married in case he filed any report against them and then on the same day, the accused had set the deceased ablaze by pouring kerosene oil on her. He further submitted that the learned trial Judge did not commit any illegality in relying upon the dying declaration of the deceased for the purpose of convicting the appellants. There is no merit in the submission made by learned counsel for the appellants that the conviction of the appellants recorded by the trial court by invoking Section 34 I.P.C. is illegal. There are no material contradictions in the statements of the witnesses recorded during the trial and the facts stated by the deceased in her dying declaration so as to render the prosecution story unreliable. The prosecution story is also not liable to be thrown out merely on the ground of there being some delay in lodging of the F.I.R. There is no merit in this appeal. The appeal is liable to be dismissed.

19. The only question which arises for our consideration in this case is that whether the prosecution has been able to prove its case against the appellants beyond all reasonable doubts or not ?

20. Record shows that as per the prosecution version set forth in the written

report of the occurrence (Ext.Ka.1) which was lodged by P.W.1 informant Ramesh Chandra, father of Sumita (deceased). Accused Sonu (deceased), Ajay (A1) and Monu (A2) had entered into the dump yard of informant's house and had caught hold of Sumita with the intention of burning her alive. Ajay (A1) poured kerosene oil on her from the canister which he was carrying on his shoulder on which Sumita (deceased) raised cries for help and started running helter-skelter within the dump yard. Monu (A2) and others threatened to shoot her in case she went to the police. On hearing the noise, P.W.1 informant Ramesh Chandra, Satpal, Zahoor and Om Prakash and several other persons rushed to his house and tried to douse the fire by pouring water on her. Sumita (deceased) had received 80 per cent burn injuries in the occurrence. She was taken to the hospital on the same day in an unconscious condition and admitted there for treatment. On the next day at about 9 a.m., she regained consciousness and a police man of police outpost- Ambehata came to the hospital and recorded her statement. P.W.1 informant Ramesh Chandra then went to police station to lodge the F.I.R. in the evening along with the statement of Sumita (deceased). The F.I.R. was registered on 23.03.2010 at about 17.10 hours. The incident which had taken place in the evening of 22.03.2010 was preceded by another occurrence which had taken place on 19.03.2010 when Sumita (deceased) was going to her school Puran Mal Degree College, Gangoh to find out the dates on which the practical examination were going to be held, she was kidnapped by accused Sonu (deceased), Ajay (A1), Monu (A2) and Jagveer (A3) at gunpoint and forcibly pushed into the maruti van and taken to different places for the next two days where they had committed rape on her. On 21.03.2010 at about 2.30 p.m., the deceased was thrown out of the maruti van in front of the "*aaraht*" of Raj Kumar Khurrana and on the information given by the villagers to P.W.1 informant Ramesh Chandra, he had taken his daughter to his house and after sometime, parents of accused Sonu (deceased) along with some respectable persons of his village had come to his house and requested him not to lodge any report otherwise they would see that his daughter was never married. As a result, he did not take any action against them.

21. The prosecution in order to prove its version of the incident examined P.W.1 informant Ramesh Chandra and P.W.2 Kusum Lata as eye witnesses of the occurrence although in the F.I.R. it was mentioned that a large number of villagers including Satpal, Om Prakash, Zahoor Ahmad etc. had also reached the place of occurrence on hearing the noise and witnessed the same but they were withheld although Om Prakash who was nominated as an eye witness of the occurrence in the F.I.R. was produced by the defence and examined as D.W.1.

22. P.W.1 informant Ramesh Chandra in his examination-in-chief deposed that the accused in the case namely Sonu (deceased), Ajay (A1), Monu (A2) and Jagveer (A3) were known to him previously. Jasveer was also called Jagveer. Sumita was his daughter. At the time of the occurrence, she was studying in B.Sc. Ist year. On 19.03.2010 at about 10.00 a.m. while she was going to Puran Mal Degree College, Gangoh where she studied, to enquire about the dates of practical examination and as soon as she reached the crossing of the village, she met Ajay (A1), Monu (A2), Jagveer (A3) and accused Sonu (deceased) near the bus

stand, who kidnapped her and forced her into their van. They took his daughter to different places for the next two days and committed wrong with her. On 21.03.2010 at about 2.30 p.m., they left his daughter in front of "*aaraht*" of Raj Kumar Khurrana in a perturbed condition. The man who sold nuts at the bus stand informed him on which he along with his other family members went to the place where his daughter was thrown. He brought her back to his house in an unconscious state. He gave water to her after which she gained consciousness. The relatives of the accused along with some respectable persons of the village came to his house and tendered apologies for the misdeeds of their children and requested him not to lodge any report with the police against them otherwise her daughter would never be able to get married. On 22.03.2010 at about 5 p.m., Ajay (A1), Monu (A2), Jagveer (A3) and accused Sonu (deceased) came to his house from the back door. Ajay (A1) poured kerosene oil on her from the canister which he was carrying on his shoulder while the remaining three accused caught hold of Sumita (deceased). Accused Sonu (deceased) set Sumita ablaze on which she ran within the dump yard shouting. When he tried to save his daughter, Jagveer (A3) took out his revolver and threatened him with dire consequences in case he came forward. On account of his threats, he could not save her. On hearing the noise, Satpal, Zahoor and Om Prakash also arrived at he place of occurrence and saw the occurrence and tried to save his daughter Sumita who had received 80 per cent burn injuries. He and his family members took his daughter to GovernmentHospital, Saharanpur and got her admitted there. His daughter regained consciousness in the morning of 23.03.2010 after which a Daroga Ji came to the hospital and recorded her statement. Thereafter he scribed the written report of the incident (Ext.Ka.1) and lodged it at P.S.- Nakud, District- Saharanpur. It is noteworthy that P.W.1 informant Ramesh Chandra in his examination-in-chief has not deposed about recording of any dying declaration of the deceased by P.W.7 Rajnikant Pandey, Naib Tehsildar after the police man of police outpost- Ambehata had recorded her statement. P.W.1 informant Ramesh Chandra in his cross-examination when contradicted with the contents of the F.I.R. in which he had not named Monu (A2) as accused, he said that he had written the name of Monu (A2) as accused in the F.I.R. but in case his name was not there, he had no explanation for the same. He came up with the same explanation for his failure to nominate Monu (A2) as accused in his statement recorded u/s 161 Cr.P.C. on being contradicted with the same by the defence counsel.

23. P.W.2 Kusum Lata in her examination-in-chief recorded during the trial corroborated the evidence of P.W.1 informant Ramesh Chandra on all material points. In addition, she stated that after the policemen had arrived, she was asked to first save her daughter and the duty of catching the accused was theirs. She also stated that after the statement of her daughter was recorded by a police man of police outpost- Ambehata, a senior officer had come and had recorded the statement of Sumita (deceased) in a closed room. Her daughter had died due to burn injuries on 27.03.2010. She in her evidence did not state that the information about her daughter being abandoned by the accused in front of "*aaraht*" of Raj Kumar Khurrana, was given to her by the

person selling nuts at the bus stand. She deposed that somebody had informed them about her daughter being thrown out of maruti van by the accused in front of "*aaraht*" of Raj Kumar Khurrana. She in her examination-in-chief also deposed that on 22.03.2010 at about 5 p.m., she was washing clothes in the dump yard and her daughter was sitting in the courtyard in a pensive mood. All the four accused namely Ajay (A1), Monu (A2), Jagveer (A3) and accused Sonu (deceased) entered the premises of her house from the back door. Monu (A2) caught hold of her daughter while Ajay (A1) poured kerosene oil on her and accused Sonu (deceased) set her ablaze. Her daughter shouted on which Jagveer (A3) threatened her with a revolver and told her that in case she made any noise, he would shoot her. Satpal, Zahoor and Om Prakash had also reached the place of occurrence on hearing the noise. The police also arrived and took the deceased along with her parents and family members to the hospital who regained consciousness on the next day at about 9 a.m. A police man from police outpost, Ambehata had recorded her statement and thereafter some senior officer came and recorded her statement in a closed room. Her daughter died on 27.03.2010 as a result of burn injuries. P.W.2 Kusum Lata, on being contradicted with her statement recorded u/s 161 Cr.P.C. in which the name of Monu (A2) was conspicuous by its absence, stated that she had told the name of Monu (A2) to the Investigating Officer but in case he had failed to mention his name in her statement, she had no explanation for the aforesaid omission on the part of the Investigating Officer. P.W.2 Kusum Lata in her cross-examination on page 34 of the paper book further deposed that when P.W.7 Rajnikant Pandey, Naib Tehsildar came to record the dying declaration of the deceased, she was sitting with her daughter in the ward. Naib Tehsildar had asked her to leave the room.

24. Although in the F.I.R. as well as in the examination-in-chief of P.W.1 informant Ramesh Chandra, he has stated that Ajay (A1) had poured kerosene oil kept by him in the canister, over the deceased while P.W.2 Kusum Lata did not state about any canister in her evidence.

25. Thus, upon a conjoint reading of the statements of P.W.1 informant Ramesh Chandra and P.W.2 Kusum Lata, it transpires that their evidence on the point of the Sumita (deceased) being kidnapped by the appellants is hearsay and inadmissible in evidence against the appellants. Moreover, there are several material contradictions in their evidence with regard to the main occurrence. While P.W.1 informant Ramesh Chandra stated that he was the first one to reach the place of occurrence after hearing the noise and was threatened by Jagveer (A3) with a revolver when he tried to save his daughter, P.W.2 Kusum Lata also claimed herself to be the first person to arrive at the place of occurrence and being threatened by Jagveer (A3). Moreover, both P.W.1 informant Ramesh Chandra and P.W.2 Kusum Lata have failed to come up with any plausible explanation for their having not nominated Monu (A2) also as an accused in their statements recorded u/s 161 Cr.P.C.

26. Similarly although both the eye witnesses deposed before the trial court that police had arrived at the place of occurrence immediately after the incident and taken their daughter with them to the hospital but in the F.I.R. (Ext.Ka.9), there is no such recital. In fact the F.I.R.

contains a categorical averment that P.W.1 informant Ramesh Chandra and villagers had taken the deceased to the hospital. The deceased also in her dying declaration stated that her father had taken her to the hospital.

27. Similarly, no explanation is coming forth for non-mention of Monu (A2) in the F.I.R. The F.I.R. also does not contain any recital that after Ajay (A1) had poured kerosene oil on the deceased, the accused had set her ablaze. In fact the F.I.R. is absolutely silent on the point that after kerosene oil was poured on her, the accused or anyone of the accused had set her ablaze. P.W.1 informant Ramesh Chandra has also failed to mention in the F.I.R. that when he had gone to save his daughter after hearing her shrieks, Jagveer (A3) had threatened him with a revolver.

28. The aforesaid discrepancies in their statements create a very strong suspicion about the truthfulness of the facts deposed by them with regard to the main occurrence. In our opinion, their evidence does not inspire confidence and it would not be safe to confirm the conviction of the appellants by placing reliance on their testimony.

29. The only evidence thus left on record against the appellants is the dying declaration of the deceased. The veracity of the dying declaration of the deceased has been assailed by the learned counsel for the appellants inter alia on the grounds that the version of the occurrence given in the dying declaration is vague as the same does not refer to the date of the occurrence and materially differs from the prosecution version; that there is evidence on record indicating that before P.W.7 Rajnikant Pandey, Naib Tehsildar had proceeded to record the dying declaration of the deceased, her family members were sitting with her and hence, there was ample opportunity of tutoring the deceased; that the statement of the deceased which was recorded by police man of police outpost- Ambehata as soon as she had regained consciousness in the hospital on the next day and with which P.W.1 informant Ramesh Chandra had gone to the police station for lodging the F.I.R. as deposed by him in his evidence, was deliberately suppressed; that there is evidence of D.W.2 Dr. Karamvir Singh who was the first doctor to attend the victim when she was admitted to the hospital on 22.03.2010 at 7.45 p.m. and the extract of medico-legal register (Ext.Kha.1) indicating that on being asked by D.W.2 Dr. Karamvir Singh about how she had received injuries, she had told him that she had set herself ablaze and the aforesaid statement in fact constituted her first dying declaration which has been illegally ignored by the trial Judge. Before considering the acceptability of the dying declaration and the course which a court should adopt in the event of there being multiple dying declarations of the deceased, it would be useful to refer the legal position :-

30. In **Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165,** the Apex Court held as under :

"10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-

examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817):

" (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja &Anr. v. The State of Madhya Pradesh (1976) 2 SCR)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of Uttar Pradesh v. Ram Sagar Yadav and Ors. (AIR 1985 SC 416) and Ramavati Devi v. State of Bihar (AIR 1983 SC 164)]

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor (AIR 1976 SC 1994)]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of Madhya Pradesh (1974 (4) SCC 264)]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See Kaka Singh v State of M.P. (AIR 1982 SC 1021)]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath and Ors. v. State of U.P. (1981 (2) SCC 654)

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors. v. State of Bihar (AIR 1979 SC 1505).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)].

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v.State of Maharashtra (AIR 1982 SC 839)]."

(ii) In Puran Chand vs. State of Haryana, 15 (2010) 6 SCC 566, this Court once again reiterated the abovementioned principles.

(iii) In Panneerselvam vs. State of Tamil Nadu, 16 (2008) 17 SCC 190, a Bench of three Judges of the Apex Court reiterating various principles mentioned above held that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of the conviction unless it is corroborated and the rule requiring corroboration is merely a rule of prudence.

31. In **Heeralal V/S State of Madhya Pradesh, 2009 LawSuit (SC) 394,** the Apex Court has held as hereunder :

"that being so, in view of the apparent discrepancies in the two dying declarations it would be unsafe to convict the appellant."

32. In Gopal V/S State of Madhya Pradesh, 2009 LawSuit (SC) 484, the Apex Court has held as hereunder :

"Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. See: Kundula Bala Subrahmanyam vs. State of A.P. 1993 2 SCC 684. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

33. We now proceed to examine the veracity and acceptability of the dying declaration in this case in the light of the above principles. Although in the case in hand, the prosecution claims that only one dying declaration of the deceased was recorded which was brought on record and proved as (Ext.Ka.12), the defence has come up with a specific case that

atleast two other dying declarations of the deceased were recorded. The first one was a statement given by the victim immediately after she was admitted in the hospital on 22.03.2010 at 7.45 p.m. for treatment, before D.W.2 Dr. Karamvir Singh in which she had stated that she had set herself ablaze.

34. The second dying declaration of the deceased came into existence at about 9 a.m. on 23.03.2010 which was recorded by a police man of police outpost-Ambehata in the hospital after the victim had regained consciousness. Copy of the aforesaid statement was given to P.W.1 informant Ramesh Chandra as deposed by him in his examination-in-chief and also mentioned by him in the F.I.R. of the incident but strangely the aforesaid statement of the victim never saw the light of the day and for the reasons best known to the prosecution, the same was suppressed.

35. The third dying declaration of the deceased which the prosecution claims to be the only dying declaration of the deceased was recorded by P.W.7 Rajnikant Pandey, Naib Tehsildar on 23.03.2010 at about 12.15-12.30 p.m. in the burn unit of the hospital after the Emergency Medical Officer present there had certified the deceased to be in a fit condition to give her dying declaration, which has been already reproduced hereinabove. The dying declaration of the deceased was proved by P.W.7 Rajnikant Pandey, Naib Tehsildar and who in his examination-in-chief deposed that he had recorded the dying declaration of the deceased on 23.03.2010 in the burn unit after the Emergency Medical Officer of S.B.D. Hospital, Saharanpur had certified that the deceased was in a fit condition to give her statement between 12.15-12.30 p.m. After recording her dying declaration, he had read it over to her and thereafter she had put her thumb impression thereon. P.W.7 Rajnikant Pandey, Naib Tehsildar proved the dying declaration of the deceased as (Ext.Ka.12). In his cross-examination, P.W.7 Rajnikant Pandey, Naib Tehsildar admitted that the application for recording the dying declaration of the deceased had accompanied the dying declaration memo dated 22.03.2010 in which it was mentioned that P.W.2 Kusum Lata had stated that the victim had told D.W.2 Dr. Karamvir Singh that she had set herself ablaze. P.W.7 Rajnikant Pandey, Naib Tehsildar failed to come up with any explanation for not obtaining deceased's signature on the dying declaration although he admitted that he had asked her to sign it and why he had obtained her thumb impression on her alleged dying declaration. He also admitted that it is not noted in the dying declaration that the deceased was not in a condition to sign the dying declaration. Although the dying declaration contains a certificate of the Emergency Medical Officer that the victim was in a position to give her dying declaration but the certificate of fitness scribed on the dying declaration of the deceased was not proved by examining the Emergency Medical Officer as a witness during the trial.

36. The evidence of P.W.7 Rajnikant Pandey, Naib Tehsildar also does not indicate that before recording the dying declaration of the deceased, he had made any efforts to satisfy himself by putting a question to the deceased that whether she was giving her dying declaration voluntarily or she was under pressure or influence of her family members. Thus, we are not satisfied that there is any evidence on record indicating that the deceased had given her dying declaration voluntarily and moreover, the possibility of the same being tutored or prompted also cannot be ruled out.

37. The version given by the deceased in her dying declaration in this case differs from the prosecution version materially.

38. Upon a careful reading of the dying declaration of the deceased (Ext.Ka.12), it transpires that while she was going to college, she was kidnapped by Ajay (A1), Monu (A2), Jagveer (A3) and accused Sonu (deceased). They took her to Shakumbhari. She somehow escaped from their clutches and returned to her house on Friday. Yesterday when she was standing in the back side of her house, all the four accused poured kerosene oil on her on which she ran into the bathroom. The accused Sonu (deceased) then set her ablaze. With regard to her kidnapping, no report was lodged with the police. Firstly, her father had searched for her and then he thought that she might have gone to some relative's place. Then he went to the house of accused Sonu (deceased) and told him to return the girl otherwise he will take action. She was taken away on Friday and she had escaped on Sunday. She further stated that she had been set ablaze at about 6.30 p.m. and was taken to the hospital by her father.

39. The dying declaration of the deceased neither contains any recital that the accused-appellants after kidnapping her, had confined her in a maruti van and had taken her to different places for two days and repeatedly committed rape on her. Further, there is no mention in the dying declaration that the deceased was thrown out of the maruti van by the accused in front of "*aaraht*" of Raj Kumar Khurrana and she was taken back to her home by her father on being informed about her being abandoned. From the perusal of the dying declaration, it appears that P.W.1 informant Ramesh Chandra, his father was aware that she was in the house of the accused Sonu (deceased) and he had gone to his house and asked him to return his daughter to him otherwise it would not be good for him and that she had returned to her house herself.

40. Although in the evidence of the so-called eye witnesses of the occurrence, it is mentioned that Ajay (A1) had poured kerosene oil on the deceased while other accused had caught hold of her and accused Sonu (deceased) had set her ablaze in the dump yard itself whereafter she had started running all over the dump yard but the deceased in her dying declaration stated that all the four accused had poured kerosene oil on her on which she ran inside the bathroom where accused Sonu (deceased) had set her ablaze.

41. Two witnesses of the fact further in their evidence stated that at the time of the occurrence, P.W.2 Kusum Lata was washing clothes in the bathroom. The deceased in her dying declaration has also not stated that after she was set ablaze by the accused Sonu (deceased), on hearing her shrieks either her mother or father had arrived at the place of occurrence and when they tried to save her, Jagveer (A3) had threatened them with his revolver.

42. There is also evidence of both P.W.2 Kusum Lata, P.W.6 S.I. Samarpal Singh, Investigating Officer and P.W.7 Rajnikant Pandey, Naib Tehsildar which shows that when P.W.7 Rajnikant Pandey, Naib Tehsildar had gone to the burn unit of the hospital to record the dying declaration of the deceased, she was surrounded by her family members and hence, the possibility of the dying

declaration being tutored, cannot be ruled out.

43. The prosecution case, that apart from (Ext.Ka.12), there was no other dying declaration of the deceased does not appear to be correct. Dr. Karamvir Singh, who was examined as D.W.2 by the defence and who was undisputedly the first doctor who had attended the deceased after she was admitted to the hospital with burn injuries has in his evidence tendered before the trial court deposed that on 22.03.2010 at about 7.45 p.m. while he was posted as Emergency Medical Officer in S.B.D. Hospital, Saharanpur, he had medically examined the victim Sumita who was brought to the hospital by her father in a precarious condition with severe burn injuries. On being asked by him as to how she had received the burn injuries, she had told him that she had set herself ablaze. He further deposed that he had recorded the aforesaid statement of the victim in the medico-legal register, original copy whereof was produced by him before the trial court and certified photostat copy of the same was brought on record, proved and marked as (Ext.Kha.1). He further deposed that he had immediately written an application for getting her dying declaration recorded in which he had himself written that the victim had told him that she had set herself ablaze. The aforesaid document was proved as (Ext.Kha.2). Upon being confronted with his statement recorded u/s 161 Cr.P.C. recorded during the investigation in which he had stated that the dying declaration recorded by the Naib Tehsildar contained correct facts, in his cross-examination he denied having made any such statement before the Investigating Officer.

44. The statement of the victim which was recorded by a police man of police outpost- Ambehata was also suppressed by the prosecution without assigning any reason and on account of the aforesaid omission on the part of the prosecution, we can safely draw an adverse inference against the prosecution that the first statement of the Sumita recorded was not at all in consonance with the prosecution case as later spelt out in the written report of the occurrence (Ext.Ka.1) filed by P.W.1 informant Ramesh Chandra.

45. In view of the foregoing discussions, we are not satisfied that the dying declaration is not tutored or consistent with the prosecution case. The two dying declarations of the deceased are not at all consistent with each other as the first dying declaration (Ext.Kha.1) indicates that the deceased had set herself ablaze while in the other dying declaration (Ext.Ka.12) which the prosecution claims to be the only dying declaration of the deceased although from the evidence on record, it is established that there were atleast three dying declarations of the deceased, one recorded by D.W.2 Dr. Karamvir Singh, the second recorded by police man of police outpost-Ambehata and the third recorded by P.W.7 Rajnikant Pandey, Naib Tehsildar in which it was mentioned that all the accused had poured kerosene oil on the deceased and set her ablaze. The dying declaration also substantially differs from the prosecution version and hence, the reliance placed by the learned trial Judge on the same for the purpose of convicting the appellants, is per se illegal.

46. The inordinate and unexplained delay of almost 24 hours on the part of P.W.1 informant Ramesh Chandra to lodge the F.I.R. of the incident in which

his daughter was set ablaze by the accused-appellants and accused Sonu (deceased) although the evidence on record indicates that the police had arrived at the place of occurrence immediately and taken the deceased along with her parents P.W.1 informant Ramesh Chandra and P.W.2 Kusum Lata to the hospital even though P.W.1 claims himself to be the eye witness of the occurrence, totally shatters the credibility of the F.I.R. Under the circumstances, the possibility of the F.I.R. of the incident having been prepared after due deliberations, consultations and on the advice of the police falsely implicating the appellants along with accused Sonu (deceased) who had allegedly kidnapped the deceased as per the prosecution version or her having an affair with accused Sonu (deceased) as per the defence version, on account of their being his cousin brothers, cannot be ruled out.

47. Moreover, we also have the evidence of D.W.1 Om Prakash who was named as a witness in the F.I.R. but was not produced by the prosecution as a prosecution witness. After going through his testimony, we find that he had reached the house of P.W.1 informant Ramesh Chandra on hearing the noise. He saw that although the gate of his house was closed but on his pushing it, it opened. Then he, Satpal and Zahoor Ahmad entered his house and saw the deceased lying on a pile of cow dung and shouting "इन्होने ने जला के मार दिया। इन्होने की मतलब माँ बाप ने जलाकर मार दिया।" He further deposed that he immediately called the police at the occurrence. The police arrived at the place of occurrence within 5-7 minutes and took the deceased and her parents towards police outpost. He was not aware what happened thereafter. D.W.1 Om Prakash was cross-examined extensively by the prosecution counsel as well as the informant's counsel but strangely no suggestion was given to him by them that either he was won over as he was not supporting the prosecution case or he had not seen the occurrence. The evidence of D.W.1 has throughout remained consistent and clinching. We do not find any reason to disbelieve D.W.1 Om Prakash. From his evidence, the complicity of the appellants in setting the deceased ablaze is ruled out completely.

48. Thus, upon a wholesome consideration of the facts of the case, the attending circumstances and a careful scrutiny of the evidence on record, both oral as well as documentary, we are not satisfied that the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts and hence, neither the recorded conviction of the appellants nor the sentence awarded to them can be sustained and are liable to be set-aside.

49. These are the reasons upon which we had allowed these appeals.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

JAIL APPEAL No. 332 OF 2018
WITH
CRIMINAL APPEAL No. 606 OF 2018

Jagta ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Zafar Abbas

Counsel for the Opposite Party:
Sri Irshad Husain, A.G.A.

A. Section 376 I.P.C. - Absence of injuries on private parts of the victim would not rule out rape – Held:- Merely because there was no injury on the private parts of the deceased, it could not be said that she was not subjected to rape. Evidence that dead body of deceased found semi naked and clothes were lying scattered. As per the inquest, there were blood spots on thigh of deceased. On facts, Rape established. (Para 21)

B. Witness - Interested witness- Who and when to be discarded - Relationship not sufficient to discredit a witness. Can be accepted as evidence with care and caution. Held:- A witness is interested only if he derives benefit from the result of the case or as hostility to the accused.

C. There is no rule of law that a court cannot act on the evidence of interested witnesses. The only thing is that a court should be careful and cautious in accepting that evidence and if after due scrutiny it is found that their evidence does not suffer from any infirmities, in that case, there is no reason why a conviction should not follow on that evidence. (Para 22)

D. Section 313 Cr.P.C - Examination of Accused Persons–Duty of Accused to explain the incriminating circumstances. Statement of accused under Section 313 of the Cr.P.C- Held:- Duty of accused to explain the death of deceased or how he parted company of deceased - Mere denial by accused and failure to explain the circumstances proved would be an additional link in the chain of circumstances against him.(Para 25 & 27)

E. Section 106 - Evidence Act- Burden of proving facts especially within knowledge – Held:- Law does not enjoin a duty on the prosecution to lead evidence of such character which is impossible or extremely difficult to be led. The burden to prove a fact that is especially within the knowledge of any person, is on that person. (Para 26)

F. Conviction under Section 3 (2) (V) of the SC/ST Act- Absence of intention- Unamended Act applicable – Held:- Conviction set aside.

The conviction under Section 3 (2) (V) set aside because of absence of evidence proving intention of accused in committing the offence only because she belonged to the Scheduled Caste community. In the present case unamended Section 3 (2) (V) of the SC/ST Prevention of Atrocities act is applicable as incident is of 09.12.2009. (Para 28)

Both Appeals Partly Allowed.

Chronological list of Cases Cited:-

1. AIR 1984 SC 1622Sharad Bhirdichand Sharda v State of Maharstra.

2. (2000)5 SCC 197 Joseph v State of Kerala.

3. AIR 1990 SC 79 Padala Veera Reddy v State of AP.

4. (1992) 2 SCC 86 State of UP v Ashok Kumar Srivastava.

5. (1980) 4 SCC 262 Rafiq v State of UP.

6. (1983) 4 SCC 10 Sheikh Zakir v State of Bihar.

7. (2005) SCC (Crl) 834 State of Punjab v Hardam Singh.

8. AIR 1983 SC 364 Dilip Singh v State of Punjab.

9. 2005 SCC (Crl) 1213 Harbans kaur v State of Harayana

10. 2004 (7) SCC 629 State of UP v Kishan Chand.

11. AIR 1977 SC 472 Dalbir Kaur v State of Punjab.

12. (2009) 13 SCC 790Satbir Singh &Ors. v State of UP.

13. (2012) 5 SCC 766 Neel Kumar@ Anil Kumar v State of Harayna.

14. (2000) 6 SCC 286 Vasa Chandra Shekhar Rao v Poona Satyarayana &Anr.

15. (2000) 10 SCC 72 Geetha v State of Karnatka.

16. (2007) 2 SCC 170 Ramdas and Ors v State of Maharshtra. (E-3)

(Delivered by Hon'ble Raj Beer Singh, J.)

1. These two appeals have been preferred against the judgment and order dated 05.05.2015 passed by the Learned Additional District and Sessions Judge, Court No.2, Moradabad in Session Trial No. 419 of 2010, (State vs. Sunder Singh and Anr.) under Sections 302/34, 376 of Indian Penal Code (hereinafter referred to as IPC) and Section 3(2)(v) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act), P.S. Asmoli, District Sambhal (Sessions Division Moradabad), whereby appellants Sunder Singh and Jagta have been convicted under Sections 302/34, 376 (D) IPC and 3(2)(v) SC/ST Act. Both the appellants were sentenced to imprisonment for life along with fine of Rs. 10,000/- each under Section 302/34 IPC, imprisonment for life along with fine of Rs. 10,000/- each under Section 376-D IPC and imprisonment for life along with fine of Rs. 10,000/ each under Section 3(2)(v) of SC/ST. In default of payment of fine, they have to undergo three years rigorous imprisonment under each head. All the sentences were directed to run concurrently.

2. Prosecution version is that on 09.12.2009 at 8:00 AM complainant's wife Suman has gone to jungle for agriculture work in sugarcane crop and after that at around 10:30 PM, complainant's sister, aged 14 years, (who has been referred in this judgment as deceased) has left her home to go there for collecting fodder from Suman. One Samar Pal and Mukhiya @ Dinesh have also seen the deceased while she was going to jungle but deceased did not reach there. When Suman came at her home and inquired about deceased, complainant's father PW-2 Karan Singh told her that the deceased has left home at about 10:30 AM to collect fodder from her. Complainant's wife Suman, father and one Karan Singh started search of deceased and when they reached near sugarcane field of Kripal Singh, at around 01.00 PM, appellants/accused Sunder Singh and Jagta came out from said sugarcane field and when they were asked about deceased, they flurried and ran away from there. When complainant's wife, father and Karan Singh made search in the same sugarcane field, dead body of deceased was found lying inside the said sugarcane field. There was a rope around her neck and her clothes were lying scattered. As per complainant, both the appellants have committed rape upon his sister deceased and due to the fear, they committed her murder. One Samar Pal and Mukhiya @ Dinesh told that when deceased was going to jungle, both the accused appellants were present near the spot as they were collecting water pipe there and except them there was no other person and thus, murder of deceased was committed by them.

3. Mentioning all these facts, complainant Padam Singh has submitted a

tahreer Ex. Ka-1 at police station and on that basis, case was registered against both the appellants-accused under Sections 376, 302 IPC and 3(1)(12) SC/ST Act on 09.12.2009 at about 17:35 hours vide FIR Ex. Ka-2.

4. The inquest proceedings were conducted by PW-8 S.I. Raj Kumar Sharma and inquest report Ex. Ka-7 and other related papers like Photo lash, letter RI, letter CMO and challan dead body etc Ex. Ka- 8 to ka-11 were prepared. One sleeper of the deceased and some broken bangles found at the spot were also seized vide memo Ex. Ka-12. The dead body of deceased was sealed and sent for postmortem.

5. Postmortem on the dead body of the deceased was conducted by PW-5 Dr. S.N. Tiwari on 10.12.2009 vide postmortem report Ex. Ka-4 and following anti mortem injuries were found on the person of deceased.

(i) Multiple Abrasion and contusion 8 cm x 5 cm over on right of neck.

(ii) Bleeding seen in both nostril.

(iii) Multiple Abrasion and contusion covering 4 cm x 2 cm over left side chick.

(iv) On dissection hyoid bone found fractured.

As per Autopsy Surgeon, the cause of death of the deceased was Asphyxia as a result of ante-mortem strangulation.

6. Initially investigation was conducted by circle officer Sarvesh and subsequent investigation was conducted PW-6 CO Brejesh Singh. During course of investigation on 10.12.2009 both the accused persons were arrested and their clothes were seized separately vide seizure memo Ex. Ka-13. After completion of the investigation, both the accused persons were charge-sheeted vide Ex. Ka-5.

7. Trial Court framed charges under Sections 376, 302/34 IPC and 3(2)(v) of SC/ST Act against both the accused persons. They pleaded not guilty and claimed trial.

8. In order to bring home the guilt of the accused persons, prosecution has examined eight witnesses. After prosecution evidence, the both the accused persons were examined under Section 313 Cr.P.C., wherein they denied prosecution evidence and claimed that they have been falsely implicated. However, no evidence was adduced in defence.

9. After hearing and analyzing the evidence on record, both the appellants were convicted under Sections 302/34, 376 (D) IPC and 3(2)(v) of SC/ST Act by the trial court and were sentenced as stated earlier.

10. Being aggrieved by the impugned judgment and order, accused appellant Jagta has preferred the Jail Appeal No. 332 of 2018 and accused appellant Sunder Singh has preferred Criminal Appeal No. 606 of 2018.

11. On the request of the appellant Jagta for appointing an Amicus Curiae to argue his appeal hence we appointed Sri Zafar Abbas, Advocate as Amicus Curiae to argue his appeal who is also appearing as counsel for appellant Sunder Singh in the connected appeal.

12. We have heard Sri Zafar Abbas, learned counsel for the appellants and Sri Irshad Husain and learned A.G.A. for the State and perused record.

13. Learned counsel for the appellants has argued that there is no reliable evidence against the appellants and they have been convicted merely on the basis of suspicion. PW-1 Padam Singh and PW-2 Karan Singh are the brother and father of the deceased and thus, they are interested witnesses and therefore, their evidence cannot be relied upon. There is no eye-witness of the alleged incident and the chain of circumstances is not complete. The statement of PW-2 Karan Singh and PW-3 Samarpal Singh that both the appellants were seen coming out from sugarcane field of Kripal Singh and ran away, is not reliable. Further, there is no conclusive medical evidence that deceased was subjected to rape. It has been further submitted that there is no material on record at all to attract provisions of Section 3(2)(v) SC/ST Act. It was submitted that learned trial court has not appreciated the evidence properly and committed error by convicting the appellants.

14. Per contra learned A.G.A. submitted that the circumstantial evidence on record clearly points out that both the appellant-accused have subjected deceased to rape and due to fear that deceased may disclose the incident, they committed her murder. There is evidence of PW-3 Samarpal Singh that when deceased was going to collect fodder, she was seen by PW-3 near agricultural field of Kripal Singh and that both the appellants Sunder Singh and Jagta were also there as they were collecting water pipes there. Further there is evidence of PW-2 that while they were searching deceased and reached near filed of sugarcane filed of Kripal Singh, both appellants have come out from sugarcane field and thereafter dead body of deceased was recovered from same place. It was pointed out that medical evidence clearly shows that deceased was molested and subjected to rape and thereafter her murder was committed. Learned A.G.A. submitted that conviction of appellant is based on evidence and there is no illegality in the same.

15. In this case there is no eye witness of the alleged incident and case is based on circumstantial evidence. It is well settled that though conviction can be based on circumstantial evidence alone but for that the prosecution must establish the chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which interference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, the accused and none else have committed the offence. In a landmark judgment of the Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622,** the Apex Court held as under:

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances

concerned 'must or should' and not 'may be ' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this court in ***Shivaji Sahebaro Bobade V State of Maharashtra 1973 CriLJ1783*** *where the following observations were made:*

Certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accuses, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

In **Joseph vs. State of Kerala, [(2000) 5 SCC 197],** the Hon'ble Apex court has explained under what circumstances conviction can be based purely on circumstantial evidence. It was observed, that,

16. *"it is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."*

Similar view has been expressed in **Padala Veera Reddy v. State of Andhra Pradesh, (AIR 1990 SC 79).** In C. Chenga Reddy and others v. State of Andhra Pradesh, (AIR 1996 SC 3390), the Supreme Court has held that:-

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In **State of U.P. vs. Ashok Kumar Srivastava, [(1992) 2 SCC 86],** it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on, is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the

circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of the guilt.

The principle that emerges from these decisions is that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person. The circumstances from which an inference of guilt is drawn must be fully established and there should not be any missing links in the case. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone.

16. In the instant case perusal of evidence shows that PW-1 Padam Singh has stated that on the day of incident his wife has gone to collect fodder from sugarcane crop and after that his sister/ deceased, aged about 14 years, has also left home for going there to collect fodder from her. While going to jungle, she was seen by Kripal Singh, Samarpal, Mukhiya @ Dinesh and on their asking, she has told that she was going to collect fodder. When deceased did not reach there, wife of PW-1 Padam Singh came at her home and inquired about the deceased but father of PW-1 told that deceased had left home at 10:30 AM for going to jungle to collect fodder. PW-1 further stated that while making search of deceased, her wife Suman, father Karan Singh and one Samarpal reached near sugarcane field of Kripal Singh, at the same time at around 1:00 PM, appellants Sunder Singh and Jagta Singh were coming out from sugarcane field and when they were asked about the deceased, they flurried and ran away from there. Thereafter, dead body of deceased was found in the same sugarcane filed. There was a rope around her neck and her clothes were lying scattered. PW-1 Padam Singh further stated that the appellants-accused Jagta and Sunder Singh have committed rape upon the deceased and with the fear that the incident may come out, they committed her murder. At the spot there were only accused Sunder Singh and Jagta and none else. PW-1 Padam Singh has proved his tahreer as Ex. Ka-1.

17. P.W. 2 Karan Singh stated that on the day of incident, his daughter (deceased) has gone to collect fodder from the field of one Inderpal but she did not return back. When he along with others has gone to search her and reached near the field of Kripal Singh, at about 1:00 PM, appellants Jagta and Suder Singh were coming out from filed of Kripal Singh and when they were enquired about deceased they did not tell anything. When they were again asked, both the accused ran away from there.

PW-2 stated that they reached at the point of field from where both the appellants have come out and saw that some crops of sugarcane was lying damaged there and at some distance the dead body of deceased was lying in semi-naked condition and there was a rope around her neck and her clothes were lying scattered. PW-2 further stated that both the appellants-accused were known to him as Sunder is resident of his village while Jagta is resident of nearby village Sedpur and both were employed by one Kanchan Jaat.

18. PW-3 Samarpal has stated that on the day of incident, at about 10:30-11:00 AM, he and Mukhiya @ Dinesh were carrying fodder from jungle and when reached near sugarcane field of Kripal Singh, deceased has met them and when they inquired from her as to where she was going, she told that she was going to collect fodder. PW-3 further stated that near the filed of Kripal Singh, appellants-accused Sunder Singh and Jagta were collecting water pipe. PW 3 stated that they both were known to him since before the incident.

19. PW-4 Gurudev Singh is a formal witness, who has recorded FIR. PW-6 A.S.P. Brijesh Singh has conducted part investigation. During investigation he has recorded the statements of witness and has filed charge-sheet Ex. Ka-5.

20. PW-7 Dr. M.C. Gurecha has examined vaginal smear of deceased and has proved his report Ex. Ka-6. As per PW 6, sperm were found in the vaginal smear of the deceased.

21. It is clear from the post-mortem report of the deceased that the death of the deceased was homicidal in nature. This fact has not been disputed from the side of appellants. However it was submitted by the learned counsel for the appellants that there is no medical evidence to establish that deceased was subjected to rape. In this regard it may be stated that merely because there was no injury on the private parts of deceased, it could not be said that deceased was not subjected to rape. Vaginal smear examination report exhibit ka-6, clearly shows that sperms were found in the vaginal smear of the deceased. In this regard, statement of PW-7 Dr. M.C. Gurecha, who examined vaginal smear of deceased, is clear that sperm were found in the vaginal smear of deceased. Further, as per the FSL report exhibit ka-15, sperms were also found at the underwear of appellant-accused Jagta. There is also evidence to the effect that dead body of deceased was found in semi-naked condition and clothes were lying scattered. As per the inquest report, there were blood spots at the thigh of deceased. All these facts clearly established that before her murder, deceased was subjected to rape. The deceased was a young girl, aged 14 years, thus, she could have been easily overpowered by the accused-appellants and thus, the fact that she did not suffer any injury at her private parts, can not be given much importance. It is well settled that absence of injuries on private parts of victim would not rule out being subjected to rape. In this connection reference may be made to case of Rafiq vs. State of U.P. (1980) 4 SCC 262 and Sheikh Zakir vs. State of Bihar (1983) 4 SCC 10. The contention of the learned counsel for the appellants that there is no medical evidence of rape has no force.

22. It was argued by the learned counsel for the appellants that PW 1 and PW 2, being brother and father of deceased, are interested witness. In this regard, it may be observed that mere relationship is not sufficient to discredit a

witness. It is well settled that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spear the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. In case of State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834, it has been held by the Hon'ble Apex Court that ordinarily the mere relations of the deceased would not depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit. In case of Dilip Singh Vs State of Punjab, A.I.R. 1983, S.C. 364, it was held by the Hon'ble Supreme Court that the ground that the witnesses being the close relatives and consequently being the partition witness would not be relied upon has no substance. Similar view has been taken by the Hon'ble Supreme Court in case of Harbans Kaur V State of Haryana, 2005, S.C.C. (Crl.) 1213; and State of U.P. vs. Kishan Chandra and others, 2004 (7), S.C.C. 629. The contention about branding the witnesses as interested witness and credibility of close relationship of witnesses has been examined by Hon'ble Apex court in a number of cases. A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness (Dalbir Kaur v. State of Punjab, AIR 1977 SC 472). The mere fact that the witnesses were relations or interested would not by itself be sufficient to discard their evidence straight way unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. There is no rule of law that a Court cannot act on the evidence of interested witnesses. The only thing is that a Court should be careful and cautious in accepting that evidence and if after due scrutiny it is found that their evidence does not suffer from any infirmities, in that case, there is no reason why a conviction should not follow on that evidence. In the case of Satbir Singh & Ors V State of Uttar Pradesh [(2009) 13 SCC 790], it was observed that it is well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. In the present case it is quite natural that it is the family members of the deceased, who would know as to when and where deceased, a girl aged 14 years, has gone. When deceased gone missing, it is quite natural that her family members would search her. The version put forward by PW 2 and PW 3 is quite natural and nothing adverse could be elicited in their cross-examination. Further, PW 3 appears a thoroughly independent witness and the prosecution version finds support from his statement. Here it would be pertinent to mention that there is nothing to show that these witnesses have any enmity or grudge against the appellants. In view of all these facts, the evidence PW 1 and PW 2 can not be doubted on the ground that they are brother and father of the deceased.

23. From statements of PW 1 and PW 2, it is clear on the day of incident at

about 11.00 AM, deceased has gone to field to fetch fodder from the wife of complainant/ PW1. The evidence of PW 3 is to the effect that around same time deceased has met him near sugar cane field of one Kripal Singh and at that time both the accused-appellants were present there as they were collecting water pipe near land of Kripal Singh. The evidence of PW 2 further shows that when PW 2 along with other persons has gone to search deceased, at about 01.00 PM both the accused-appellants were seen coming out from the field of Kripal Singh. When PW 2 and his companion enquired them about the deceased, they ran away from there. PW 2 and others went at the place, from where both accused have come out from field of Kripal Singh, and saw that some sugarcane crop was lying damaged. As they went further inside the field, they found that dead body of deceased was lying in semi-naked condition and her clothes were lying torn and there was a rope around her neck. On all these facts, statements of witnesses are clear and cogent. These witnesses have been subjected to cross-examination but no such fact could emerge, which may create any doubt about credibility of these witnesses. Statement of PW 2 that at around 11.00 his daughter (deceased) has gone to fetch fodder is supported by PW 3, who appears an independent witness. From statement PW 3 it is also established that at around 11.00 AM, when deceased was last seen alive, both the accused-appellants were present there as they were collecting water pipe there. Thereafter, at about 01.00 PM, both the accused-appellants were seen coming out from the field of alleged Kripal Singh and when they were enquired about the deceased, they both ran away and after that dead body of deceased was found inside sugar cane field of Kripal Singh. In fact as per PW 2, when they reached at the point of alleged sugarcane field, from where both accused persons have out and when PW-2 and his companion went a little further, dead body of deceased was found lying there. The statements of the said witnesses are clear and cogent and no such fact could be elicited from their cross-examination, which could make any dent on the credibility of tthese witnesses. Further, as stated earlier, sperm were found in vaginal swab of deceased, which indicates that before her death, she was molested and subjected to rape. It appears that deceased has resisted the move of molesters as there were flesh pieces in her nails.

24. One of the important piece of evidence is that on the next day of incident, pant and underwear of both the accused persons were seized by PW 8 vide seizure memo exhibit ka- 13 and later on same were sent to FSL for examination. As per FSL report exhibit ka-15, spots of human blood as well sperm were found on the underwear of accused-appellant Jagta. Motive of committing murder of deceased is quite apparent as deceased was subjected to forcible rape and possibly due to the fear that she may disclose the incident, she was murdered. This fact also finds support from fact that as per postmortem report exhibit ka-4, presence flesh pieces was found in her nails, which indicates that the deceased has resisted the move of molesters.

25. Here it would be pertinent to mention that in their statements u/s 313 CrPC, the appellants have not offered any explaination what so ever regarding the incriminating circumstances. They have

simply denied prosecution evidence but did not take any specific plea regarding circumstances that at 11.00 AM they were seen around the deceased and that at around 01.00 PM when PW 2 and others were searching deceased, they have come out from the sugar cane field of Kripal Singh and ran away and soon thereafter dead body of deceased was recovered from the same portion of field, from where they have fled. Similarly no specific plea was taken qua evidence that sperms were found on the underwear of appellant-accused Jagta and that blood spots were also found on his pant. No doubt, it is duty of prosecution to prove its case by cogent evidence but nevertheless in a case based on circumstantial evidence, when prosecution has alleged and led evidence to the effect deceased was last seen alive with accused, it is duty of accused to explain as how deceased suffered death or how he parted away company of deceased. In ***Neel Kumar @ Anil Kumar v. State of Haryana, (2012) 5 SCC 766,*** the Apex Court observed:

"It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 CrPC. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. (See also: Aftab Ahmad Anasari v. State of Uttaranchal, AIR 2010 SC 773)."

The Apex Court in **Vasa Chandrasekhar Rao vs. Ponna Satyanarayana &Anr. [(2000) 6 SCC 286]** and **Geetha vs. State of Karnataka [(2000) 10 SCC 72]** while explaining the law relating to circumstantial evidence has ruled that where circumstances proved are put to the accused through his examination under Section 313 of the Code and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier, in this case, the incriminating circumstances were put to the appellants while recording their statements under Section 313 of the Code of Criminal Procedurebut they have merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellants.

26. On the basis of evidence, it is establisheded that at about 11.00 AM when deceased was last seen alive near sugarcane field of alleged Kripal Singh, both the accused-appellants were present there as they were working in a nearby field and were collecting water pipe and thereafter at around 01.00 PM, they were seen coming out from said sugarcane field and soon after dead body of deceased was found in side the same sugar cane field, from where both the accused have fled away. As stated above, appellants have failed to offer any explaination regrading any of the incriminating circumstance esatblished against the. Law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of

proving that fact is upon him. If an offence has been committed secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In fact it is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. No doubt mere conjectures or suspicion cannot take the place of legal proof and the large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, as observed by the Apex Court, but it is equally established that the law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. If a fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

27. In the present case, accused-appellants have failed to give any explanation, whatsoever and thus inference has to be drawn that it were the accused-appellants, who committed the incident in question. It would be pertinent to mention that time gap between the last seen of deceased around accused-persons and recovery of dead body of deceased is of just two hours. As stated earlier, deceased was subjected to rape before her murder and that she has resisted the move of her molesters. Thus, time gap between the said two circumstances is not much so as to create any doubt that any other person might have committed the incident. In such a small gap of time there is no possibility of any other theory except that the incident was committed by the appellants, specially when they have not come up with any explanation what so ever.

28. Considering entire evidence on record, so far as charge u/s 302 IPC is concerned, it is manifest that the prosecution has established the chain of circumstances, which consistently points to the accused-appellants Jagta and Sunder alone and these circumstances are inconsistent with their innocence. All the circumstances have been firmly established and when these circumstances are taken into consideration cumulatively, they conclude that within all human probability, it were the accused-appellants Jagta and Sunder and none else have committed the murder of the deceased. It is also established that before her death deceased was molested and subjected to rape. In FSL examination report, spots of human blood as well sperm were found on the underwear of accused-appellant Jagta. In the attending facts and circumstances of the matter, the involvement of accused Jagta in commission of rape is also established. However, as no blood spot or mark of sperm was found on clothes of accused-appellant Sunder and thus, it would not be safe to uphold his conviction u/s 376 IPC.

So far as the charge and conviction under Section 376 IPC is concerned, it may be seen that both the appellants were charged for the offence under Section 376 IPC while they

have been convicted under Section 376(D) IPC. Thus, learned Trial Court committed error by convicting the appellants under Section 376(D), without framing charge under Section 376(D) IPC. In fact, as the age of the deceased was 14 years, accused must have been charged under Section 376(2)(I) IPC. Be that as it may, as it could not be proved that accused-appellant Sunder Singh has committed rape upon the prosecutrix thus, conviction of accused-appellant Jagta under Section 376(D) IPC is liable to be altered under Section 376 IPC. Keeping in view the facts and circumstances of the matter it wold be proper that appellant-accused Jagta be sentenced to imprisonment for life along with fine of Rs. 10,000/- under Section 376 IPC.

So far as the conviction of both the accused-appellants u/s 3(2)(V) SC ST Act is concerned, neither of the material witness has stated that they are members of scheduled caste or scheduled tribe. Even if they belong to such category, there is absolutely no evidence that the crime in question was committed on the ground that the deceased belong to scheduled caste or scheduled tribes. Hon'ble Supreme Court in Ramdas and Ors. V. State of Maharashtra, (2007) 2 SCC 170 (para 11) has held as under :

"11. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was prehaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

The gravamen of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is that any offence, envisaged under Indian Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging to Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe". Section 3(2)(v) of the SC/ST Prevention of Atrocities Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words ".....knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". Therefore, if subsequent to 26.01.2016 (i.e. the day on which the amendment came into effect), an offence under Indian Penal Code which is punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community and the accused person has knowledge that such victim belongs to SC/ST community, then the charge of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge under Section 3(2)(v) of the SC/ST

Prevention of Atrocities Act. In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was of 09.12.09. From the unamended provisions of Section 3(2) (v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the accused in committing such offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community. The evidence and material on record does not show that the appellants have committed murder of the deceased on the ground that she belonged to Scheduled Caste or that she was raped on the ground of her caste. Section 3(2)(v) of the SC/ST (Prevention of Atrocities) Act can be pressed into service only if it is proved that the rape and murder has been committed on the ground that deceased belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellants in committing the offence upon the victim only because she belongs to Scheduled Caste community, the conviction of the accused-appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can not sustain. In view of these facts, the conviction and sentence of both the appellants under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is in not accordance with law and thus, the same is liable to be set aside.

29. In view of aforesaid, we are of the considered opinion that conviction of the appellant-accused Jagta and Sunder u/s 302 IPC is based on evidence and the trial court was justified in convicting the appellants of these charges and same is upheld accordingly. The sentence under Section 302 IPC is also upheld. Conviction of appellant Jagta under Section 376(D) IPC is altered to under Section 376 IPC and he is sentenced to imprisonment for life and fine of Rs. 10,000/-. In default of payment of fine appellant shall undergo one year imprisonment. Conviction and sentence of both the appellants/accused under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act is set aside. Conviction and sentence of appellant-accused Sunder u/s 376 IPC is also set aside. Both the appellants are stated in jail, they shall serve out the remaing sentence.

30. Both the Appeals are partly allowed in above terms.

31. A copy of this order along with lower court record be sent to court concerned forthwith for necessary compliance.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ALI ZAMIN, J.

CRIMINAL APPEAL No. 871 OF 1986

Bhaggoo and Ors. ...Appellants (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri G.P. Dikshit, Sri Rakesh Kumar Singh, Sri Tripurari Pal, Sri R.P.S. Chauhan.

Counsel for the Opposite Party:
D.G.A.

A. Minor discrepancies in evidence of eyewitnesses-Minor discrepancies in evidence sof eye-witnesses who have given convincing and reliable evidence with regard to details and manner of

assault will not affect their evidentiary value. (Para 20)

B. Motive - Submission that there was no strong motive for the accused-appellants to commit the offence rejected for the reason that it is well settled that where direct evidence is worthy of credence - motive does not carry much weight. (Para 26 and 27)

C. Section 134 of The Evidence Act 1872-Non examination of wife of the first informant, mentioned as a witness in the F.I.R, by the prosecution in the trial. Held - Prosecution is not obliged to adduce witnesses mentioned in the F.I.R or in the charge-sheet in view of section 134 of the Evidence Act. Law is well settled that the Court can and may act on the testimony of a single witness provided the witness is wholly reliable but if there are doubts about the testimony, the Court will insist on corroboration. It is the quality and not quantity that is material. (Para 33, 34,35,36,37,38)

D. Contradictions, discrepancies and variations in the case of prosecution-All the witnesses supported the prosecution case and despite lengthy cross-examinations, no adverse material could be brought on record to disbelieve their statements or render their statements doubtful. Held- Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvements in their testimony, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not effect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.
(Para 39,40,41,42,43and 44)

Both appeals dismissed.

Case law discussed/relied upon: -

1. (2012) 3 SCC 196, Lokesh Shivakumar v. State of Karnataka

2. AIR, 1953, SC 364, Dalip Singh v. State of Punjab

3. (2010) 7 SCC 759, Dharnidhar v. State of Punjab

4. 2013 (15) SCC 298, Ganga Bhawani v. Rayapati Venkat Reddy &Ors.

5. (2007) 14 SCC 150, Namdeo v. State of Maharashtra

6. AIR 2008 SC 1381, Kunju @ Balachandran v. State of Tamil Nadu.

7. (2004) 12 SCC 229, Yakub Ismailbhai Patel v. State of Gujarat.

8. (2002) 9 SCC 537, State of Haryana v. Inder Singh and Others.

9. (2012) 4 SCC 124, Sampath Kumar v. Inspector of Police, Krishnagiri.

10. Criminal Appeals Nos. 473-474 of 2019 decided on 12.03.2019,

11.Sachin Kumar Singraha v. State of Madhya Pradesh.

12. Criminal Appeal No. 56 of 2018, Smt. Shamim v. State of NCT of Delhi decided on 19.09.2018.

13. AIR 2009 SC 152 State Represented by Inspector of Police V. Saravanan &Anr.

14. AIR 2009 SC 331, Arumugam v. State.

15. (2009) 11 SCC 334, Mahendra Pratap Singh v. State of Uttar Pradesh.

16. JT 2010 (12) SC 287, Dr. Sunil Kumar Sambhudayal Gupta &Ors. V. State of Maharashtra.

17. (2014) 7 SCC 323, Sumer Singh v. Surajbhan Singh &Ors.

18. (1990) 4 SCC 731, Sham Sunder v. Puran.

19. (2005)5 SCC 554, M.P v. Saleem.

20. (1996) 2 SCC 175, Ravji v. State of Rajasthan. (E-3)

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri R.K. Singh, learned Senior Counsel assisted by Sri Tripurari Pal and Sri J.K. Upadhyay learned A.G.A. for the State, considered the written submission of the appellants and perused the material on record.

2. This appeal has been filed against the judgement and order dated 07.03.1986 passed in Session Trial No.396 of 1984 (State vs. Bhaggoo and others), Police Station Usehat, District Budaun by which learned Special Judge (E.C. Act), Budaun has convicted the appellants-accused Bhaggoo, Dodhey, Dharam Singh, Atar Singh, Puttoo, Satyapal, Navrang and Ramphal and sentenced to undergo two years rigorous imprisonment under Section 148 of I.P.C., 6 months rigorous imprisonment under Section 323/149 of I.P.C. and life imprisonment under Section 302/149 of I.P.C. Accused Roshan has been sentenced to undergo one year's rigorous imprisonment under Section 147 of I.P.C., 6 months rigorous imprisonment under Section 323/149 of I.P.C. and imprisonment for life under Section 302 I.P.C. It has been also directed that all the sentences shall run concurrently.

3. Appeal qua appellant no.1 (Bhaggoo), appellant no.2 (Dodhey), appellant no.3 (Dharam), appellant no.4 (Navrang) and appellant no.9 (Roshan) have been dismissed as abated vide order dated 23.04.2019. Hence, this appeal remain for consideration against appellant no.5 (Atar Singh), appellant no.6 (Puttoo), appellant no.7 (Satyapal) and appellant no.8 (Ramphal).

4. In brief facts of the case are that near about one and half year preceding to the incident Hari Ram, brother of the accused Navrang was murdered in which Navrang had made informant Dori Lal, deceased Ram Bharosey, Dori, Prem Pal, Shishupal and Malkhan accused.

Accused Bhaggoo and Dodhey are real brothers, Ram Sahai is son of Dodhey, Dharam Singh and Navrang are sons of Ram Sahai. Accused Roshan is son of Badri and Sohan Pal is son of Ganga Singh, accused Satyapal and Ramphal are sons of Soran, accused Atar Singh and Puttoo are sons of Balwant. Atar and Puttoo are cousins of accused Bhaggoo, accused Ramphal, Satyapal and Sohan Pal are nephews of Navrang, Roshan Lal is cousin of Navrang.

In the family of the informant his great aunt and his maternal uncle Arav Singh, father of the deceased Ram Rais had expired, on account of which they were not celebrating the Holi festival. On 22.03.1984 before sun set in the evening informant Dori Lal, his brother Ram Bharosey, Prem Pal, nephew Surendra Pal, cousin Ram Rais and Durvijay son of Harbhajan, resident of village Milkia, police station Kalan and Shankar Singh son of Het Ram, village Fatehgarh were sitting over the chaupal. In the meantime, accused Bhaggoo, Dodhey, Navrang, Dharam Singh, Atar Singh and Puttoo armed with guns, Ramphal and Satyapal armed with country-made pistols, accused Sohan Lal and Roshal Lal armed with lathi came there and on exhortation of Dharam Singh and Satyapal that they should not be allowed to escape accused

Bhaggoo and Dharam Singh fired at Ram Bharosey, Navrang and Satyapal fired at Ram Rais, Dodhey and Atar Singh fired at Surendra, Puttoo and Ramphal fired at the informant with intention to kill them. Informant Dori Lal escaped from the fire shot but fire shots hit to Ram Bharosey, Ram Rais and Surendra. As soon as Ram Bharosey was shot, he fell down after running for 2-3 steps and Ram Rais also fell down after running 20-25 steps towards South. Surendra Singh hid himself in the wheat crop. Informant Dori Lal, Prem Pal, Durvijay and Shankar took cover behind door of the surrounding houses and raised alarm. The accused fled away towards the gallery from which they had come. After the accused had fled, they found that Ram Bharosey and Ram Rais had both died. On search Surendra was found lying in the field of wheat crop after going 50 steps. Informant got the written report (Ext.Ka-1) scribed at his house by one Pratap Singh in the village and along with Surendra, Ram Naresh, Prempal and Ram Chandra reached the police station by bullock cart and at 10:00 p.m. handed over the written report to the Head Moharrir, who on the basis of written report Ext.Ka-1, registered Case Crime No.48 of 1984, under Sections 147, 148, 149, 302, 307 I.P.C. against the appellants and prepared chik report Ext.Ka-3 and G.D. entry Ext.Ka-4. Investigation was taken over by Station Officer Mahendra Pal Singh.

The Investigating Officer recorded statement of informant injured Surendra and sent injured Surendra for medical examination. Dr. Ragesh Rai medically examined injured Surendra Singh and prepared his medical report Ext.Ka-2, according to which following injuries were found on the person of the injured:

1. A contused swelling on both lips colour read situated on all over the both lips simple caused by some hard object duration fresh.

2. Bleeding from right ear present, no external injury seen, suspected internal injury, advised x-ray, injury kept under observation referred to radiologist and E.N.T. Surgeon duration fresh.

3. Contused swelling 6 cm x 4 cm oral red situated 2 cm outer to the right lateral end of mouth simple caused by hard object duration fresh.

4. tenderness felt 4.5 cm. below the right mastoid, no external injury is seen caused by some hard object duration fresh.

5. Eighteen gun shot wound entry in an area 23 cm. x 21 cm. in front of right ear to the mid line of skull on right side palpable, no scorching tattooing bleeding seen caused by some fire arm direction straight duration fresh patient feel omitting, sensible referred to radiologist.

5. The Investigating Officer along with S.I. Sher Singh and other employees reached the village in the night of the incident and kept deceased Ram Rais's body in the varandah because it was lying in a dirty place. Being night inquest report could not be completed. On the instruction of Investigating Officer S.I. Sher Singh conducted inquest of deceased Ram Bharosey and Ram Rais, prepared inquest reports, relevant documents i.e. photo of the dead body, challan of dead body and sample of dead body seal Ext.Ka-11 to Ext.Ka-14 and Ext.Ka-15 to Ext.Ka-18 respectively. After completing the inquest he dispatched the dead bodies of Ram Bharosey and Ram Rais for post-mortem along with Constable Uma Shankar and Naresh Pal Singh.

6. P.W.8 Dr. R.K. Verma conducted autopsy on the body of deceased Ram Bharosey on 24.03.1984 at 9:00 a.m. and prepared post-mortem report Ext.Ka-9, according to which on the person of deceased Ram Bharosey following injuries were found:

1. Gun shot wound of entry on left side of upper part of chest mid axillary line 5 cm. below left axilla and 7 cm. away from left nipple measuring 4 cm. x 3 cm., chest cavity deep 1 cm. blackening present around the wound.

2. Abrasion measuring 5 cm. x 3 cm. on right side of forehead.

3. Gun shot wound of entry on lower side of middle of chin 1 cm. x 0.75 cm. x bone deep, mandible bone fractured and in communication with wound no.4.

4. Gun shot wound of exit 3 cm. x 1 cm. x bone deep on upper part of middle of chin.

5. Gun shot wound of entry 2 cm. x 2 cm. x bone deep on lateral side of dorsum aspect of left palm at the base of thumb through and through wound. Dispraying the whole of left thumb. The first metacarpal bone badly fractured.

6. Gun shot wound abrasion in an area of 6 cm. x 5 cm. on right aide abdomen just below left side and 6 cm. away from umbilicus.

7. Gun shot abrasion in an area of 8 cm. x 4 cm. on right side of upper part of chest below right clavicle.

8. Gun shot wound in an area 5 cm. x 4 cm. x bone deep on right hand dispraying whole of right thumb fracturing the metacarpal bone of thumb and tearing all the adjacent muscle of first index finger right hand. On opening the chest 2nd and 3rd ribs of left side, left lung and heart were badly damaged. Small pallets nos.69 recovered from the wound.

In his opinion cause of death was shock due to excess bleeding and death was possible on 22.03.1984 at the time of sun set. The ante-mortem fire arm injuries found on the body of deceased were sufficient to cause death.

Dr. R.K. Verma also conducted autopsy on the body of deceased Ram Rais and prepared post-mortem report Ext.Ka-10. According to which following injuries were found on the body of the deceased Ram Rais:

1. Gun shot wound of entry left side of chest 2 cm. x 2 cm. circular shaped x chest cavity deep, 4 cm. below left nipple, blackening 2 cm. present.

2. Gun shot abrasion in an area of 4 cm. x 3 cm. x skin deep on outer side of wrist joint.

On opening the chest 5th and 6th ribs were fractured. The left lung was damaged partly, Heart completely lacerated. The right side lung is lacerated badly and both chest cavity are full of clotted blood.

In his opinion the death could be attributable to shock and hemorrhage. Both the deceased could have died on 22.03.1984 before sun set. These injuries could be caused by fire arm and the injuries were sufficient in the ordinary course of nature to cause death.

7. The Investigating Officer recorded the statement of witnesses, Prempal, Surendrapal, Durvijay, Pratap Singh, Ram Naresh etc. and inspected the spot on the pointing of complainant and witnesses and prepared spot map Ext.Ka.5. He also took the blood stained and plain earth from the places where the dead bodies of Ram Bharosey and Ram Rais were found and got prepared its memo Ext.Ka-6 and Ext.Ka-7. After,

completing the investigation submitted the charge sheet Ext.Ka-8 before the C.J.M., Budaun, under Sections 302/149 and 323/149 I.P.C. against the accused, who committed the accused for trial to the court of Session where Case Crime No.480/1984 was registered as Session Trial No.396 of 1984 (State vs. Bhaggoo and others) from where it was transferred to the court of Special Judge (E.C. Act), Budaun for trial. The trial court framed charge against the accused-appellants Bhaggoo, Dodhey, Dharam Singh, Navrang, Atar Singh, Puttoo, Satyapal and Ramphal under Section 148 I.P.C. and charge against Bhaggoo, Dodhey, Dharam Singh, Navrang, Atar Singh, Puttoo, Satyapal, Ramphal, Roshan and Sohanpal was framed under Sections 302/149 I.P.C. Charge against the accused-appellant Roshan was also framed under Section 323/149 I.P.C. The accused abjured the charge and claimed trial.

8. The prosecution in order to prove its case examined nine witnesses. P.W.1 Dori Lal informant, P.W.2 Surendra Pal injured, P.W.3 Durvijay and P.W.4 Pratap Singh scribe of written report were examined as witnesses of fact while P.W.5 S.R. Sharma Pharmacist, P.W.6 Harpal Singh chik and G.D. scribe, P.W.7 Mahendra Pal Singh Investigating Officer, P.W.8 R.K. Verma who had conducted autopsy of the dead bodies and P.W.9 S.I. Sher Singh, who had prepared the inquest memo of dead bodies as well as memo of blood stained and plain earth from the place of dead bodies were produced as formal witnesses. The accused-appellants in their examination under Section 313 Cr.P.C., denied the prosecution case and alleged false implication due to partibandi and enmity.

9. After hearing learned counsel for the parties and scrutinizing the entire evidence on record, the impugned judgement and order has been passed. Hence, this appeal.

10. Learned counsel for the appellants submits that the prosecution witness P.W.-4 Durvijay in para 9 of his testimony has stated that Daroga came on next day and got scribed the report by Pratap Singh which belies the prosecution claim that the F.I.R. was lodged and registered at the police station on 22.03.1984 at 10:00 p.m. He also submits that injured Surendra Pal has stated that Dodhey and Atar Singh fired at him but he could not tell which part of his body was hit by the shot. The doctor who had medically examined him has not been produced and no supplementary report has been filed before the Court. However, P.W.5 S.R. Sharma has identified his hand writing and signature. He has stated that injury report of Surendra Pal is mentioned at page No.135 of the register but on this page police case is not mentioned while at page no.136 and 134, police case has been mentioned. He further submits that P.W.1 Dori Lal has stated that Investigating Officer had taken the blood stained and plain earth also from the place where Surendra Pal injured had hidden himself in the field while P.W.7 Mahendra Pal Singh-Investigating Officer has stated that he had taken the blood stained and plain earth from both the places where the dead-bodies were found. P.W.2 Surendra has stated that informant Dori Lal had taken him from the field while P.W.1 Dori Lal has stated that injured Surendra himself came out of the field. P.W.1 Dori Lal in his deposition at page 28 has stated that the bed was spread on the chabutra while at page 58, the Investigating Officer has stated that on the spot no carpet was found. Thus, the statement of P.W.1 Dori Lal does not find

support but makes his presence doubtful. At page 58 and 59 the Investigating Officer has stated that chabutra was white washed on which the deceased and injured were said to be sitting at the time of the incident. On this chabutra, no mark of pellets or pellet was found. Such contradictory statements make presence of witnesses as well as place of occurrence doubtful. He also submits that injured P.W.2 Surendra has stated that shot hit Ram Rais while he was fleeing towards South and accused were firing from North but according to post-mortem report Ext.Ka-10, gun shot entry wound on left side of chest 2 cm x 2 cm chest cavity deep was found which could not be possible if deceased was towards South and assailant had fired from North. Thus ocular evidence is contrary to medical evidence, as such prosecution case is doubtful.

11. Next submission of learned counsel for the appellants is that the statement of P.W.1 Dori lal at page 32 does not find support from the spot map that he did not flee in the direction in which accused were standing. In spot map Ext.Ka-5 place-P has been shown surrounding of the complainant where complainant and other witnesses fled to save themselves from place-C while at place-X has been shown presence of the accused. If the witnesses were present on the spot and had fled towards their surrounding to save themselves, then in any case would not have escaped unhurt and the accused would have not have spared the witnesses. Lastly, he submits that prosecution has completely failed to prove the incident. Looking to the injuries of injured and deceased, it appears that due to enmity, the appellants have been falsely implicated exaggerating the incident. Appeal qua accused- Bhaggu and Dharam Singh, who have caused the death of Ram Bharose and Naurang, who had shot at deceased Ram Rais, has been abated. One gun shot wound was found on the person of Surendrapal. Appeal qua Dhodhey, author of one of the fire arm wound received by Surendra, has also been abated. Dori Lal had not received any injury, so, in the interest of justice, benefit of doubt may be given to the appellants-Satya Pal, Atar Singh, Puttoo and Ramphal.

12. Per contra learned A.G.A. submits that P.W.1 Dori Lal and P.W.4 Pratap Singh scribe of the written report have supported the prosecution version. PW.6 Harpal Singh also has stated that on 22.03.1984 at 21:55 p.m. on the basis of written report Ext.Ka.1, he had registered Case Crime No.480 of 1984 and prepared chik report Ext.Ka-3 and G.D. Ext.Ka-4. The Investigating Officer has also denied the fact. Thus, giving information and its registration is fully proved. He has also submitted that from the testimony of P.W.1 Dori Lal and P.W.2 Surendra and Investigating Officer P.W.7 Mahendra Pal Singh place of occurrence is established. P.W.5 S.R. Sharma in his deposition has stated that Dr. Ragesh Rai was posted for two years as C.M.O. to P.H.C. Usehat. He was well acquainted with his writing and signature, whereabouts of the doctor is not known. He proved the injury report Ext.Ka-2, so, if the Doctor, who had medically examined Surendra Pal had not been produced, it cannot be said that fire injury was not caused to injured Surendra. So far as the mentioning of police case in the register is concerned, the Head Moharrir P.W.6 has stated that he had written majroobi chitthi, entry with regard to which was made in G.D. No.28. So far as the

variation in the statements of P.W.1 Dori Lal and P.W.2 Surendra regarding the manner in which injured Surendra Pal came out from the field, not finding pellets or mark of pellet on chabutra or a carpet spread on chabutra or not finding it by the Investigating Officer it as well as not taking of blood stained and plain earth from the place of hiding of injured Surendra by Investigating Officer, are concerned, these are minor discrepancies which cannot affect the prosecution case. In furtherance of common object, all the accused, had committed the offence, which is fully proved from the evidences led by the prosecution, hence, anyone, who is member of unlawful assembly, cannot be given benefit of doubt as contended by learned counsel for the appellants. Appeal has no merit and it is liable to be dismissed.

13. P.W.1 Dori Lal has stated that after getting the written report scribed by Pratap Singh, it was handed over to Head Moharrir at about 10:00 p.m. in the police station. He proved it as Ext.Ka-1. From the cross-examination of this witness by defence, nothing has been elicited. The aforesaid fact finds corroboration from the evidence of P.W.2 injured Surendra Pal and from his cross-examination too, nothing has been elicited. P.W.4 Pratap Singh specifically has stated that on dictation of Dori Lal he had written the report Ext.Ka-1 and he had denied the suggestion that the report was written on dictation of Daroga. P.W.6 Head Moharrir C.P. Harpal Singh has stated that on 22.03.1984 at 21:55 p.m. he had prepared chik on the basis of the written report Ext.Ka-1 given by complainant Dori Lal and also entered it in the G.D. No.28. He had proved the chik report Ext.Ka-3 and G.D. entry as Ext.Ka-4. From his cross-examination also nothing has been elicited. A suggestion has been given by the defence to the Investigating Officer P.W.7 Mahendra Pal Singh that on his dictation the information was scribed and totally bogus proceedings were conducted which has been denied by him. P.W.3 Durvijay had given his statement first time in court after a lapse of one and half year from the incident and nothing turns on his evidence that F.I.R. was got scribed by Darogaji on the next morning. Considering the convincing, consistent and reliable evidences of informant Dorilal, injured Surendra, scribe P.W.4 Pratap Singh, Head Moharrir P.W. 6 Harpal Singh and Investigating Officer P.W.7 Mahendra Pal Singh the statement of P.W.3 Durvijay given time in court after one and half year of the incident does not appear trustworthy and reliable. Accordingly, we do not find any force in the contention of learned counsel for the appellants that giving first information report is ante time.

14. P.W.2 Surendra Pal, injured, in cross-examination at page 38 of the paper book has stated that shot hit him on his head which is also supported with injury report Ext.Ka-2 proved by P.W.5 S.R. Sharma and other witnesses of fact. So contention of learned counsel for appellants is without substance that injured did not state on which part of his body the shot had hit.

15. P.W.5 S.R. Sharma has stated that Dr. Ragesh Rai was posted for two years as C.M.O. in P.H.C., Usehat and he was also posted there. He is acquainted with handwriting and signature of the doctor, the whereabouts of the doctor is not known. In view of his statement, if Dr. Ragesh Rai has not been produced, the prosecution case will not be adversely affected.

16. P.W.6 C.P. Harpal Singh has stated that he had prepared *majroobi chitthi* and made entry in the G.D. No.28. Injured Surendra Pal himself has stated that fire shot hit him on his head and he was medically examined on being send by police, which has been supported by informant Dori Lal, P.W.6 Head Moharrir Harpal Singh and P.W.7 Mahendra Pal Singh Investigating Officer. In view of the above testimony of the prosecution witnesses, prosecution case is not affected on account of non filing of supplementary report and not mentioning police case in the register of mentioning injury as stated by P.W.5 S.R. Sharma.

17. According to first information report, complainant Dori Lal, deceased Ram Bharosey, Ram Rais, Prempal, Surendra and Durvijay were sitting on the chaupal at the time of the incident. Appellants came armed with gun, country-made pistols and lathi. On exhortation of Dharam Singh and Satyapal the accused fired at them causing fire arm injuries to Ram Bharosey, Ram Rais and Surendra. Ram Bharosey died on the spot. Ram Rais and Surendra fled towards South. Ram Rais after running for some distance also died and Surendra fled and hid himself in wheat crop. P.W.1 in his deposition supporting the F.I.R. version has stated that Ram Bharosey fell down after 2-3 steps on receiving the gun shot injury and Ram Rais fell down after running for about 20-25 steps and Surendra hid himself in wheat crop. In cross-examination, he has stated that Surendra fled 50 steps. This version has been also supported by P.W.2 Surendra who had also received injuries in the incident and P.W.3 Durvijay. The Investigating Officer P.W.7 Mahendra Pal Singh has stated that on the pointing of complainant and witnesses, he inspected the place of incident and prepared the spot map and proved it as Ext.Ka-5. He took into his possession the blood stained and plain earth from the places where both the dead bodies were found lying. In Ext.Ka-5 spot map at place-A, the dead body of the deceased Ram Bharosey has been shown, Place-C is the place where the deceased and witnesses were sitting. Place-B has been shown where the dead body of deceased Ram Rais was found and place K is shown, where Surendra had hidden himself in wheat crop. Distance of place A to B has been mentioned as 25 steps and distance of place A to C has been mentioned 3 steps and distance from place-C to place-K is 50 steps which corroborates the statement of P.W.1 Dori Lal, P.W.2 Surendra, the injured and P.W.3 Durvijay. Thus, the testimonies of P.W.1 Dori Lal, P.W.2 Surendra and P.W.3 Durvijay regarding the place of incident causing fire arm injury and the places where the dead bodies were lying and presence of injured in wheat crop after the incident are consistent and corroborated by P.W.7 Mahendra Pal Singh Investigating Officer. On the basis of evidences available on record and as discussed above, we are of the view that the prosecution evidence with regard to the place where informant Dori Lal, injured Surendra, deceased Ram Bharosey, Ram Rais and witnesses were sitting at place-C the place of incident shown in Ext.Ka-5, the chaupal and coming of accused armed with weapons as mentioned above and firing at them, causing death of Ram Bharosey, Ram Rais and injury to Surendra are consistent, corroborated and convincing. Considering the above evidences, on the basis of statement of P.W.7 Mahendra Pal Singh Investigating Officer, that chabutra was white washed

and he had not found any marks of pellet or pellets on chabutra, it can't be said that place of incidence is doubtful.

18. P.W.7 Mahendra Pal Singh has stated that on the spot, he did not find any mattress spread but in spot map Ext.Ka-5, it has been mentioned that below place-C mattress was spread over on which the deceased and witnesses were sitting which indicates that at the time of investigation, Investigating Officer had found the mattress but at the time of deposition he has made a contrary statement. As such we find no weight in the contention of learned counsel for the appellant that statement of P.W.1 Dori Lal does not find support from the evidence of P.W.7 Mahendra Pal and it makes his presence on the spot doubtful.

19. According to P.W.1 Dori Lal (informant) and P.W.2 Surendra, the incident occurred on 22.03.1984 before the sun set and according to P.W.3 and P.W.4, it occurred near about 6:00-6:30 p.m. As per first information report Ext.Ka-3, distance of the police station has been shown to be 14 kilometers and according to P.W.1 (informant Dori Lal), P.W.2 Surendra and P.W.3 Durvijay, they had gone to police station by bullock cart. As per statement of P.W.6 Harpal Singh the written report was given by informant Dori Lal, on the basis of which chik F.I.R. was registered and as per Ext.Ka-3 on 22.03.1984 at 21:55 p.m. within three to three and half hours after the incident it was registered. In the facts and circumstances, it appears that a prompt report has been lodged. Thus on the point of giving information by P.W.1 Dori Lal, the evidence of P.W.1, P.W.2 Surendra injured, P.W.3 Durvijay and P.W.6 Harpal Singh Head Moharrir scribe of chik and G.D. is consistent. If the informant was not present on the spot then lodging first information report of the incident promptly giving vivid details of the incident would not have been possible. This fact also fortifies the presence of the informant Dori Lal on the spot.

20. In ***Chand Khan vs. State of U.P., (1995) 5 SCC 448,*** it has been held that minor discrepancies in evidence of eye-witnesses who have given convincing and reliable evidence with regard to details and manner of assault will not affect their evidentiary value.

21. In spot map (Ex.Ka-5), the place K wheat crop field has been shown where the injured-Suredrapal was found. It is not disputed that on the pointing of the complainant-Dori Lal, the spot map was prepared by the Investigating Officer. The incident has occurred on 22.03.1984 and the statement of P.W.1 Dori Lal has been recorded in court on 03.09.1985, near about after 1-1/2 years, so due to fading of memory, due to lapse of time, P.W.1-Dori Lal might have given the statement that blood and plain earth was taken from the place where Surendra had hidden himself in the wheat crop field. It is not disputed that Investigating Officer has taken in his possession the blood stained and plain earth from two places where the dead-bodies of deceased-Ram Bharosey and Ram Rais were found. Considering the facts and circumstances of the case, in the statement of the informant there does appear to be a minor discrepancy. So far as the statement of P.W.1 and P.W.2 regarding coming out of injured Surendra from the field himself or being taken by informant Dori Lal is concerned, it is also a minor discrepancy. In view of the

observation of ***Hon'ble Supreme Court in Chand Khan vs. State of U.P. (supra)*** and above discussion on the basis of statements of P.W.1 Dori Lal that injured Surendra himself came and Investigating Officer also took in his possession blood stained and plain earth from the place in the field where Surendra had hidden himself and statement of P.W.2 Surendra Pal that informant Dori Lal had taken him from the field will not affect their convincing and reliable evidence with regard to details given about incident and manner of assault.

22. In view of the above discussion, we find no substance in the contention of learned counsel for the appellants that presence of witness as well as place of occurrence is doubtful.

23. According to post-mortem report Ext.Ka-10, gun shot wound of entry on left side of chest 2 cm x 2 cm circular shaped, chest cavity deep was found on the body of deceased Ram Rais. In cross-examination P.W.2 Surendra has stated that fire shot hit Ram Rais while he was fleeing towards South and accused were firing from North. Considering the statement of P.W.2 Surendra and injury found in Ext.Ka-10, post-morterm there appears prima-facie contradiction in statement of witness Surendra and injury found in post-mortem report Ext.Ka-10 because if fire is shot from North and deceased was fleeing towards South normally fire wound on chest will not be possible. P.W.2 Surendra in his examination in chief has stated that on exhortation of Dharam Pal and Satyapal, Bhaggoo and Dharam Singh fired at his father, Navrang and Satyapal fired at Ram Rais, Dodhey and Atar Singh fired at him and Puttoo and Ramphal fired at Dori Lal. In cross-examination by defence he has stated that all the accused had fired from a distance of 6-7 steps towards North. They had all fired at the same time and after firing they fled in the direction from which they had come. He has also stated that no one had fired twice. Evidence of P.W.1 Dori Lal, P.W.2 Surendra and P.W.3 Durvijay is consistent on the point that informant Dori Lal, deceased Ram Bharosey, Ram Rais, injured Surendra, Prempal, Durvijay and Shanker were sitting on the chaupal at that time when appellants/accused came and fired at them, shots fired hit Ram Bharosey, Ram Rais and Surendra, informant Dori Lal escaped unhurt. Ram Bharosey fell down after 2-3 steps, Ram Rais fell down after 20-25 steps and Surendra hid himself in wheat crop field. It is not the case of prosecution that when appellants/accused came and fired at the deceased and injured Surendra, they again fired when injured and deceased Ram Bharosey and Ram Rais as well as informant Dori Lal and other witnesses were fleeing away from the place of incident. Considering the prosecution case and evidences led in this respect including the injured Surendra also as discussed above, on the basis of the statement of injured Surendra that shot fired hit Ram Rais while he was fleeing towards South and accused were firing from North then the shot hit Ram Rais, the prosecution case cannot be doubted. Accordingly, we find no force in the contention of learned counsel for the appellants.

24. In Ext.Ka-5 place-C is shown where injured, deceased and witnesses were sitting and towards East of it the place-X has been shown the place from where accused opened fire. Place-P has been shown in East and North of the

place-C as well as from place-X. Distance from C to X has been mentioned 5 steps. Place A is shown where dead body of Ram Bharosey was found. Distance from A to P has been mentioned 12 steps. Distance of C to A has been mentioned 3 steps. According to the map place-X is towards West adjacent to the way. Place-P is situated towards eastern side of the way and there is a space between the way and surroundings at place-P. P.W.1 has stated that from chaupal, his surrounding is 10 to 12 steps and its door is towards west. Accused were standing towards North of the surroundings and fired from there. He has also stated that when he fled from the chabutra at that time the accused had not fired at him but they had fired at deceased Ram Bharosey and Ram Rais. He has also stated that when accused fired at him at that time accused were standing in the North of his surrounding and he was on East South corner to the accused. They were standing towards South of the house of Puttoo and towards North of his surroundings below the chaupal. In the map also towards North of his surrounding the house of Puttoo has been shown. It is also considerable that when a shot is fired thereafter in re-loading of the arm it will take time and in such a situation sprinting is possible. In view of the statement of P.W.1 Dori Lal as well as the location and situation depicted in the spot map, as discussed above, we find no substance in the contention of learned counsel for the appellants that statement of P.W.1 Dori Lal does not find support from the spot map that he did not flee in the direction in which accused were standing and if witnesses were present on the spot and had fled away to their surrounding then in that case they should have received gun shot injuries.

25. We have gone through the evidence produced by the prosecution. We find that the statements of P.W.1 Dori Lal and P.W.2 injured Surendra Pal Singh are consistent, corroborative and convincing with regard to murder of Hari Ram brother of accused Navrang. The evidence of P.W.1 Dori Lal, P.W.2 injured Surendra Pal and P.W.3 Durvijay with regard to their sitting over the chaupal on 22.03.1984 before sun set and coming the accused at that time and firing at them in which death of Ram Bharosey and Ram Rais was caused and Surendra Singh received injuries are also consistent, corroborative and convincing. Ocular version is also supported by medical evidence and formal witnesses with regard to manner of assault and time of injury as well as spot of the incident. The case of the prosecution is fully proved.

26. In ***Lalji and others vs. State of U.P., (1989) 1 SCC 437,*** the Hon'ble Supreme Court has held that once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it is not open to the Court to see as to who actually did the offensive act. The prosecution is not obliged to prove which specific overt act was done by which of the accused. In ***Lalji and others (supra),*** it has been also held that "common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of

occurrence. It is an inference to be deducted from the facts and circumstances of each case." In ***Chand vs. State of U.P. (2004) 5 SCC 141,*** it has been also held that "the plea that definite roles have not been ascribed to the accused and therefore Section 149 is not applicable, is untenable. It is not really necessary to determine as to which of the accused persons forming part of the unlawful assembly inflicted what particular or specific injury in the course of the occurrence."

27. In the instant case, from the prosecution evidence it is established that all the accused armed with guns, country-made pistols and lathi came and committed the alleged offence in which Ram Bharosey and Ram Rais succumbed to the injuries and Surendra Pal also received fire arm injury in his head. From the above, it is clear that all the accused formed an unlawful assembly and committed the alleged offence. As such, in view of the law laid down by Hon'ble Supreme Court in the above referred cases, in our opinion no benefit of doubt or benevolence can be given to the appellants as contended by the learned counsel for the appellants.

28. Thus, upon a wholesome consideration of the facts of the case, attending circumstances and the evidence on record, we do not find that the learned trial Judge committed any illegality or legal infirmity in convicting and sentencing appellants Atar Singh, Puttoo, Satyapal and Ramphal in Criminal Appeal No. 871 of 1986, to undergo two years under Section 148 of I.P.C., 6 months rigorous imprisonment under Section 323/149 of I.P.C. and life imprisonment under Section 302/149 of I.P.C.

29. This appeal lacks merit and is accordingly, **dismissed.**

30. Appellants Atar Singh, Puttoo, Satyapal and Ramphal are on bail. Chief Judicial Magistrate, Budaun is directed to take them into custody and send them to jail for serving out the remaining out of their sentences.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

CRIMINAL APPEAL No. 981 OF 2015

Sanjeev Kumar Singh
...Applicant/Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri O.P. Singh, Sri Brijesh Sahai, Sri Chandra Bhushan Prasad, Sri Nirvikar Gupta, Sri Pradeep Kumar Chaurasia, Sri Rajesh Pratap Singh.

Counsel for the Opposite Party:
A.G.A.

A. Narcotic Drugs and Psychotropic Substances Act, 1985 – Non-Joining of Independent Witnesses- The obligation to take public witnesses (independent witness) is not absolute.

If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is

believable after taking due care and caution in evaluating their evidence. (Para 15,16,17)

B. Section 114 Evidence Act - gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim *omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies.

When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed and therefore absence of independent witnesses reasonably explained and no illegality found in the same. (Para 16)

C. Section 50 Of the N.D.P.S Act - applies on personal search only and recovery from tanker or box does not require compliance of Section 50 of the Act.

Moreover, the recovery memo and statements of two recovery witnesses show that it was explained to the accused before search that he has a right to be searched before a gazetted officer or magistrate, and only when the accused permitted search by police, the search was conducted and the illegal ganja was recovered. (Para 18,19,20 and 21)

D. Section 35 and 54 of the N.D.P.S Act- Conscious Possession - creates a legal fiction & presumes - the person in possession of illicit article had culpable mental state & had committed the offense.

From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the Court shall presume the existence of mental state from the commission of an offence and it is for the accused to prove otherwise. It is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act.(Para 22,31 and 32)

E. Non-Compliance of the provisions of Section 42 (2) and Section 57 of the N.D.P.S Act - Sections 42 and 43 contemplate two distinct situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit.

Therefore, the learned trial court has concluded on the basis of evidence that the said vehicle from which contraband was recovered was intercepted at a public place and on road, and therefore, in the facts of the case Section 43 of the Act is applicable. Since PW-3 proved before the trial court G.D. Ext. Ka-7 in which it is contained that after registration of offence, information was given to C.C.R. and superior officers by R.T. Set and so, where the higher officer has been informed without any unreasonable delay and the F.I.R. has reached to the Magistrate without any further delay, there remains no force in the argument that Section 57 of the Act has been violated. (Para 24 to 29)

F. Section 20 (C) of the N.D.P.S Act - The recovered contraband was slightly above the commercial quantity (20 kg. 300 gm.) for which 10 years rigorous imprisonment and one lac fine and in default 1-year additional imprisonment will serve the purpose of sentencing. Accordingly, awarded sentence is liable to be modified. (Para 34)

Case Law discussed/ relied upon: -

1. Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC),

2. Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746

3. Dharam Pal Singh Vs. State of Punjab, 2010(71) ACC 548 (SC)

4. Gian Chand & Others Vs State of Haryana, AIR 2013 SC 33

5. State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172 (Five Judge Bench)

6. T. Hamza vs State of Kerala, (2000) 1 SCC 300

7. Megh Singh vs State of Punjab, (2003) 8 SCC 666

8. Dilbagh Singh v State of Punjab, (2017) 11 SCC 290

9. Kulwinder Singh Vs. State of Punjab, (2015) 6 SCC 674

10. State of Haryana vs Jeneral Singh, (2004) 5 SCC 7188

11. Syco Jabbi vs State of Maharashtra, 2004 (1) Crimes 112

12. Krishna Chandra vs State of Haryana, 2013 (3) CCSC 1558 (SC)

13. Abdul Rasheed Ibrahim Mansuri vs State of Gujarat, 2000 CrLJ 1384 (SC)

14. Jitendra Singh Rathore vs State of UP, 2014 (1) JIC 511 (Allahabad)

15. State of Karnataka v. Dondusa Namasa Baddi, 2011(72) ACC 666 (SC)

16. Karnail Singh v. State of Haryana, 2009 (8) SCC 539 (Five judge Bench)

17. Darshan Singh v State of Haryana, (2016) 14 SCC 358

18. Girish Raghunath Mehta v Inspector of Custom, AIR 2016 SC 4317

19. State, NCT of Delhi vs Malvinder Singh AIR 2007 SC (supp.) 237 (E-3)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. This criminal appeal has been preferred against the judgment and order dated 24.02.2015, passed by Additional Sessions Judge, Court No. 5, Varanasi, in Criminal Case No. 424 of 2010 (State vs. Sanjeev Kumar Singh), arising out of Case Crime No. 126 of 2010, under Section 8/20 N.D.P.S. Act, Police Station Ram Nagar, District Varanasi, whereby the accused appellant has been convicted and sentenced under Section 8/20 N.D.P.S. Act for 12 years rigorous imprisonment along with fine of Rs. 1,25,000/- and on default in payment of fine, for two years additional imprisonment.

2. Brief facts of the case is that S.O. Isalamul Haq Khan of Police Station Ram Nagar along with S.I. Mukesh Babu, S.I. Kamlesh Pal, Constable Dinesh Yadav, Constable Parvez Khan, Constable Munna Yadav, Constable Harishchandra with Constable Driver Surendra Nath Singh on their Government Jeep were on their law and order duty on 13.09.2010 and were involved in checking of vehicles. From an informer, they received information that in a gray coloured Indica Car bearing Registration No. DL 9 CD 0066 is coming from the side of Padav with illegal "Ganja" (marijuana/cannabis). Believing on that information, when that Indica Car appeared coming from the side of Padav, by throwing torch light, the police asked the driver to stop the car but seeing the police, the driver turned the car towards Pathari Tola. The car along with driver was intercepted on the turn of Pathari Tola after using necessary force at about 10:00 PM. On inquiry, the person sitting on the driving seat, informed his name to be Sanjeev Kumar Singh. On being asked why he tried to run away, he told that in the dickey of the car, he has two bags of illegal "Ganja" and, therefore, he was trying to run away from being apprehended by the police. He was informed about his right to be

searched before Magistrate or any gazetted officer. At this, he said that when he has been already intercepted, he may be searched by them. He also said that he does not want to go elsewhere for his search. Before him, the members of the police group took search of each other in order to assure that none of the police person has anything illegal with them. From the dickey of the car, two bags were recovered and on being opened, "Ganja" was found in the two bags. Constable Dinesh Yadav brought the weighing machine and from one bag 10.1 Kg and from the second bag 10.2 Kg illegal "Ganja" was recovered. On being asked, he was unable to show any license for carrying "Ganja". 50-50 grams sample from both the bags were taken and the remaining was sealed in both the recovered bags and the sample was wrapped in news paper after keeping the same in white clothes on which the sample seal was pasted.

3. Recovery memo was prepared by S.I. Kamlesh Pal on the dictation of the S.O. and after being informed about the offence, the accused was taken into custody along with recovered illegal Ganja. During the course of arrest and recovery, some local public arrived there and on being asked to be witness of recovery, they did not agree. The information with regard to arrest was given to the family members of the accused and recovery memo was prepared, read over and signatures of all concerned were obtained and a copy thereof was given to the accused.

4. On the basis of recovery memo, F.I.R. was lodged. During investigation, S.I. Akhilesh Kumar recorded the statement of witnesses, prepared site map and after finding sufficient evidence, he filed charge sheet against the accused for the offence under Section 8/20 N.D.P.S. Act. Charge was framed against the accused for the aforesaid offence. The accused denied charge and claimed trial.

5. The prosecution has examined witnesses PW-1 Islamul Haq Khan (complainant), PW-2 S.I. Kamlesh Pal and PW-3 S.I. Akhilesh Kumar Singh, (I.O.) proved Memo of arrest/recovery as Ext. Ka-1, site map Ext. Ka-2, docket Ext. Ka-3, charge-sheet Ext. Ka-4, chemical-examination report Ext. Ka-5, chik F.I.R. Ext. Ka-6, G.D. Ext. Ka-7 and recovered illegal "Ganja" was proved as Material Ext.-1 & Ext.-2.

6. The statement of the accused Sanjeev Kumar Singh was recorded under Section 313 Criminal Procedure Code, wherein, he has denied the incident and recovery and has stated the prosecution case to be false. He has further stated that he has been falsely implicated in the present case for to not providing illegal gratification for transportation of his truck no. UP 62 T 6421. In defence, he has also submitted registration certificates of two trucks bearing registration nos. UP 62 T 6421 and UP 65 BT 6816.

7. After hearing both the parties and perusing the evidence on record, the learned Additional Sessions Judge has passed the impugned judgment and convicted and sentenced the accused appellant for the offence under Section 8/20 N.D.P.S. Act.

8. Aggrieved by the impugned judgment, this appeal has been preferred on the ground that the appellant has been falsely implicated in the present case. The conviction and sentence is against the weight of evidence on record and contrary

to law. Moreover, the sentence awarded is too severe. The case against the appellant was not established by the prosecution and, therefore, the impugned judgment is liable to be set aside and he is entitled for acquittal.

9. Heard Sri O.P. Singh, learned Senior Advocate assisted by Sri Chandra Bhushan Prasad, learned counsel for the appellant, Sri Manu Raj Singh and Sri L.D. Rajbhar, learned AGA and perused the record.

10. Three witnesses have been examined from the side of prosecution. PW-1 is S.I. Islamul Haq Khan (complainant) has stated that on 13.09.2010, he was S.O. Ram Nagar. He along with S.I. Mukesh Babu, S.I. Maklesh Pal, Constable Dinesh Yadav, Constable Parvez Khan, Constable Munna Yadav, Constable Harishchandra with Driver Surendra Nath Singh were on law and order duty on their Government Jeep and were involved in checking of vehicles on Chowk Chauraha. On the information from an informer about an Indica Car of gray colour numbered as DL 9 CD 0066 coming from the side of Padao with illegal Ganja, they started checking of vehicles coming from the side of Padav and the said car appeared and was given indication by torch light to stop but the said vehicle turned towards Pathari Tola. After using necessary force, the said car was intercepted along with driver at about 10:00 P.M. at Pathari Tola Turn. The driver told his name to be Sanjeev Kumar Singh and informed about two bags of Ganja in the dickey of the car. He was informed about his right to be searched before the Magistrate or gazetted officer but he voluntarily consented for search being made by the police group. The police personnel took search of each other to assure that they are not carrying any illegal article and thereafter two bags were recovered from the dickey of the car having 10.1 Kg. and 10.2 Kg. of illegal Ganja therein, which were weighed on a weighing instrument which was arranged from the nearby shop by Constable Dinesh Yadav. Sample of 50-50 gm. from each bag were taken and sealed separately. The remaining recovered Ganja was sealed in the said two bags. Recovery memo was prepared on his dictation by S.I. Kamlesh Pal, which was read over and heard by concerned and the police personnel and the accused signed over the recovery. The accused was taken into custody along with Indica Car and recovered illegal Ganja. The copy of recovery memo was given to the accused and again his signature was obtained. The witness has proved the recovery memo as Ext. Ka-1. The first information report was lodged. His statement was taken by the Investigating Officer. The witness has also proved the recovered Ganja as Material Ext. 1 and 2.

11. PW-2 is S.I. Kamlesh Pal who is also a witness of fact. He has also proved the recovery by stating that the illegal Ganja was recovered from the possession of the accused from two bags which were kept in the dickey which was 20.3 Kg. in weight, from which 50-50 grams of sample was taken and the remaining was sealed in the said bags. The witness has identified his signature on the recovery memo.

12. PW-3 is S.I. Akhilesh Kumar Singh (Investigating Officer) who has narrated the whole process of investigation and has said that after obtaining the chemical examination report from the Forensic Science Laboratory and after recording the evidence of the witnesses of recovery and preparing the site map, he submitted charge sheet

against the accused. He also proved the chik F.I.R. Ext. Ka-6 and G.D. Ext. Ka-7 as secondary witness as the chik and G.D. writer Ram Daras Ram has worked with him and he was aware about his hand writing and signature.

13. Learned counsel for the appellant has submitted that the mandatory provision of N.D.P.S. Act were not complied with by the search team and the appellant has been falsely implicated in the present case. There was no public witness of the recovery which has been made at a public place. No information was given about the recovery and arrest to the superior officers. There is discrepancy and contradictions in the statements of the witnesses and the impugned judgment is not sustainable under law and is liable to be set aside.

14. The recovery memo shows that for sample 50 gm. each of the recovered items from two bags were taken out and sealed and the same was sent for chemical-examination, the report of the Forensic Science Laboratory is on record as Ext. Ka-5 and that shows that the recovered articles were ganja (marijuana/cannabis). So, there remains no doubt in this regard. PW-1 and PW-2 are the witnesses of recovery who have proved that the two bags of ganja was recovered from the accused which was kept in the Dickey of the car he was driving at the time of recovery. The recovery memo has been duly prepared and signed by witnesses and the accused himself and the copy thereof has been delivered to the accused and thereupon he further signed over memo as a mark of receipt. It has been further proved by the witnesses that before conducting search, the police team conducted search of each other to ensure that none of them were possessing any incriminating article at that time. So far as absence of any public witness is concerned, the recovery memo and the statements of recovery witnesses clearly shows that people gathered there at that time were asked to become witnesses but they refused. It is needless to mention that normally people avoid becoming witness in such kind of situation.

15. A reference may be made in this regard of the judgments in ***Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC), Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746*** and ***Dharam Pal Singh Vs. State of Punjab, 2010(71) ACC 548 (SC).*** Where the accused, on seeing the police party, made an attempt to turn back and escape but was over powered by the police party and on his arrest and search "Charas" was recovered from his possession for which he had no license and after prosecution he was convicted for the offence under Section 20 of the N.D.P.S. Act 1985, the Supreme Court has settled the law on the point that the obligation to take public witnesses(independent witness) is not absolute. If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is believable after taking due care and caution in evaluating their evidence.

16. In ***Gian Chand & Others Vs State of Haryana, AIR 2013 SC 3395,*** it

has been held that mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditable and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. In this case, at the time of recovery of poppy husk from possession of accused some villagers had gathered there. The Investigating Officer in his cross examination made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness. Section 114 of the Evidence Act gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim *omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed.

17. In this instant case, the people gathered there refused to become witness and there was no option with the police. Both the police witnesses have proved the recovery and nothing has come in their cross-examination worth creating any doubt on their testimony. Therefore, in this instant case, the learned trial court, if found the absence of public witnesses at the time of recovery reasonably explained, I find no illegality in it.

18. It has been submitted by the learned counsel to the appellant that the police team did not comply the mandatory provisions of section 50 N.D.P.S. Act. Section 50 is as follows:

"Section 50: Conditions under which search of person shall be conducted :-

(1) When any officer duly authorized under Section. 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazettted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

6. After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which

necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

19. Section 50 provides reasonable safeguard to the accused before search of his person is made by an officer authorised under section 42 of the Act to conduct search. In ***State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172 (Five Judge Bench),*** it was settled by the supreme court that search of person under Section 50 of the N.D.P.S. Act does not include search & recovery from bag, briefcase and container etc. Section 50 applies where personal search of a person is involved. In ***T. Hamza vs State of Kerala, (2000) 1 SCC 300,*** it has been clarified that Section 50 has been incorporated to provide statutory safeguard to lend credibility and fairness and to avoid arbitrariness keeping in view the severe punishment prescribed in the statute. It has been further clarified in ***Megh Singh vs State of Punjab, (2003) 8 SCC 666,*** that Section 50 applies only in case of personal search of a person and does not extend to search of a vehicle, container, bag or premises. In ***Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746 and Jarnail Singh vs. State of Punjab, 2011 CrLJ 1738(SC)1,*** the above view was further affirmed.

20. In ***Kulwinder Singh Vs. State of Punjab, (2015) 6 SCC 674,*** where bags containing poppy husk were seized from truck in his the accused were sitting, it has been held by the Supreme Court that it was not a case of personal search of the accused and Section 50 of the N.D.P.S. Act, 1985 was not attracted as Section 50 only applies in case of personal search of person and not applicable to search of vehicle, container, bag or premises. In ***Dilbagh Singh v State of Punjab, (2017) 11 SCC 290,*** it was held that compliance of Section 50 is mandatory in case of search of person. Where the recovered contraband has been recovered from the car the accused was driving, Section 50 is not applicable.

21. In the instant case the illegal ganja has been recovered from the dickey of the car the accused was driving at that time. Moreover, the recovery memo and statements of two recovery witnesses show that it was explained to the accused before search that he has a right to be searched before a gazetted officer or magistrate, and only when the accused permitted search by police, the search was conducted and the illegal ganja was recovered. The learned trial court has taken the reference of the judgment of the Supreme Court in ***State of Haryana vs Jeneral Singh, (2004) 5 SCC 7188*** and ***Syco Jabbi vs State of Maharashtra, 2004 (1) Crimes 112,*** where the contraband was recovered respectively from tanker and box in possession of accused and it was held that Section 50 applies on personal search only recovery from tanker or box does not require compliance of Section 50 of the Act. Therefore, in view of aforesaid principles of law and factual matrix also, the compliance of Section 50 N.D.P.S. Act was not at all mandatory and I find no force in the submission of the learned counsel to the appellant.

22. It has been submitted by the learned counsel to the appellant during arguments that the vehicle from which the alleged recovery was made by police, it has not been clarified whether the same was taken into possession by police and whether any investigation was conducted to trace the whereabouts of car or the

owner thereof, nor it was clarified where the said car was taken and kept and whether any offence was registered in respect of the said car. From the perusal of the impugned judgment, it appears that the learned trial court has discussed this aspect at length and on evidence, a finding has been recorded to the effect that the car was taken into possession by police and was taken to police station and an entry thereof was made in the relevant G.D. Since the illegal ganja was recovered from the dickey of the said car, it is obvious that the same must have been opened by the key of the car and when the car was taken to the police station, the same could have been possible with the help of the key. The learned trial court has taken the view that it was not necessary for the prosecution to produce the key before the court during trial nor it was necessary to book the car under the provisions of the Motor Vehicle Act. The learned trial court took the view that the car was seized by police which is sufficient for the purpose of the trial of the instant case and it was not required that a mention to that effect should have been necessarily made in the charge-sheet. Again it has been also concluded that if the I.O. did not find the car at the place of recovery, the same is natural as prior to that the said car was already consigned to police station. I find myself in full agreement with the reasoned conclusion arrived at by the learned trial court on the point. This argument that it has been nowhere established by the prosecution that the accused was owner of the car or who was the owner thereof, the learned trial court has very rightly concluded that this fact was not required to be proved nor the prosecution was under obligation to lead any evidence on this point. The contraband was recovered from the dickey of the car he was driving and there was no other person in the car and prior to search he himself admitted to police team that there is ganja in the dickey. This shows his conscious possession over the recovered contraband and for the purpose of prosecution it was sufficient.

23. Another submission which has been made by the learned counsel to the appellant is in respect of alleged discrepancy in respect of place of recovery and site-map. The argument is that the police team was present on Chowk Chouraha, Ramnagar at place 'C', and the recovery was made at place 'B' and it has not been explained when police team reached at place 'A'. The learned trial court has discussed this aspect in detail by taking reference of the statement of I.O. and site-map and has found on evidence that on receiving the information, the police team started checking of vehicles coming from the side of Padaw towards Chowk and tried to stop the said car by throwing torch light whereupon, the accused turned the car towards Pathari Tola and anyhow he was stopped and caught by police. The court found that the distance between 'A' and 'C' was not much and moreover, there were 8 police persons and logically, they were not static at one place and, as such, no benefit could be given to the accused. Again, not mentioning of the police station in the site-map may be an omission of I.O., but, the same was not necessary nor it may indicate that the recovery was made at the gate of the police station. Therefore, the learned trial court did not find any substantial contradiction in respect of the place of recovery. The approach of the learned trial court is based on reasoning which is

convincing and moreover, the discrepancy or omission if any in preparation of site-map is insignificant and has no bearing over the case in hand.

24. It has been further submitted that the police team did not comply with the provisions of Section 42 (2) and Section 57 of the N.D.P.S. Act which requires conveying of information so received and search and seizure and as such the whole trial vitiates. In support of this argument, the judgments in ***Krishna Chandra vs State of Haryana, 2013 (3) CCSC 1558 (SC), Abdul Rasheed Ibrahim Mansuri vs State of Gujarat, 2000 CrLJ 1384 (SC) and Jitendra Singh Rathore vs State of UP, 2014 (1) JIC 511 (Allahabad)*** have been referred.

25. Section 42 is as follows:

"(2) Where an officer takes down any information in writing under sub-section (1) or records ground for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior."

Section 57 is as below:

"Whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."

26. It has been held in ***State of Karnataka v. Dondusa Namasa Baddi, 2011(72) ACC 666 (SC)*** following ***Karnail Singh v. State of Haryana, 2009 (8) SCC 539 (Five judge Bench)*** that if no information was taken down in writing by police officer or conveyed to immediate police officer then any oral evidence of police officer will not be in compliance with the provisions of Section 42(2) of the N.D.P.S. Act. In ***Darshan Singh v State of Haryana, (2016) 14 SCC 358*** also, it has been held that registration of F.I.R. and its communication to S.P. is not due compliance of Section 42(2).

27. In this case, PW-3 proved before the trial court G.D. Ext. Ka-7 in which it is contained that after registration of offence, information was given to C.C.R. and superior officers by R.T. Set. In ***Dilbagh Singh v State of Punjab, (2017) 11 SCC 290,*** it has been held that where higher officer has been informed without any unreasonable delay and the F.I.R. has reached to the Magistrate without any further delay, there remains no force in the argument of the learned defence counsel.

28. In ***Girish Raghunath Mehta v Inspector of Custom, AIR 2016 SC 4317,*** it has been held that Section 42 is not applicable when contraband is recovered from a public place. Adequate and substantial compliance is a question of fact to be determined on the basis of facts and circumstances of each case. In ***State of Haryana vs Jarnail Singh, (2004) 5 SCC 188,*** it has been laid down that Sections 42 and 43 contemplate two distinct situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit.

29. In ***State, NCT of Delhi vs Malvinder Singh AIR 2007 SC (supp.) 237,*** accused was on scooter at public place when stopped and searched on the basis of earlier information and contraband recovered. The Supreme Court pointing out the distinction between

the two situations contemplated by Sections 42 and 43, held that Section 42 is not applicable and Section 43 will apply where such search has taken place on a public place. Therefore, the learned trial court has concluded on the basis of evidence that the said vehicle from which contraband was recovered was intercepted at a public place and on road, and therefore, in the facts of the case Section 43 of the Act is applicable.

30. Arguments have been advanced regarding sampling from the recovered contraband for chemical examination. Prosecution has alleged that recovered contraband were kept in two bags, one containing 10 kg. 100 gm. and other 10 kg. and 200 gm. and from each bag 50 gm. was taken out as sample and both the samples were sealed separately and the same was sent for chemical examination through docket Ext. Ka-3 as stated by PW-3 I.O. The arguments of defence by which a confusion was tried to be created regarding taking sample twice, sending the same by concerned CO, where the sample was kept for 11 days and that the sample was found 50.12 gm. and 50.31 gm. when reached to the Laboratory, have been rightly negatived by the learned trial court giving cogent reasons based on evidence on record, as there was nothing on record nor any suggestion to the witnesses that the sealed sample was anywhere tampered. The recovered contraband was weighed before being resealed and prior to search the police personnel searched each other to remove any possibility of the contraband being planted. There was no reason for false implication and the submission that being truck owner, because he did not fulfil illegal demands of police, has no valid base. Omission in investigation here or there was rightly ignored being insignificant and negligible.

31. In ***Dharam Pal Singh Vs. State of Punjab, 2010 (71) ACC 548(SC),*** it has been laid down that Section 54 of the N.D.P.S. Act creates a legal fiction & presumes the person in possession of illicit article when possession is once established, that the accused had culpable mental state & had committed the offense.

32. In ***Gian Chand (Supra),*** the recovery of contraband has been considered from yet an other angle and the Supreme Court has remarked that From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the Court shall presume the existence of mental state from the commission of an offence and it is for the accused to prove otherwise. It is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act.

33. On the basis of above discussion, I find that in this instant case, the samples were properly sampled, sealed and sent to Laboratory for

examination, certificate to that effect by the Laboratory that the seal of samples found intact and the same tallied with specimen seal, rules out any possibility of any tampering therewith. The contraband was recovered from the car the accused was driving and the car was consigned to police station also authenticate the conscious possession of accused. The recovered contraband was more than two hundred kg negates the possibility of their being planted by police. Both the recovery witnesses have proved the recovery of contraband from the car the accused was driving. There is no evidence to show any bias or malice on the part of investigating agency. There is no merit in the argument with regards to compliance of Sections 42, 50 and 57 of the N.D.P.S. Act. The learned trial court has appreciated the evidence on record in correct legal and factual matrix.

34. Section 20 (C) of the Act provides minimum sentence of ten years which may be extended to twenty years and a minimum fine of rupees one lac extendable up to two lacs in case of recovery of commercial quantity of contraband. The learned trial court has awarded a sentence of 12 years imprisonment and rupees one lac and twenty five thousands fine. The recovered contraband is ganja and in comparison to other contraband like heroine, smack and charas, it is very cheaper in cost and easily found herb with hardly international demand and its addiction is not that serious and may not have vital impact on individuals. While awarding sentence, the learned trial court appears to have become a little mechanical. The recovered contraband was slightly above the commercial quantity (20 kg. 300 gm.) for which 10 years rigorous imprisonment and one lac fine and in default 1 year additional imprisonment will serve the purpose of sentencing. Accordingly, awarded sentence is liable to be modified.

35. Thus, there appears to be no perversity or illegality in the impugned judgment. So far as conviction is concerned, the same is upheld and the awarded sentence is modified to mean 10 years rigorous imprisonment and one lac fine and in default of fine, 1 year additional imprisonment.

36. With the above modification in sentence, the appeal is finally **disposed off.**

37. The convicted appellant Sanjeev Kumar Singh, if on bail shall surrender before the learned trial court forthwith to undergo the remaining sentence.

38. The office is directed to transmit back the lower court record along with a copy of judgment for information and compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

JAIL APPEAL No. 948 OF 2009

Kalluwa ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri V.S. Parmar

Counsel for the Opposite Party:
Sri Ratan Singh (A.G.A.)

A. Section 302 I.P.C. - Appeal against conviction. - Independent witness– inconsistency and contradiction in statement of witnesses.

If a person is not known to any witness and he was seen for the first time at the time of occurrence, identification of that person for the first time in Court is very weak type of evidence. (Para 44)

B. Every contradiction, inconsistency between the statement of witnesses, normally, may not be treated material but where accused/appellant and witness are residents of same town and occurrence had taken place in the night, neither name of accused nor name of witness or description of weapon was mentioned in F.I.R, important natural and independent witness present at the time of occurrence were not produced, no identification parade was conducted. The contradiction and inconsistency found herein above are major and important which have demolished the castle of prosecution case. (Para 46)

Appeal is allowed. (E-2)

(Delivered by Hon'ble Virendra Kumar Srivastava, J.)

1. This jail appeal under section 383 Code of Criminal Procedure, 1973 (Cr.P.C) has been preferred by accused-appellant Kalluwa (hereinafter referred as appellant) through Superintendent of Sub-Jail, Mahoba against the judgment and order dated 16.1.2009 passed by Additional Sessions Judge, Court No.2, Mahoba, in S.T. No.116 of 2007 (State vs. Kalluwa), whereby appellant has been convicted under section 302 I.P.C and sentenced for imprisonment for life and also with a fine of Rs.10,000/-

2. Brief facts, as stated in First Information Report (hereinafter referred to as F.I.R) as well as in material available on record of the prosecution case, are, that on 12.6.2007 at about 3.40 a.m., P.W-1 Annu alias Daya Shanker, resident of Mohalla Jayandra Nagar Charkhari, police station (P.S) Charkhari, District Mahoba, submitted a written report (Ex.ka-1) at P.S. Charkhari, District Maboba alleging therein, that in the intervening night of 12.6.2007 he and his wife Smt. Vimla (P.W-2) were sleeping inside his house and his mother Smt. Brijrani (deceased) was sleeping on the cot, on platform (Chabutara), situated out side his house. At about 3.00 a.m, upon hearing cry of his mother, he and his wife came out from his house and saw that an unknown person was running away, after causing serious injury on the head of his mother by a sharp edged weapon. He and his wife (P.W-2) saw and identified him in the light of tube light and also can identify him. When he came towards his mother, he saw that his mother had died. Her dead body was lying at the place of occurrence.

3. On receipt of F.I.R (Ext.Ka-1), P.W-5 Cons. Jairam Prajapati registered the case and prepared chick report (Ext.ka-3), on 12.6.2007 at 3.40 a.m, as case crime No.1012 of 2007, under Section 302 I.P.C against unknown person and also made relevant entry of the said information in general diary (Ext.ka-4). Investigation was undertaken by P.W-6, S.I. Gopal Krishna Gupta (I.O), who was posted as officer in-charge P.S. Charkhari, District Mahoba. He immediately rushed to the place of occurrence and recorded statement of P.W-1 Annu alias Dayashankar, inspected the place of occurrence and prepared site plan of the occurrence (Ext.ka-5). He prepared inquest report (Ext.ka-6) and necessary police papers i.e chalan nash,

request letter to C.M.S, letter to R.I, photo nash (Ex.ka-7 to Ext.ka-10) and thereafter sealed the dead body of the deceased, and sent it to the District Hospital, Mahoba for postmortem.

4. P.W-4, Dr. D.K. Sullerey, conducted autopsy on corpus of deceased Brijrani on 12.6.2017 at 4.00 p.m. and found following anti mortem injury.

(1) Incised wound 18 cm x 2 cm cavity deep with cutting of underlying bones (Temporal and parietal left) and laceration on left eye and brain matter coming out at left side of face at base of nose to left ear.

(2) Incised wound 13 cm x 1.5 cm with cutting underlying bone (left maxilla) at the left side of face.

(3) Incised wound 6 cm x 1.5 cm with cutting underlying bone (right side of mandible) Teeth at right side of face just lateral to right angle of mouth .

5. During investigation, I.O (P.W-6) recorded statements of Rajju (P.W-3) and appellant. He also took the sample of blood stained and plain earth and piece of blood stained bed sheet and prepared its seizure memo (Ext.ka-11 and Ext.ka.12).He arrested appellant, and on his confessional statement and on his pointing out, recovered weapon used in the commission of offence, one spade (*Farsha*) from the bushes, situated near Pahadee of *Khajor* and prepared seizure memo of recovery of weapon (Ext-ka-13) and site plan of recovery of weapon (Ext.ka-14). After recording the statement of eye witnesses, witnesses of inquest report, seizure memo and other police officials i.e. Annu alias Daya Shankar (P.W-1) Amar Singh Chauhan, Bhauu alias Bhagwan, Maan Singh and Aswani Kumar, Raj Bahadur, Shankar Singh, Vimla Devi (P.W-2), Rajju (P.W-3), Cons. Moharrir Jairam Prajapati, P.W-5, Cons. Prakash Narayan, Home guard Ram Swaroop, he submitted charge sheet (Ex.Ka-15), under section 302 I.P.C against appellant.

6. The cognizance of the offence was taken by Chief Judicial Magistrate, (C.J.M) Mahoba on 21.7.2007.

7. Since the offence was exclusively triable by Court of Session, C.J.M Mahoba, after providing copies of relevant police of papers as required under section 207 Cr.P.C, committed the case to Court of Session Judge, Mahoba; who framed the charges on 6.10.2007 as under:-

''मैं सुधीर कुमार सक्सेना, सत्र नयायाधीश, महोबा एतद् द्वारा आप अभियुक्त–कलुआ पुत्र हिन्दूपत विश्वकर्मा पर निम्नलिखित आरोप विरचित करता हूँ :–

यह कि दिनांक 12.6.07 समया करीब 3–00 बजे प्रातः (रात) घटनास्थल पेश दरवाजा वादी (चबूतरे पर बाहर) वहद मुहल्ला ज्येन्द्रनगर थाना चरखारी जिला महोबा में आपने हत्या करने के अभिप्राय से वादी की मॉ श्रीमती बृजरानी पर फरसा के वार से चोटें पहुँचाकर श्रीमती बृजरानी की मृत्यु कारित की । इस प्रकार से आपने भा0दं0सं0 की धारा 302 के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है ।

एतद द्वारा निर्देशित किया जाता है कि उक्त आरोप में आपका विचारण इस न्यायालय द्वारा किया जायेगा।

आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया, जिसे उसने अस्वीकार किया और विचारण की मांग की।''

I, Sri Sudhir Kumar Saxena, Sessions Judge, Mahoba do hereby charge on you Kalluwa s/o Hindopat Vishwakarma as follows:-

That you in the intervening night of 12.6.2007 at about 3.00 a.m. in front of the house of informant (outside

his house at Chabutara) within the area of Mohalla Jayant Nagar, P.S Charkhari, District Mahoba with intention to commit the murder of Smt. Brijrani, mother of the informant by causing injury with Farsa and thereby committed an offence punishable under section 302 of the I.P.C and within the cognizant of this Court.

And hereby directed that you be tried by this court on the said charge.

The charge were read over and explained to the accused- appellant who pleaded not guilty and claimed to be tried.

(Translated by Court)

8. In support of its case, prosecution examined six witnesses, out of whom P.W-1, Annu alias Daya Shankar, P.W-2, Smt. Vimala wife of informant, P.W-3, Rajju, brother-in-law (Dewar) of the deceased are witnesses of fact whereas P.W-4, Dr. D.K. Sullerey, P.W-5 cons. 130 Jairam Prajapati, P.W-6, Inspector Gopal Krishna Gupta are formal witnesses.

9. After conclusion of evidence, the statement of appellant was recorded under section 313 Cr.P.C., who stated that the entire prosecution story is false and concocted and claimed that he has falsely been implicated in this case. Upon opportunity given by Trial Court for defence evidence, he had produced D.W-1 Laadkunwar and D.W-2 Hindupat in his defence.

10. Upon conclusion of trial and after hearing learned counsel for both the parties, Trial Court found appellant guilty for the offence under section 302 I.P.C and accordingly convicted and sentenced him as above . Aggrieved by the aforesaid impugned judgment and order, appellant has preferred this appeal.

11. We have heard Sri V.S. Parmar, learned counsel for the appellant and Sri Ratan Singh, learned A.G.A for the State.

12. It has been argued by learned counsel for the appellant that F.I.R is ante timed; appellant is not named in the F.I.R; no identification parade was held; there was no source of light at the place of occurrence; P.W-3 Rajju is not named in the F.I.R; P.W-1 Annu alias Daya Shankar has also not named any witness who had seen the occurrence; P.W-2 Vimla and P.W-3 Rajju are the nearest relative of P.W-1 Annu alias Daya Shankar and are interested witness; presence of P.W-3 Rajju at the place of occurrence is highly doubtful; statement of eye witnesses P.W-1 Annu alias Daya Shanker, P.W- 2 Vimla and P.W-3 Rajju are self contradictory and doubtful; recovery of alleged weapon used in the offence is also doubtful; even if prosecution case is found reliable, offence under section 302 I.P.C is not made out rather only offence under section 304 I.P.C may be made out in the fact and circumstance of this case; and accused-appellant is innocent and has falsely been implicated in the present case hence impugned judgment and order is based on surmises and conjuncture and liable to be set aside.

13. Per contra, learned A.G.A has submitted that presence of witnesses at the place of occurrence is natural; their evidence are trustworthy; accused-appellant had been identified in the light available at the place of occurrence; evidence of prosecution witnesses cannot be thrown out only on the ground that they are relatives of the deceased; the ocular evidence is fully supported medical evidence; F.I.R has been lodged without any delay; prosecution has proved its case beyond

reasonable doubt against the accused-appellant; there is no illegality in the aforesaid impugned judgement and order, hence appeal is liable to be dismissed.

14. We have considered the submission made by the learned counsel for both parties and perused the record.

15. In the light of arguments advanced by both the parties and evidence available on record, it has to be determined "whether prosecution has succeeded to establish the offence under section 302 I.P.C against the appellant beyond reasonable doubt."

16. P.W. 1, Annu alias Daya Shankar, Informant of the occurrence, has stated that on 12.6.2007, his mother Brijrani was sleeping at platform (Chabutara), situated in front of his house, whereas he and his wife Vimla Devi (P.W-2) were sleeping inside his house. At about 3.00 a.m, upon hearing cry of his mother, he and his wife came out from their house and saw that some unknown person was assaulting at his mother, by sharp edged spade (Farsa). He saw and identified his face in the light of tube-light at the time of occurrence but did not know his name. He raised an alarm wherefrom appellant run away towards *Paharh* (mountain). He saw that his mother was lying, with blood, at cot. He has further stated that his uncle Rajju and another one person Bhau alias Bhagwan Das were also sleeping on platform situated in front of his house. They had also chased the appellant. According to him, after the occurrence, he had lodged F.I.R (Ext-ka-1); police had taken in custody blood stained earth and pieces of bed sheet, plain earth and prepared its recovery memo, at the place of occurrence wherein he had also put his signature; and police had prepared inquest report of the corpse of the deceased Brijrani, sealed the corpse, and sent it for postmortem. This witness has identified the appellant in court room and said that he had caused murder of his mother, to whom he had seen at the place of occurrence. He has further stated that while they were chasing accused, Bhau alias Bhagwan Das thrown a stick (danda) at him.

17. P-W-2, Vimla, daughter-in-law of deceased, sleeping inside her house with P-W-1, Annu alias Daya Shankar, at the time of occurrence, has stated that deceased Brijrani was sleeping out side her house at platform (chabutara) whereas her father-in-law's brother (*Chachiya Shasur*) Rajju (P.W-3) was sleeping at another platform in front of her house. It was 3.00 a.m, at the time of occurrence. She heard cry of her mother-in-law, Brijrani (deceased). She and her husband came out from their bed room and saw that appellant Kalluwa was assaulting deceased. When they raised alarm, appellant fled away and her husband and father-in-law Rajju (*Chachiya Shasur*) had chased him. She had identified appellant Kalluwa in the light of tube light, who had assaulted twice to her mother-in-law by spade.

18. P.W-3, Rajju, is the brother-in-law (Dewar) of deceased Brijrani. He has stated that it was 3.00 a.m, he was sleeping at the platform in front of house of one Virendra, situated across the road whereas deceased Brijrani was sleeping at the platform, situated in front of her house; at the time of occurrence he heard shriek and cry of deceased Brijrani; he saw that appellant Kalluwa was assaulting by spade on the deceased; his nephew

Annu alias Daya Shankar (P.W-1) and nephew's wife Vimla(P.W-2) were also raising alarm; he had also challenged and chased the appellant but he fled away toward *Godari Pahadiya*; at the time of occurrence there was sufficient light of tube light in which he had seen the occurrence; after occurrence, he could not disclose the name of accused Kalluwa as he was afraid; he had disclosed his name to the police ; after 2-4 days of the occurrence, police was carrying appellant kalluwa in a jeep, and he was present at *Pachraha* (five roads junction) *Akhthauha*, Charkhari road with one Shankar Singh. He has further stated that police had told him that appellant was willing to get spade (weapon use in the offence) recovered, whereupon he also followed the police and appellant-Kalluwa had said that he would hand over the spade whereby, he had caused the murder. Police had taken away him also by the jeep. Jeep was stopped beneath the hill. Police had searched in person to each other. After getting down from Jeep, the appellant Kalluwa, leading police party, searched the spade from bushes of palm tree, and handed over the same to police, and said that it was that spade whereby he had caused the murder of deceased Brijrani. He has further stated that police had taken in his custody the alleged recovered spade, sealed it, and prepared memo of recovery, wherein he had also put his signature. This witness identified his signature on recovery memo before the trial court.

19. P.W-4, Dr. D.K. Sullerey, who had conducted autopsy of the dead body of deceased, has stated that on 12.6.2007 he was posted at district Mahoba as Emergency Medical Officer, and had conducted autopsy of the dead body of the deceased at 4.00 p.m. which was brought before him in sealed condition by Cons. 84 Prakash Narayan Mishra, H.G-1742, Ram Swaroop, P.S Charkhari with relevant police papers. (*Anti mortem injuries, found by this witness, have been mentioned in para 4 of the judgement*); in the stomach of the deceased about 6 M.L paste material was present; deceased was at about 44 years; her body was average built up; rigor mortis was present on her body; the deceased had died due to hemorrhage and shock caused by anti mortem injury which would have been caused half day before the autopsy and post mortem report (Ext-ka-2) was prepared at the time of autopsy.

20. P.W-5, Constable 130, Jai Ram Prajapati has stated that on 12.6.2007 he was posted at P.S. Charkhari as Cons. Moharrir. On that date, on the written information filed by Annu alias Daya Shankar (P.W-1), he had lodged F.I.R No.93 of 2007 as Case crime No. 1012 of 2007, under section 302 I.P.C, against unknown person, prepared chik report (Ext-ka-3) and entered information in general diary(Ext-ka-4).

21. P.W-6, Gopal Krishna Gupta (I.O) has stated that on 12.6.2007, he was posted as Station House Officer at P.S. Charkhari and undertaken investigation of the case. He had inspected place of occurrence on the pointing out of Informant, Annu alias Daya Shankar (P.W-1), and prepared site plan (Ext.ka-5). The inquest was conducted under his supervision by Devi Deen. Inquest report (Ext.ka-6) and relevant papers, letter to C.M.O, Chalan nass, letter to R.I., photo nass (Ex.ka-7 to Ext.ka 10) were also prepared. He had taken into his custody, pieces of blood stained bed sheet,sample of blood stained and plain earth and

prepared recovery memo (Ext.ka 11 to Ext.ka12).Appellant was arrested by him on 13.6.2007. On his confessional and disclosure statement, the weapon (spade) used in the offence was recovered from the bushes of palm tree situated at nearby *Godari Pahadi* in the presence of witnesses. According to him recovered spade was sealed in the presence of the witnesses and its recovery memo (Ext-ka-3) was prepared and signed by him and by witnesses. He has further stated that during investigation he had recorded statement of witnesses and also prepared site plan (Ext-ka-14) of recovery of spade and after investigation filed a charge sheet (Ext-ka-15) against the appellant Kalluwa, under section 302 I.P.C. According to him on 20.7.2007, the recovered articles i.e blood stained earth, pieces of bed (bistar) and spade (material Ext-1 to material Ext- 4) were sent to the Forensic Science Laboratory for examination.

22. After conclusion of prosecution evidence, statement of appellant was recorded under section 313 Cr.P.C, wherein he denied the occurrence and the evidence produced by the prosecution and has stated that he has been falsely implicated by the police in this case.

23. The appellant was given opportunity to lead evidence in his defence. D.W-1 Ladkunwar and D.W-2 Hindupat were examined by him in his defence. Both these witnesses are the parents of appellant.

24. D-W-1 Ladkunwar, mother of appellant, has stated that on the day of occurrence at 6.00 a.m, police had taken away his son from her house when both of them were sleeping in front of her house.

25. D.W-2 Hindupat, father of appellant, has stated that on the day of occurrence he was sleeping at his house with his family. Police had come and taken away his son (appellant). He has further stated that when he quarried to police, it said that they were taking away him for interrogation.

26. So far as the submission of learned counsel for the appellant that the prosecution witnesses P.W-1 Annu alias Daya Shankar, P-W-2 Vimla and P.W-3 Rajju are interested witnesses, the presence of P.W-3 Rajju at the place of occurrence is highly doubtful and the statements of all the above three witnesses are self-contradictory is concerned, it is settled principle of law that only on account that prosecution witnesses are relatives of the victim/ deceased, their testimonies cannot be discarded. In such case, their testimony is required to be tested with due care and caution. It is also to be required to see; whether presence of the witnesses on the place of occurrence is natural and their statements are trustworthy or not.

27. As per F.I.R, occurrence was happened at 3.00 a.m. i.e in the night. In F.I.R none was named as accused. Even the nature and description of arm or weapon is also not mentioned therein. At the time of occurrence P.W-1 Annu alias Daya Shankar and P.W-2 Vimla were sleeping inside their house, whereas deceased was sleeping out side of her house. At about 3.00 a.m, both P.W-1, Annu alias Daya Shankar and P.W-2, Vimla heard cry of deceased and came out from their house.They saw that one unknown person was running after causing severe injury on the head of the deceased by sharp edged weapon. As per F.I.R, all these witnesses have neither

seen appellant at the time of causing injury to deceased nor identified appellant.Even they had not identified weapon whereby injury was caused to the deceased. In F.I.R, it has further been mentioned that both these witnesses had seen accused in the light of mercury tube light and they can identify appellant. In F.I.R, it has also not been mentioned whether both these witnesses had chased appellant or not. In this FI.R, presence of any other witness except P.W-1 Annu alias Daya Shankar and P.W-2 Vimla has also not been mentioned.

28. P.W-1, Annu alias Daya Shankar, in his statement has specifically stated that when he came out from his house, he saw that an unknown person was causing injury to his mother by spade (farsa). He has further stated, that at the time of occurrence, he had identified accused by his face but he did not know his name. He had seen accused causing the occurrence in the light of mercury tube light and when he shouted, accused had fled away towards Pahadi (hill). He has further stated that at the time of occurrence his uncle Rajju (P.W-3) and another person Bhau alias Bhagwandas were sleeping on chabutara (platform) in front of his house. According to him both these persons had also chased the accused. This witness has identified accused before Trial Court and stated that appellant had caused death of his mother. In cross-examination, this witness has stated that he had chased accused whereas his wife (P.W-2) began weeping by clinging with his mother. He had chased 40-50 meters to the accused but he did not know how many people were chasing the accused. According to him when he returned to his mother, it was 3.05 p.m. He had neither lifted his mother nor had asked any one to do so because his mother had died. He had not touched his mother. In cross examination, he has further stated that he drives the vehicle. He has further stated that he had seen the occurrence when accused-appellant was running after causing occurrence. At that time mercury light was blowing on the pole but he did not know whether it was moon light or dark light. In cross examination, he has also stated that he had not seen the face of accused at that time when he was fleeing. P.W-2, Vimla, in her examination-in- chief has specifically stated that when she and her husband (P.W-1) came out from their house, on hearing the cry of her mother-in-law, saw that appellant-Kalluwa, present in Court, was attacking by spade to her mother-in-law. She has further stated that her husband and her cousin, father-in-law Rajju (P.W-3) had chased the appellant- Kalluwa. In cross examination she has further stated that she did not know the name of the appellant. She did not know as to which side the face of the appellant was, at the time of occurrence. According to her she was interrogated by police after 5-6 days. She has specifically stated in her cross examination that she did not disclose to investigating officer that accused-appellant Kalluwa had caused the death of deceased because she did not know name of appellant Kalluwa. She has further stated that she did not know as to how many persons named Kalluwa are residents of her town. Thus, statements of these witnesses are contradictory with fact mentioned in F.I.R (Ex.ka-1), as to whether they saw appellant at the time of causing injuries to deceased or they saw appellant, when he was running after occurrence, and also contradictory to F.I.R whether appellant was chased by any one or not.

29. P.W-3, Rajju, is brother in-law (dewar) of the deceased. He is not named in the F.I.R as an eye witness. According

to him, at the time of occurrence he was lying and sleeping at the platform situated in front of one Virendra, across the road, whereas his sister-in-law (Bhabhi) was sleeping, opposite side of the road at platform situated in front of her house. At about 3.00 p.m, he heard cry of deceased Brijrani and saw that appellant was causing injury to his sister-in-law (Bhabhi), by spade. According to him, at that time, his brother's son (bhatija) (P.W-1) Annu alias Daya Shankar and his wife Vimla (P.W-2) were also raising alarm. They came near appellant and tried to chase him but he fled away towards Godari Pahadiya (hill). According to him, he had identified the appellant in the light of mercury lamp, emitting light on the pole, situated nearby the place of occurrence. In examination in-chief, he has explained that he could not disclose name of appellant Kalluwa as he had become afraid at the time of occurrence, but disclosed it to police. In cross examination, he has specifically stated that after the occurrence he had gone to the police station with Annu alias Daya Shankar (P.W-1). He had not gone with Arvind Singh. P.W-1 Annu alias Daya Shankar did the job of driving of vehicle to Arvind Singh. He has further stated that no body except him and Annu alias Daya Shankar (P.W-1) had gone to police station. His daughter-in-law (Bahu) remained at her house. He has further stated that before reaching police station, he had returned to his house and thereafter Annu alias Daya Shanker would have gone to police station but he did not know whether he had lodged report or not. He has stated that just after one hour of the occurrence, police had reached the place of occurrence and recorded his statement. The statement was also recorded after two days and police had continuously interrogated him for five days.

30. Admittedly, P.W-3 Rajju has not been named in the F.I.R. His presence or any role has also not been shown in the F.I.R. P.W.-1, Annu @ Daya Shankar, in his cross examination has also admitted that he did not mentioned name of witnesses in F.I.R for which he has not given any explanation. P.W.3 Rajju has stated that he has four brothers. All were married and there is partition among them. They reside in separate houses situated at separate place. He resides inside the town (basti) near the '***B'*** *Park.*

31. PW-6 S.I. Gopal Krishna Gupta, Investigating Officer of the case, has stated that P.W-3 Rajju did reside two kilometers away from the place of occurrence. Neither P.W-3 Rajju nor any witness of the prosecution has shown any justification as to why P.W-3, Rajju was lying and present at the platform, situated in front of one Virendra's house in the night, at the time of occurrence. The prosecution has also not produced any justification as to why the name of Rajju (P.W-3) and his role of chasing at the time of occurrence was not mentioned in F.I.R. of occurrence. In addition to it, this witness (P.W-3) once said that he had gone to police station with P.W-1 Annu alias Daya Shankar but again retracted to his statement and said that he had not gone to police station. In such circumstances evidence of this witness (P.W-3) becomes doubtful.

32. In addition to above, from perusal of the site plan (Ex-ka 5) of the place of occurrence, it is clear that the house of one Virendra, Bhagwan, Virendra son of Mulayam Singh and Gorey Lal are situated

just nearby the place of occurrence. PW-1 Annu alias Daya Shankar, in his examination-in-chief, has stated that in front of his house, his uncle Rajju (P.W-3) and one Bhau alias Bhagwan were lying. In cross examination he has also stated that the house of Bhagwan Dass is situated near the place of occurrence. P.W-3 Rajju has also, in cross examination, has stated that the house of Bhagwan Dass is situated in front of place of occurrence, the house of Govind Thakur is also situated near the house of Bhagwan Dass just 20-25 fit away from the place of occurrence. He has further stated that one Virendra Rajpoot, resides beside to one Devi Deen. He has further stated that the house of Vishwanath is also situated beside to the house of Devi Deen. P.W-1 Annu alias Daya Shankar has stated, in cross examination, that at the time of chasing accused Bhau alias Bhagwan Dass had assaulted on accused by throwing a stick. P.W-6, S.I, Gopal Krishna Gupta (I.O.) admitting this fact has also stated the fact that accused was attacked by Bhagwan Dass is true. P.W-3 in cross examination has stated that he knows Bhagwan Dass, who is uncle of appelant whereas P.W-1 said at one place that he did not know the uncle of Kalluwa but in response to question put by Trial Court he said that house of Bhagwan Dass is situated in front of place of occurrence. The prosecution has neither produced Bhau alias Bhagwan Dass nor any independent person, as witness, who resides nearly the place of occurrence. In such situation, the presence of P.W-3 Rajju, who is not resident to nearby place of occurrence and his statement, being relative of Informant, becomes doubtful.

33. From the perusal of F.I.R it transpires that no one has witnessed the occurrence and accused causing injury to the deceased. Nature and description of weapon has also not been mentioned in F.I.R (Ext-ka.1). In F.I.R it has been mentioned as follows:-

" एक अज्ञात व्यक्ति माता जी के सिर पर तेज धार वाले हथियार से सिर मे गम्भीर प्रहार करके भाग रहा था " *One unknown person by causing injury on the head of his mother by sharp edged weapon was running. (English translation by Court)*

34. Non mentioning the name of any person as accused, non mentioning the direction where accused was running and also non mentioning the name of weapon or its details in F.I.R shows that none had seen the occurrence. After occurrence, when they saw dead body of deceased and inspected the injuries, on the basis of nature of injures, P.W-1 Annu alias Daya Shankar and other witnesses learnt that injuries were caused by any sharp edged weapon and thereafter on the basis of surmises and conjecture, F.I.R was lodged against unknown person. Thus, non mentioning name of weapon, name of accused/appellant and direction of his running after causing occurrence, in F.I.R, has also created prosecution case very doubtful.

35. It is also pertinent to ascertain, at this juncture, whether F.I.R was lodged promptly or it was anti timed. According to P.W-1 Annu alias Daya Shankar, occurrence was happened at 3.00 a.m. on 12.6.2007. From perusal of the statement of P.W-1, Annu alias Daya Shankar, P.W-2 Vimla and P.W-3 Rajju, it appears that after hearing the alarm, raised by the deceased Brijrani both P.W-1 Annu alias Daya Shanker and P.W-2, Vimla came out from their house and saw that unknown accused was causing injury to the deceased. The accused was chased up to 40-50 meters by P.W-1, P.W-3 and so many people, present nearby the place of occurrence and when they could not succeeded

to catch the appellant Kalluwa they returned back to the place of occurrence. Thereafter P.W-1 Annu alias Daya Shnkar had gone to lodge F.I.R.

36. From perusal of Ext-ka-3, Chik F.I.R, it appears that F.I.R. was lodged at 3.40 a.m i.e just after 40 minutes of the occurrence. The place of occurrence from the police station had been shown one and half kilometer. P.W-1, Annu alias Daya Shankar, has not stated, in his statement at what time had he proceeded for police station. Although P.W-3 Rajju has stated that he had gone to police station with P.W-1 Annu alias Daya Shankar but again he stated that he had returned back and P.W-1 Annu alias Daya Shnker had gone to police station who would have lodged F.I.R. P.W-1 Annu alias Daya Shnkar, in his cross examination has specifically stated that he had reached police station at 3.15 a.m. and lodged F.I.R. at 3.16 a.m. In the facts and circumstances of this case where occurrence has taken place at 3.00 a.m. and P.W-1 Annu alias Daya Shankar and other witnesses had chased the accused 40-50 meters and returned thereafter to the place of occurrence, statement of P.W-1 Annu alias Daya Shankar that he had reached police station at 3.15 a.m. and F.I.R. was lodged at 3.16 a.m, is not reliable. It shows that F.I.R was not lodged on 12.6.2007 at 3.40 a.m. rather it was lodged at any other time thereafter and in the chik F.I.R time of lodging F.I.R. was shown at 3.40 a.m.

37. It is also pertinent to mention at this juncture that the inquest proceeding (Panchayatnama) of the deceased was conducted on 12.6.2007 from 6.00 a.m to 8.30 a.m. P.W-1 Annu alias Daya Shnkar (informant) is also one of the member/witness of the inquest proceeding who had put his signature on the inquest report (Ext-ka-6). In this report also neither the name of accused nor description of weapon has been mentioned. It appears that till the completion of inquest proceeding, P.W-1 Annu alias Daya Shnkar did not know as to which type of weapon was used in the offence.

38. So far as the presence of light at the place of occurrence is concerned, in the F.I.R it has been mentioned that P.W-1 Annu alias Daya Shnkar and his wife P.W-2 Vimla had seen the occurrence and identified accused in the light of mercury lamp . P.W-1 Annu alias Daya Shnkar in his cross examination has stated that he had seen accused in the mercury lamp light when he was fleeing from the place of occurrence. He did not know whether it was moon light or dark light at the place of occurrence. P.W-2 Vimla has also stated that she had seen the occurrence in Mercury lamp emitting light. Although P.W-1 Annu alias Daya Shankar has not stated and specified the place where mercury light was installed/ situated, P.W-2 Vimla has, in her cross examination, has stated that mercury lamp was emitting light from other side of the road, where her mother-in- law (deceased) was sleeping. From the perusal of Ex-ka-5, site plan, it appears that the pole, where mercury lamp emitting light, was situated other side of the road at the distance of 15 steps away. Thus, it is clear that there was no light at the place of occurrence, and if any light was present, it was at the other side of the road.

39. According to prosecution case both witness (P.W-1 and P.W-2) came out from their house and saw appellant causing injury to deceased. In site plan

(Ex.ka-5), house of P.W-1 Annu alias Daya Shankar has been shown towards eastern side of place of occurrence whereas pole where mercury light was emitting, was western to the place of occurrence. It means that if front of appellant Kalluwa was towards house of P.W-1 Annu alias Daya Shanker, mercury lamp emitting light, as shown in site plan was situated on the back side of appellant. Thus, the possibility of light on the face of appellant is doubtful. P.W-1 Annu alias Daya Shankar, in his cross examination, has specifically stated that he did not know any (Dishayen) of place of occurrence, hence he could not disclose as to which side the mercury lamp was situated . He had denied to disclose as to which side his mother's head and legs were lying at the time of occurrence and also could not disclose, which side his mother was present at the time of occurrence.

40. P.W-2 Vimla has also stated in her cross examination that she did not know as to which side the face of appellant- Kalluwa was present at the time of occurrence. In F.I.R. no special character of appellant has been mentioned. According to P.W-1 Annu alias Daya Shankar and P.W-2 Vimla, they had not seen the appellant, prior to occurrence. They have also not stated any special character of body, physique or face of appellant. Thus, from the statements of these witnesses, it is clear, that there is contradiction in their statements regarding their opportunity to see and identify the appellant/accused causing injury to deceased at the time of occurrence, that either these witnesses were not present at the time of occurrence or concealing the true fact regarding the presence of other witnesses at the place of occurrence. In such situation statements of these witnesses that they had identified appellant in the light of mercury lamp is not reliable and trustworthy.

41. It is also pertinent to note that P.W-3 Rajju in his cross examination has stated that he was also interrogated continuously 5-6 days after the occurrence. This witness has accepted his presence nearby the place of occurrence but his interrogation for 5-6 days creates doubt in the prosecution case. In addition to it, P.W-6 (I.O.) has not stated in his examination in chief that when and how the name of appellant Kalluwa came into the light during investigation. He has stated in his examination that accused was arrested on 13.6.2007 and confessed his guilt. He made a disclosure statement regarding concealment of spade (Farsa) used in the offence in herbs and bushes nearby chilla tree situated at Godari hill and on his statement, the said spade (Farsa)/ weapon was recovered. This witness (P.W.6) has not disclosed in whose presence weapon, used in the offence, was recovered.

42. P-W-3 Rajju, in his cross examination, has stated that after 2-4 days of the occurrence, police was carrying appellant Kalluwa in police jeep at *Pacharaha* (junction of five roads) Akhthauha, Charkhari road, where he and one Shankar Singh were present. In cross examination he has stated that Shankar Singh is his nephew. According to this witness, the spade (farsa) used in the offence was recovered by police in his presence. P.W-3 Rajju who is real uncle of P.W-1 Annu alias Daya Shankar, is not named in F.I.R, despite that, he has been produced by the prosecution as eye witness but his presence at the place of occurrence has been found not natural. He has also been

made witness by police in the recovery of weapon (spade) used in the offence. Alleged recovery of weapon (Spade) has not been made in the presence of any independent witness. In view of the above, presence of this witness at the place of occurrence and also at the place of recovery of weapon, as a star witness, creates doubt in the prosecution case as well as recovery of weapon (spade).

43. In F.I.R (Ex-ka-1), no identification marks, physique, get-up or any special character of body of accused has been mentioned. It has also not been mentioned in F.I.R as to which direction appellant had fled away after occurrence. P.W-1, Annu alias Daya Shankar, in his cross examination, has specifically stated that he did not know Kalluwa prior to the occurrence. He did not know whereabouts of appellant Kalluwa's field from the place of occurrence. He also could not say as to in which side appellant-Kalluwa field was situated. He also did know as to in which side appellant Kalluwa's house was situated from the place of occurrence. P.W-2 Vimla, has also stated same way. She has stated that she knows Kalluwa after the occurrence. She has further stated that she did not know that Bhagwan Dass, uncle of Kalluwa, resides in front of her house and Kalluwa used to visit her uncle's house. She has also expressed her ignorance to appellant-Kalluwa's house and field. According to her the name of Kalluwa had been disclosed to her after occurrence by P.W-3 Rajju. Both these witnesses have also not stated any special character or identification of accused to whom they saw for the first time at the time of occurrence, but they have identified the appellant-Kalluwa during trial, before the trial court.

44. It is settled principle of law that if a person is not known to any witness and he was seen for the first time at the time of occurrence, identification of that person for the first time in Court is very weak type of evidence. It can be relied upon in very peculiar fact and circumstance of that case. Reliability of such identification depends upon several factors for example; whether witness identifying the accused for the first time in court, had an opportunity to see and identify accused after the occurrence and prior to his identification in court or not; whether any precaution before his identification was taken by court or not; for example, covering the important identification marks on the face of accused or whether he was present in the court room along with other accused or standing alone at the time of identification.

45. Coming to the fact of this case, neither P.W-1, Annu alias Daya Shankar nor P.W-2 Vimla did know appellant-Kalluwa before occurrence. They have also not stated regarding any identification marks of appellant-Kalluwa. No identification proceeding was held during investigation. Appellant has been identified before the Trial Court on 2.1.2008, i.e. after six months of occurrence. From perusal of order sheet of Trial Court's proceeding it transpires that the charge was framed on 6.10.2007 and thereafter case was fixed for prosecution evidence. On 25.10.2007, 17.11.2007 and 7.12.2007 when the case was fixed for evidence the appellant and P.W-1 Annu alias Daya Shankar were present before Trial Court, but the evidence of P.W-1 Annu alias Daya Shankar could not be recorded. It has not been mentioned in the order sheet of the aforesaid date, that the appellant had covered his face or any caution had been given to him to cover his face or identity mark. On 2.1.2008, when P.W-1 Annu alias Daya Shankar identified the

appellant Kalluwa during his examination, nowhere is mentioned in order sheet as to whether appellant was standing in court room with so many accused/people or was standing alone. As it had already observed that the appellant Kalluwa and P.W-1 Annu alias Daya Shankar are residents of same town. Thus, in view of the peculiar facts and circumstances of this case P.W-1 Annu alias Daya Shankar had of ample opportunity to see, appellant after the occurrence and prior to identification, in Court. His statement regarding identification of appellant is not reliable. Similarly statement of P-W-2 Vimla who also did not know appellant Kalluwa prior to the occurrence and came to know his name as told to her by P.W- 3 Rajju, is also doubtful.

46. Every contradiction, inconsistency between the statement of witnesses, normally, may not be treated material but where accused/appellant and witness are residents of same town and occurrence had taken place in the night, neither name of accused nor name of witness or description of weapon was mentioned in F.I.R, important natural and independent witness present at the time of occurrence were not produced, no identification parade was conducted, eye witnesses are relatives and out of these witnesses one witness, PW-3 Rajju is not resident to the nearby place of occurrence, the contradiction and inconsistency found herein above are major and important which have demolished the castle of prosecution case.

47. Thus, in view of the above, we are of the considered view that the prosecution has failed to prove its case beyond reasonable doubt against appellant. He is entitled to be acquitted against charge levelled against him. The judgment and order passed by learned Additional Session Judge, Court No.2, Mahoba in Session Trial No.116 of 2007 is hereby set aside. Consequently, the appeal is allowed.

48. The appellant is in jail. He, if not wanted in any other case, shall be released forthwith.

49. Keeping in view the provision of Section 437-A of the Code, appellant-Kalluwa is hereby directed forthwith to furnish a personal bond of a sum of Rs.10,000/- each and two reliable sureties each of the like amount before Trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against this judgment or for grant of leave, appellant-Kalluwa, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

50. A copy of this judgment be sent to Trial Court by FAX for immediate compliance. Tbe Lower Court's record be also sent back along with a copy of this judgment.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

CRIMINAL APPEAL No. 5200 OF 2009

Jagraj ...Applicant/Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Harikesh Kumar Gupta, Sri Ajay Kumar Kashyap, Sri R.B. Pal.

Counsel for the Opposite Party:
A.G.A.

A. Section 8/18 of NDPS Act. - Appeal against conviction – Defect in framing of charge. Mere wrong mention of section Held:- does not vitiate the trial.

Appellant was fully aware that he is being charged for keeping 200 gms. of Opium without there being any license to keep the same. The error appears to have occurred in mentioning the section of the offence and in place of "section 18", "section 20" has been mentioned. Mere defect in the charge will not vitiate the trial automatically but such eventuality gives an occasion to the accused to prove or to show that serious prejudice has been caused to him on account of the error/defect in framing of charge. (Para 17)

Criminal Appeal dismissed.

Chronological list of Cases Cited: -

1. Willie (William) Slaney vs. State of Madhya Pradesh reported in AIR 1956 SC 116,

2. State of Orissa vs. Rajendra Tripathi reported in 2004 SCC (Crl.) 1586,

3. Girdhari vs. State of Rajasthan reported in (2010) 15 SCC 576,

4. Pon Adithan vs. Deputy Director, Narcotics Control Bureau, Madras reported in (1999) 6 SCC 1, (E-2)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. The present criminal appeal has been preferred by the accused appellant Jograj challenging the order dated 05.06.2009 passed by Additional Sessions Judge, Court No.1, Pilibhit, in Special Trial No.63 of 2007 (State vs. Jograj) arising out of Case Crime No.1080 of 2007 u/s 8/18 Narcotics Drugs & Psychotropic Substances Act, 1985, Police Station Neuria, District Pilibhit, whereby the appellant has been convicted u/s 8/18 Narcotics Drugs & Psychotropic Substances Act, 1985 and has been sentenced for four years rigorous imprisonment and a fine of Rs.10,000/- and in default of payment of fine, for six months further imprisonment.

2. Heard Mr. R.B. Pal, Advocate holding brief of Mr. Ajay Kumar Kashyap, learned counsel for the appellant and Mr. Om Prakash Mishra, learned Additional Government Advocate as well as perused the record.

3. The prosecution case as narrated in the F.I.R. lodged by P.W.1 Sub-Inspector Gajram Singh is that on 22.08.2007, Sub-Inspector Gajram Singh along with Constable Ran Singh & Constable Kanhai Lal was busy in making enquiry about an application and was also on patrolling duty, during which when they reached Pilibhit road near village Gulhadiyan Dulhan, they received an input from police informer that one person sitting near the triangle of village Dhankuna is possessed with opium. Relying on this information, the police personnel made a search of each other to ensure that none of them were having any illegal substance and thereafter, proceeded towards triangle of village Dhankuna. They also tried to get independent witnesses, but no one came forward to become witness of search. When they reached near the triangle of village Dhankuna, the police informer pointed out the person who was having opium. As soon as the police personnel reached close to that person, he tried to run towards village Dhankuna, however the police personnel chased and apprehended him near the triangle of

village Dhankuna at about 07:30 P.M. and upon being asked to disclose reason for his running away from the police, he confessed that he has opium in the polythene bag kept in his hand and that is why he ran on account of fear of his arrest. The P.W.1 informed him about his right to be searched in presence of a Gazetted Officer or before a Magistrate. But the arrested person reposed faith in police personnel and consented for being searched by them. On being asked, he disclosed his name to be Jograj and upon being searched, one green colored polythene, having therein another white polythene, was found in his right hand, wherein a black colored sticky substance smelling like opium was recovered. After weighing, the quantity of substance was found to be about 200 gms. Thereafter accused Jograj was arrested and was informed about the grounds for his arrest and the mandate of law regarding arrest and the instructions issued by Hon'ble Supreme Court and National Human Rights Commission regarding arrest and search were followed. The recovered substance was duly sealed and a memo was prepared and copy thereof was given to the accused after obtaining his thumb impression and thereafter, the arrested accused along with recovered substance was brought and detained in police station and on the basis of recovery memo and arrest memo, an F.I.R. was registered on 22.07.2007 at about 9:10 A.M. The entries of relevant facts were also made in the general diary of the police station. Thereafter during investigation, the sample of recovered substance was sent to forensic laboratory at Lucknow for its forensic examination and subsequently forensic report was received, wherein presence of opium was mentioned and percentage of morphine in the sample was found to be 2.8%. After completing investigation, a charge-sheet was submitted against the appellant u/s 8/18 Narcotics Drugs & Psychotropic Substances Act, 1985 (*referred in short as NDPS Act hereinafter*).

4. The learned trial court, vide order dated 01.12.2007, framed charge against the accused appellant u/s 8/20 NDPS Act and the trial proceeded.

5. The prosecution in order to prove its case, examined five prosecution witnesses, out of them, P.W.1 Sub-Inspector Gaj Ram Singh is first informant of the case and is a witness of arrest of accused appellant Jograj and the recovery of 200gms. of opium from his possession. P.W.2 Constable Ran Singh is also witness of arrest of accused appellant Jograj and recovery of 200gms. opium from his possession. P.W.3 Constable Clerk Naveen Kumar Saxena had registered the F.I.R. and has proved the registration of a criminal case. P.W.4 Sub-Inspector, Bhuwaneshwar Singh, Investigating Officer, had conducted the investigation and had submitted charge-sheet. P.W.5 Constable Satyapal has given the evidence about collection of sample of recovered opium and send it to forensic lab and has proved the link evidence.

6. Thereafter, the accused appellant Jograj was examined u/s 313 Cr.P.C., who denied his involvement in the offence and stated that some stolen property was recovered from one person, whose wife had kept two pants which were stolen from his house and hence, the police had challaned him in the false case of Narcotics Drugs & Psychotropic Substance. He further stated that he will

adduce evidence in his defense but no evidence was adduced by the defense.

7. The learned trial court relied the prosecution witness and convicted the accused appellant under section 8/18 NDPS Act and sentenced him to four years R.I. and a fine of Rs.10,000/- and in default of payment of fine, six months further imprisonment. Feeling aggrieved by this order of conviction and sentence, the accused appellant Jograj preferred the present criminal appeal.

8. The learned counsel for the appellant has assailed the impugned order of conviction and sentence and has submitted that:-

(i) The prosecution case is not supported by any independent public witness and it would not be safe to rely upon the evidence of police personnel only.

(ii) There is anomaly in sending the substance recovered to forensic lab and although it is alleged that 40gms. of sample was prepared and sent for testing in forensic lab, but the substance alleged to have been received in forensic lab has been shown to be 37gms. only and hence, the entire exercise done by the prosecution appears to be doubtful and the prosecution case has to be disbelieved.

(iii) The charge framed against the accused appellant is defective for the reason that the substance alleged to have been recovered from the possession of the appellant is "opium", as such charge u/s 8/18 NDPS Act should have been framed, but the learned trial court has framed charge u/s 8/20 NDPS Act which relates to substance "charas" and thus, there is ambiguity and illegality in framing of charge, which goes to the root of the matter and causes prejudice to the appellant and hence, the trial of the accused appellant is vitiated in law.

(iv) The mandatory provisions of NDPS Act and rules regarding search, arrest and recovery, particularly sections 42 & 50, have not been complied with by the police party in the present case, which vitiates entire proceeding and the accused appellant is liable to be acquitted.

9. On the other hand, the learned Additional Government Advocate has supported the order of conviction and sentence and has contended that the prosecution witness are wholly reliable and the prosecution has proved its case beyond reasonable doubts and the accused appellant has miserably failed to show any prejudice caused to him on account of the alleged defect in framing the charge.

10. In the light of rival submissions, this court proceeds to examine the evidence available on record, which reflects that the P.W.1 Sub-Inspector Gajram Singh, the first informant has stated that on 22.08.2007 he was posted at police outpost Dhankuna, police station Neuria and on that day he along with constable Ran Singh and constable Kanhai Lal left for outpost Dhankuna after making an entry in the general diary to conduct an enquiry on some application received by him. When they reached near triangle of village Gulhadiyan Dulhan, an input was received from police informer that one person who is sitting at Dhankuna triangle is having opium in his possession and he may be arrested. Believing this information, the police party after ensuring non-availability of any illegal substance with them proceeded to village Dhankuna triangle along with police informer. P.W.1 Sub-Inspector

Gajram Singh, the first informant has further stated that while proceeding, the police personnel tried to procure independent public witness but none from public was ready to accompany them for that purpose. After reaching near Dhankuna tiraha, the police informer pointed out towards one person said to have opium in his possession and while reaching towards that person, he tried to run away but was chased and over powered and was arrested. Upon being asked, he disclosed that he is having opium in a polythene bag. Upon this, the P.W.1 apprised him about his right to be searched in front of any Gazetted Officer or Magistrate. The said person reposed trust in police personnel and stated that he is not willing to be searched before any Gazetted Officer or Magistrate. Thereafter again, P.W.1 tried to procure independent public witness but none became ready for that purpose and thereafter the aforesaid person was interrogated who disclosed his identity as Jograj Singh S/o Tika Ram, resident of village Dhankuna, police station Neuria, District Pilibhit. The P.W.1 Sub-Inspector Gajram Singh has also identified the accused in the court and has stated before the court that he is the same person who was found to be in possession of Opium and when he was searched, a black coloured sticky substance was recovered from a white polythene which was kept in a green coloured polythene laying in the right hand of the accused appellant. Upon being sniffed, the substance smelled like opium. P.W.1 Sub-Inspector Gajram Singh has stated that he asked the constable Kanhai Lal to procure Taraju Baat and after weighing, the weight of the substance was found to be 200 grams. The accused Jograj was asked to produce the license of keeping opium but he failed to show it. Then again he was explained about the offence committed by him and the recovered substance was taken into possession by the police. Meanwhile the endorsement of accused regarding his consent to be searched by police personnel was also obtained. The substance was sealed on the spot and a recovery memo was prepared upon which the accused put his thumb impression and the accompanying police personnel also signed it. A copy of the recovery memo was also given to accused Jograj and thereafter he along with accused Jograj went to police station and the criminal case was registered against accused Jograj and the recovered substance i.e. opium was also kept in malkhana in a sealed cover. The aforesaid witness was cross examined by the defense in detail but nothing material could be elicited from the cross examination. A suggestion has also been made to this witness that accused appellant was arrested from the house as he was a suspect of theft of a engine in the village but he did not confess regarding the theft so he has been falsely implicated in this case. This suggestion was readily denied by P.W.1.

11. Similar statements have been given by P.W.2 Ran Singh, who has supported the statement of P.W.1 in every material aspect. Apart from other things, he has also identified the bundle in which substance, alleged to have been recovered from the possession of the accused, was kept and sealed by Sub-Inspector Gajram Singh. He has further identified the signature of Gajram Singh as well as his own signature on the bundle and has also identified the thumb impression of accused Jograj. After opening the seal of the bundle before trial court, the substance kept therein in white polythene has also been identified by P.W.2 as the substance recovered from the possession of accused Jograj.

12. P.W.3 Constable Naveen Kumar Saxena has given his statement regarding registration of first information report and has proved the Chik first information report and other general diary entries regarding admission of arrested accused at police station and also about preservation of substance recovered from accused Jograj in a sealed packet.

13. The P.W.4, Sub-Inspector, Bhuwneshwar Singh who was the Investigating Officer of the case has proved the steps taken by him during investigation and he has also proved further investigation done by Sub-Inspector, Dharam Singh and has also given statement regarding sending of sample of recovered substance to forensic lab and receiving of forensic report from concerned lab.

14. The P.W.5, Constable, Satyapal has given link evidence regarding preparation of sample and sending it to forensic lab. He has also stated that a sample of substance measuring about 40gms. was taken from the bundle and was forwarded to forensic lab, Lucknow on 13.09.2007 in a sealed cover and was deposited in the forensic lab on 14.09.2007.

15. With regard to the submissions made by learned counsel for the appellant that there is discrepancy regarding the weight of the sample of the substance recovered from the possession of the appellant. In this regard, while the prosecution case is that 40 gms. of substance was sent to forensic lab, the report of forensic lab shows that only 37 gms. of substance was received in the lab. Although Exhibit Ka-9 by which the sample was sent shows the quantity of the sample as "about 40gms.", though a judicial notice can be taken of the fact that such a minor difference in the weight of substance in question may occur on account of difference of weighing machines and its accuracy on both the ends, i.e. at the end of local police and at the end of forensic laboratory, especially in view of the fact that because of stickiness of the substance in question, it may not be completely taken out from the bundle wherein it was kept and it may also lose some weight on account of time gap and may get affected on account of change of humidity due to change in weather conditions in between the time of taking sample and its examination at forensic lab. Furthermore, the difference of weight, as suggested by learned counsel for appellant, is too trivial and is in fact inconsequential and cannot be treated as discrepancy in prosecution evidence and hence, it does not create any doubt in the mind of the court.

16. With respect to defect in framing of charge and consequential prejudice to accused appellant, this court has gone through the language of charge framed by the trial court and bare perusal of charge reveals that the accused/appellant has been specifically informed to the effect that on 22.08.2007 at about 07:30 A.M., 200 gms. of Opium have been recovered from the green polythene held by accused/appellant in his right hand. A copy of the charge framed against the appellant is mentioned below:-

"आरोप

मैं, आर0के0 जैन अपर सत्र न्यायाधीश/न्यायालय सं0 1, पीलीभीत आप, जोगराज पर निम्नलिखित आरोप लगाता हूं:–

यह कि दिनांक 22.8.2007 को समय 7:30 बजे प्रातः वाहद ग्राम धनकुनी में तिराहा के पास थाना न्यूरिया जिला पीलीभीत के क्षेत्र में आप पुलिस पार्टी द्वारा गिरफतार किये गये और आपके कब्जे से आपकी

जमा तला□ी से आपके दाहिने हाथ में पकड़े हरे रंग की पॉलीथीन के अन्दर से 200 ग्राम अफीम बरामद हुई जिसको रखने का आपके पास कोई लाइसेंस नही था। इस प्रकार आपने धारा 8/20, स्वापक औषधी एवं मनःप्रभावी पदार्थ अधिनियम के अंतर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

मै, एतदद्वारा आपको निर्देश देता हूं कि आपका विचारण उक्त आरोप पर इस न्यायालय द्वारा किया जायेगा।

दिनांकः 01.12.2007
आर0के0 जैन
अपर सत्र न्यायाधीश/न्यायालय सं0 1
पीलीभीत

आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया। उसने आरोप अस्वीकार करते हुए विचारण चाहा।

दिनांकः 01.12.2007
आर0के0 जैन
अपर सत्र न्यायाधीश/न्यायालय सं0 1
पीलीभीत

17. Thus it is crystal clear that accused appellant was fully aware that he is being charged for keeping 200 gms. of Opium without there being any license to keep the same. The error appears to have occurred in mentioning the section of the offence and in place of "section 18", "section 20" has been mentioned. The law is well settled in this regard that **mere defect in the charge will not vitiate the trial automatically** but such eventuality gives an occasion to the accused to prove or to show that serious prejudice has been caused to him on account of the error/defect in framing of charge. Chapter XVII of the Code of Criminal Procedure deals with the framing of charge. The relevant provisions in this regard find place in sections 211, 212, 213 & 215 of Cr.P.C. which are being quoted below:-

"211. Contents of charge-

(1) *Every charge under this Code shall state the offence with which the accused is charged.*

(2) *If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.*

(3) *If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.*

(4) *The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.*

(5) *The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.*

(6) *The charge shall be written in the language of the Court.*

(7) *If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact date and place of the previous, conviction shall be stated in the charge, and if such statement has been omitted, the Court may add it at any time before sentence is passed.*

212-Particulars as to time, place and person- (1) *The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which. it was committed , as are reasonably sufficient*

to give the accused notice of the matter with which he is charged.

(2) *When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other moveable property, it shall be sufficient to specify the gross sum or, as the case may be, described the movable property in respect of which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219.*

Provided that the time included between the first and last of such dates shall not exceed one year.

213. When manner of committing offence must be stated- *When the nature of the case is such that the particulars mentioned in section 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.*

215. Effect of errors- *No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact mislead by such error or omission, and it has occasioned a failure of justice."*

18. Like-wise, section 464 of Cr.P.C. deals with the effect of omission to frame, or absence of, or error in charge. It states as under:-

"464. Effect of omission to frame, or absence of, or error in, charge- (1) *No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*

(2) *If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-*

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b)In the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:
Provide that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

19. The Hon'ble Apex Court, while deciding the reference in the case of ***Willie (William) Slaney vs. State of Madhya Pradesh*** reported in AIR 1956 SC 116, has elaborately discussed the purpose and scope of framing of charge in a criminal trial and has observed in following manner:-

"Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well

established and well understood lines that accord with our notions of natural justice.

If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is "substantial" compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based".

20. In the present matter, the record shows that at the time of framing of charge, the accused was heard and after framing of charge, it was read over and explained to the accused appellant, but at that point of time he did not raise any grievance or objection regarding any type of error or irregularity in framing of charge.

21. Similarly, the prosecution witnesses were examined in presence of accused and his counsel, who clearly stated that 200 gms. of opium was recovered from the possession of the accused appellant and hence, there was no occasion to have doubt in the mind of the accused appellant that he was charged and was being tried for illegal possession of 200 gms. of any substance other than opium regarding which he was not having license. This fact was again put to accused appellant by the Trial Court while putting question no.2 at the time of his examination U/s 313 Cr.P.C. and his answer to question no.2 goes to show that he was fully aware of the accusation made against him. Furthermore, when the learned Trial Court asked the accused appellant as to whether he wants to say anything further, the accused appellant replied that no such opium has been recovered from his possession. For ready reference, the relevant question nos. 2 & 7 put by the learned Trial Court to the accused and its reply by the accused appellant are being quoted below:-

*"**प्रश्न संख्या 2**– पी0डब्लू0 1 एस0आई0 गजराम सिंह का कथन है कि पकड़े गये व्यक्ति का नाम पता पूछा और भागने का कारण पूछा तो उसने बताया कि उसके पास पोलीथीन में अफीम है। इस पर उससे कहा कि तुम्हारा विधिक अधिकार है कि तुम अपनी जमा तलासी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष चलकर दे सकते हो तो आपकी स्वीकृति पर आपकी जमा तलासी ली गई तो आपके दाहिने हाथ में पकड़े हरे रंग की पॉलीथीन में काले रंग का चिपचिपा पदार्थ बरामद हुआ। जिसे उसने सूखा व अन्य कर्मचारियो को सुंघाया जो उसमें से अफीम की गंध आ रही थी तथा बरामद अफीम को तराजू बांट से तोला तो अफीम का वनज 200 ग्राम निकला। मौके पर फर्द प्रदर्शक–1 अंकित की गई तथा माल अफीम को सील मोहर किया और माल व अभियुक्त को थाने में दाखिल करके मुकदमा पंजीकृत कराया। आपको इसके संबंध में क्या कहना है?*

***उत्तर**–जी नहीं गलत है।*

***प्रश्न संख्या 7**– क्या आपको कुछ और कहना है?*

***उत्तर**–चोरी का माल जिसके यहां बरामद हुआ था उसकी औरत ने मेरे घर पर दो पैन्टें चोरी की मेरे यहां पहुंचा दी थी। पुलिस ने फर्जी अफीम एन0डी0पी0एस0 में मेरा चालान कर दिया मेरे पास में कोई अफीम बरामद नही हुई थी।"*

22. This statement of accused appellant makes it amply clear that the accused appellant was fully aware of the prosecution allegations at every stage of the trial and the error in mentioning the provision number of offence, while

framing of charge, was not significant even according to the accused himself. Thus the submission made by learned counsel with regard to the error in framing charge is liable to be rejected.

23. For next submission regarding non-compliance of mandatory provision of section 42 & 50 of NDPS Act and illegality in the arrest and the recovery from appellant, the record shows that P.W.1 & P.W.2 have categorically stated to the effect that the accused was informed, orally as well in writing on the form prescribed for that purpose, about his right to be searched before a Gazetted Officer or Magistrate and moreover, P.W.1 Gajram Singh has proved the aforesaid documents as Exhibit Ka-1 which contains thumb impression of accused Jograj. The memo of arrest and the document regarding intimation of arrest of accused to the District Legal Aid Committee has also been proved as Exhibit Ka-2. Like-wise the P.W.1 Sub-Inspector, Gaj Ram Singh had received information, when he was on the patrol duty and he might not have chance to reduce the same into writing and to dispatch it to the Superintendent of Police.

24. The position of law in this aspect of the matter as laid down by Hon'ble Apex Court in the case of ***State of Orissa vs. Rajendra Tripathi*** reported in 2004 SCC (Crl.) 1586, enlightens this court, wherein under similar set of facts, conclusion was drawn in following manner: -

"8. It has to be noticed that before the trial Court and the High Court the stand was taken by the accused persons alleging non-compliance of Sections 42 and 50 of the Act. The same was given up by the respondents in this appeal and in our view rightly. Considering the time when search and seizure was done, and the undisputed position that the detection was made while the officers were on patrolling duty, Section 42 has no application. Additionally the evidence of P.W.s. 1 & 5 clearly shows that the accused persons were given the liberty to be searched in the presence of the prescribed officer and they did not choose to be searched by any person other than P.W.5. Therefore, the plea related to non-compliance of Section 50 as raised during trial and before the High Court in addition to the concession, plea regarding non-applicability of Sections 42 and 50 of the Act is also without any substance. The residual question is regarding custody of the contraband articles and corrections in seizure memo. The evidence on record clearly shows that the forwarding report clearly indicated that the articles were being produced before the Magistrate. The order sheet of the Magistrate shows that because he was busy he directed that the articles should be produced on 10.8.1992 for the purpose of collecting samples."

25. In one another judgment in the case of ***Girdhari vs. State of Rajasthan*** reported in (2010) 15 SCC 576, the Hon'ble Apex Court dealt with the objection raised by the accused regarding non-compliance of section 50 of NDPS Act and rejected such objection, the relevant portion whereof may be usefully quoted herein below:-

"4. The learned counsel then argued that the mandatory requirement of section 50 has also not been complied with inasmuch as there was an error in the memo issued to the appellants as to their right of being searched by a gazetted officer or magistrate. He pointed out that in the said

memo given to the appellants instead of word "magistrate", the word "Judicial Magistrate" is used which is not the requirement of section 50 of the Act. We do notice that P.W.7 while issuing the memo to the appellants has used this word "judicial magistrate" instead of the word "Magistrate" found in section 50 of the Act. But then the learned counsel is unable to point out to us what prejudice is caused to the appellant by the usage of the word "judicial magistrate" instead of the word "Magistrate". In the absence of any such prejudice being caused to the appellants, we think this argument of learned counsel for the appellants must also fail."

26. Recapitulating facts of the case, it is found that apart from above noted circumstances on the issue of compliance of section 42 and 50 as well as arrest of appellant and recovery of contraband, the P.W.1 was not cross-examined on these factual aspects of the matter and as such, this court is satisfied that the provision of section 42 and 50 of NDPS Act has been duly complied with by the arresting police party and there is also no illegality in the arrest and the recovery from appellant.

27. With regard to the submission of non-compliance of section 52 of Narcotics Drugs & Psychotropic Substance Act, the record of the case demonstrates that there is sufficient material on record to satisfy this court about due compliance of the provision of section 52 of NDPS Act. The averment regarding compliance of section 52 of NDPS Act is available in the recovery memo and first information report itself. The P.W.1 Sub-Inspector, Gaj Ram Singh and P.W.2 Constable Ran Singh have stated in their deposition before the court that the accused appellant was informed about his right to be searched in presence of a Gazetted Officer or Magistrate and in this regard, his written consent was also taken and produced in the court and was proved by P.W.1 as Exhibit Ka-1.

28. Similarly, the submission with regard to the non-presence of independent witness is also not acceptable in as much as the presence of independent witness during search is not mandatory. Moreover in the present case, it has been stated by the prosecution witnesses that they had tried to procure public witnesses but no one came forward to become the witness of search and arrest. This statement is not improbable, in view of the fact that the accused is resident of the same vicinity, from where he was arrested. It is a matter of common knowledge that the co-villagers normally don't get ready to give evidence against another co-villager in criminal matters. Furthermore, there is no such circumstance or material available on record, which may discredit the evidence of the searching officer who is responsible government servant. In this regard, the relevant part of the judgment of Hon'ble Apex Court in the case of ***Pon Adithan vs. Deputy Director, Narcotics Control Bureau, Madras*** reported in (1999) 6 SCC 1, may be referred, which reads thus:-

"6. It was next contended by Mr. Lalit that oral testimony of a witness alone cannot be regarded as sufficient for establishing that the requirement of Section 50(1) was complied with. To support this contention he relied upon the decision of this Court in T. P. Razak v. State of Kerala, 1995 Supp (4) SCC 256. In that case the Sub-Inspector of Police had searched the accused and recovered brown sugar from him. He deposed before the Court that before the accused was searched he had asked the appellant whether he wanted to be taken before a

Gazetted Officer or a Magistrate for the purposes of search and that the accused had replied that it was not necessary. As this fact was not reflected either in the F.I.R. or in the seizure mahazar and the independent witness to the mahazar had not supported the version of the Sub-Inspector this Court held that the prosecution had failed to establish that there was compliance with the provision of Section 50(1) of the Act. As it appears from the judgment the trial Court in that case had not considered it necessary to assess the evidence of Sub-Inspector of Police since it was of the view that it was not necessary to comply with the provisions of Section 50(1). The High Court had also proceeded on the basis that the said requirement of Section 50(1) is directory and, therefore, its non-compliance was not fatal to the prosecution case. It was in the context of these facts and circumstances that this Court held:

"Having regard to the fact that the FIR and Seizure Mahazar do not mention about the appellant having been asked before the search was conducted as to whether he would like to be produced before a Gazetted Officer or a Magistrate and the further fact that P.W.1, the other independent witness, also does not state about this we are of the view that the prosecution has failed to establish that there was compliance with the provisions of Section 50 of the Act before conducting the search of the appellant."

In that case no clear finding was recorded regarding credibility of the Sub-Inspector of Police who was the only witness on the point. It was upon appreciation of the evidence led in that case that it was held that the prosecution had failed to establish that there was compliance with the provisions of Section 50(1) while conducting the search of the accused. We, therefore, cannot agree with the submission of Mr. Lalit that this Court in that case has laid down as a proposition of law that in absence of independent evidence or any other supporting documentary evidence, oral evidence of a witness conducting the search cannot be regarded as sufficient for establishing compliance with the requirement of Section 50(1)."

29. In view of totality of facts and circumstances detailed herein above, there is no merit in the submissions made by learned counsel for the appellant and this court finds that the prosecution has been able to successfully prove its case beyond reasonable doubt. Hence, the conviction of the appellant is liable to be upheld. On the question of sentence, this court is of the view that the learned Trial Court has considered the aspect of sentence in detail and has already taken a lenient view and as such, under facts and circumstances of the case, there comes no occasion to alter or reduce the sentence.

30. The present criminal appeal is devoid of merit and is dismissed accordingly.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

CRIMINAL APPEAL No. 5202 OF 2018

Arvind Parmar @ Bunty and Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Ram Datt Dauholia, Sri Nanhe Lal Tripathi.

Counsel for the Opposite Party:
G.A.

A. Sections 457, 380, 411 of IPC-Criminal appeal against conviction-FIR lodged against unknown person delay in lodging the FIR is not explained.

According to prosecution incident took place in the night of 8.8.2012 and FIR was lodged on 13/14.8.2012 as Case Crime No.1617 of 2012, under Sections 457, and 380 IPC. Subsequently, appellants arrested by the police on 14.08.2012. Recovery of the golden ornaments made from joint possession. (Para 3)

CriminalAppeal allowed.(Para 29)

Chronological list of Cases Cited:-
1. 41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,

2. AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh (E-2)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as "Cr.P.C.'), has been filed by the convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra, and Raheem Khan, against the judgment of conviction, dated 23.07.2018 and sentences awarded therein, by the Court of Additional District & Sessions Judge/Special Judge (U.P. Dacoity Affected Area), Lalitpur, in Sessions Trial No. 44 of 2013 (State vs. Arvind Parmar @ Bunty and others), arising out of Case Crime No. 1617 of 2012, under Sections 457, 380 and 411of Indian Penal Code (Hereinafter in short referred to as "IPC'), Police Station-Kotwali Lalitpur, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra and Rahim Khan have been sentenced with five years' rigorous imprisonment and fine of Rs.5,000/-, each, under Section 380 IPC, and Ten years' rigorous imprisonment, with fine of Rs.10,000/-, each, under Section 457 IPC, and three years' rigorous imprisonment, with fine of Rs.3,000/-, under Section 411 IPC. In case of default of deposit of fine of Rs.10,000, they will have to serve one year's simple imprisonment, in default of deposit of fine of Rs.5,000/-, they will have to serve six months' simple imprisonment and in default of deposit of fine of Rs.3,000/-, they will have to serve three months simple imprisonment, with further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjunctures.

2. The occurrence had been said to have taken place in the night of 8.8.2012 and a first information report was lodged on 13/14.8.2012 as Case Crime No.1617 of 2012, under Sections 457, and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Bunty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Raheem Khan, appellant no.3, said to have fled from the spot. Recovery of golden

ornaments was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred 8.8.2012, but the first information report was lodged on 14.8.2012. PW-3, Tariq Khan, had stated that the arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery of golden ornaments was said to have been made from them, while appellant no.3 was said to have fled from spot, whereas it was a false recovery and false implication. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-1, dated 8.8.2012, was got lodged by the informant, Satyendra Singh Parmar, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that on 8.8.2012, while, he, alongwith his wife, was at his in-laws house at Village Bangaria, Police Station Pali, to attend a marriage ceremony and there was none at his house, on 9.8.2012, his land-lord, Uttam Chandra Jain, informed him telephonically that locks of his rooms were broken and household goods were scattered here and there. On receiving information, he immediately rushed to Lalitpur and reached at his room where he found that Rs.80,000/-, in cash, and gold ornaments of about one Tola had been stolen. Unknown thieves opened his double bed (***Diwan***), broken locks of suitcase and hou goods were scattered here and there. Hence, this report. Case Crime No.1617 of 2012, under Sections 457 &380 IPC was got registered against unknown thieves on 13/14.8.2012.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team was on surveillance duty, informer gave information about presence of thieves near Cremation Ghat, ChandiMataTemple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and called him to Varni Four-way Junction. A Police Team led by him, with this Inspector, proceeded for ChandiMataTemple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, reisdent of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem

managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar (informant), Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others rushed to the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Kumar Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak and Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 and 413 was made.

6. On the basis of investigation, chargesheet was filed and Magistrate took cognizance over it. As offence, under Section 413 IPC was exclusively triable by the court of Sessions, this file was committed to the court of sessions, where, after hearing learned Public Prosecutor as well as learned counsel for defence. Charges for offence, punishable under Section 380, 457, 411 and 413 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Satendra Singh Parmar, informant, PW-2, Head Constable, Chetram and PW-3, Sub Inspector, Tariq Khan.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and 411 IPC and judgment of acquittal, under Section 413 IPC was passed.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. No appeal, by the State against judgement of acquittal for offence, under Section 413 IPC, is there.

11. First Information Report, Exhibit Ka-1 (Paper No. 5Ka), was formally proved by PW-1, Satendra Singh Parmar and it has specifically been lodged against unknown thieves, because this witness was not present at his home at the time of alleged occurrence of theft. In examination-in-chief, this witness has said that on 8.8.2012, while, he, alongwith his wife, was at his in-laws house at Village Bangaria, Police Station Pali, to attend a marriage ceremony and

there was none at his house, on 9.8.2012, his land-lord, Uttam Chandra Jain, informed him telephonically that locks of his rooms were broken and household goods scattered here and there. On receiving information, he immediately rushed to Lalitpur and reached at the room where he found that Rs.80,000/-, in cash, and gold ornaments of about one Tola had been stolen. Unknown thieves opened his double bed, broken locks of suitcase and goods were scattered here and there. Hence, a typed report, under his signature, was lodged which was got registered against unknown thieves on 13/14.8.2012.

While he was in search of his stolen articles, on 14.8.2012, he received information about arrest of some thieves by the Police Personnel at Cremation Ghat, Nai Basti, behind ChandiMataTemple, Lalitpur and when this witness reached there, he found four thieves, apprehended by the Police, were sitting infront of Cremation Ghat (Shamshan Ghat). Apart from him, Akhilesh Sharma, Advocate, Niraj Nayak, Smt. Gita Kushwaha and Pramod Gupta, who were also victim of theft, also reached on the spot. In their presence, Police asked names of those four thieves and on being asked, they disclosed their names as Arvind, Jitu, Rajan and Naval Ahirvar and they also disclosed that their other four accomplices fled away from the spot. From their personal search, stolen articles, golden ornaments and cash money were recovered. They disclosed that Rs.2,000/-, in cash, was stolen from the house of informant. Other persons, who reached there also identified their house-hold articles, ornaments and cash money. Recovered articles were sealed on the spot and recovery memo was also got prepared on which some persons put their signatures.

12. In cross-examination, this witness has categorically said that this report was not against any specific person, rather it was against unknown thieves. He was not aware of either Arvind @ Banty Parmar or other accused persons since before. He was informed by the Police and was called from home thenafter he reached on the spot where he has been informed that the recovery has been made. There was no signature of this witness on any paper, alleged to have been prepared on the spot, because no paper was prepared on the spot. Alleged recovered articles were not produced before this witness at the time of his testimony. No receipt of delivery of article was ever issued by this witness nor it was taken by the Investigating Officer. Meaning thereby, neither recovery was before this witness nor any specific mark of identification of alleged recovered article was there nor any recovery memo was prepared on the spot nor the same were produced before the court during trial nor this witness was previously acquainted with whereabouts of accused persons. Thus, this witness does not support prosecution case at all.

13. The other witness, PW-2, Head Constable Chet Ram, who is a formal witness, proved registration of first information report, under his signature, Exhibit Ka-3. This registration of report was against unknown accused persons for offence, punishable under Sections 457 and 380 IPC. In cross-examination, it has specifically been said this witness that the report had been lodged against the unknown thieves. There was no eye witness account nor was there any specific mark identification of any stolen articles nor receipt of stolen articles nor any paper relating to

ownership of stolen articles were produced. By whom stolen articles were being used and how much older those stolen articles were also not disclosed in the report. Reason for delay in lodging the first information report was also not disclosed. Meaning thereby, there was delay in lodging first information report of which there was no reason nor there was any specific mark of identification of stolen articles nor there was any eye witness account of incident of theft. The report was against unknown thieves. Thus, testimony of this testimony is of relevance to the prosecution and is of no avail to the prosecution.

14. PW-3 is Sub Inspector, Tariq Khan. He, in his testimony, has said that while he was posted at Police Station Kotwali, Lalitpur, on 13.8.2012, he has been entrusted with investigation of Case Crime No. 1617/2-12, under Sections 457 and 380 IPC, On pointing of informant, he inspected place of occurrence and prepared site plan and site map, Paper No. 16 Ka, Exhibit Ka-4, which were in his hand-writing and under his signature. He recorded statement of scribe of first information report and landlord Uttam Chand Jain. He also prepared site plan and site map of the place, from where accused persons were arrested, which are Paper No. 16-Ka/2 and Exhbit Ka-5. On collecting sufficient evidence against accused persons, he filed chargesheet against them on 22.8.2012, which was Exhibit Ka-6.

15. In his cross-examination, this witness has stated that case crime number 1617/12 was got registered on 13.8.2012, without naming any accused nor anyone has seen occurrence of theft nor identity of any accused was disclosed in the statement of any witness. Accused Jitu, Naval, Arvind @ Bunty, and Rajan were arrested on 15.8.2012. Arrest was made by SOG Incharge, Sunit Kumar Singh, who was accompanied by S.O., Uday Bhan Singh. No specific mark of identification of stolen articles was mentioned in the first information report nor there was any independent public witness nor there was signature of accused on the statement. He did not remember how many articles pertaining to occurrences of theft were recovered from accused persons. Before arrest of accused persons, none of the witness took their names. Neither identification parade of recovered articles nor of accused were conducted. Meaning thereby his examination-in-chief and examination-in-cross is with full of variance. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but there is neither any specific mark of identification nor there is any corresponding evidence for connecting with above offence of theft was there on record, which was a condition precedent for offence, punishable under Section 411 IPC.

16. Section 457 of Indian Penal Code (IPC) provides that "whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished

with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years'.

17. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

18. Allahabad High Court in ***41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,*** has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

19. In present case, no evidence of house breaking by night or lurking house-trespass by appellants was there, except alleged recovery of cash, but the same were not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above house-breaking or recovery of above ornament from convict-appellants.

20. Section 411 IPC provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. 21. Apex Court in ***AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh,*** has propounded ingredients of offence, under Section 411 IPC, i.e., ingredients, which prosecution has to establish: (1) that the stolen property was in possession of the accused, (2) that some person, other than accused, had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property.

22. In present case, neither property was duly identified by any

specific mark of identification nor it was established before Trial court by way of producing the same nor its identity was established in identification parade nor the same was recovered in presence of informant, who had disputed alleged preparation of recovery memo.

23. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

24. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

25. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

26. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

27. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 23.07.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

28. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

29. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.07.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PANKAJ BHATIA, J.

CRIMINAL APPEAL No. 4318 OF 2014

Ram Nath ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri D.K. Singh, Sri Girraj Singh, Sri Sharad Chandra, Ms. Zia Naz Zaidi, Sri Brijesh Sahai.

Counsel for the Opposite Party:
A.G.A.

A. Circumstantial evidence and suspicion. Prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it.(Para 17)

Criminal Appeal allowed.

Chronological list of Cases Cited:-
1. Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622

2. Sharad Birdhichand Sarda (supra) (E-2)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Girraj Singh, Advocate holding brief of Ms. Zia Naz Zaidi, learned counsel for the appellant and Ms. Manju Thakur, learned AGA for the State.

2. The appeal has been filed by Ram Nath son of Chhaviram Thakur against the judgment and order dated 28.10.2014 passed by Additional Sessions Judge, Court No.2, District Firozabad, in Sessions Trial No.125 of 2013 convicting the appellant for an offence under Section 302 IPC and sentencing him to life imprisonment and a fine of Rs.10,000/-.

3. The prosecution case, before the trial Court, was that one Bihari Lal lodged a first information report with Police Station Nagla Sindhi, District Firozabad alleging that he was the resident of village Niyamatpur, Police Station Nagla Sindhi. On 17.5.2013 his father Viddya Ram son of Jyoti Ram had gone to village Nauni and his cousin brother Rahul son of Kundan Singh and Ela alias Dinesh were at home. At about 3.00 in the morning loud cries were heard. On hearing the cries his cousin brother Rahul and uncle Kanta Prasad reached the house of Ram Nath Dhakrey and saw Ram Nath and Ayodhya Prasad, both sons of Chhaviram coming out of the house of Ram Nath Dhakhrey shouting that they had killed Sundari and Ela alias Dinesh as the love relationship in between them was not acceptable to them. He and his brother went inside Ram Nath's house and saw that his brother Ela's body was lying near the door and the body of the girl Sundari lay in the Courtyard. It was further stated that after seeing the incident, on account of fear they returned home and on the next date they gathered the courage to report the offence to the Police Station.

4. On the basis of the said written report, Exhibit Ka-2, Case Crime No.29/13 under Section 302 IPC & 3(2)5 SC/ST Act was registered against the two accused Ram Nath and Ayodhya Prasad and the Chick FIR Exhibit Ka-2 was prepared.

5. The gist of the prosecution case was recorded by P.W.4 Constable Clerk 614 Mahendra Pratap Singh in the General Diary at serial no.12 at 8.00 A.M. on 18.5.2013 Exhibit Ka-3. The investigation of the case was entrusted to P.W.6 Circle Officer Kehar Singh Rana, who after registration of the case, reached the place of incident, recorded the statements of the witness Santosh held inquest on the bodies of the deceased and got inquest reports Exhibit Ka-8 &

Exhibit Ka-9 prepared along with the related documents through S.O. Police Station Nagla Sindhi. He also inspected the place of incident and prepared the site plan Exhibit Ka-6. After completing the inquest proceeding he dispatched the dead bodies in sealed condition to the DistrictHospital for post-mortem examination.

6. The post-mortem was carried out by P.W.5, the Doctor on 19.5.2013 and in the report the injuries on the body as well as the cause of death with regard to deceased Ela alias Dinesh, the following was recorded:-

"सूजन 6 x 5 सी0 एम0 Left lumber region (2) Multiple abrasion with contusion over the front of chest 15 cm. x 10 cm. (3) Multiple abraded contusion over the upper part front of (अप0) in an area 6 cm. x 4 cm. (4) Mainly left Temporal Bone. Brain में clotted Blood है। (5) Hips में Fracture है 2 cm. ls 5 cm. left side में (6) Plura & lungs फट गये थे। (7) दाहिना फेफडा congested था। Chest cavity में blood था। अमाशय खाली था। छोटी आंत मे semi digested food था। बडी आंत मे feacal Matter (लैट्रिन के पार्टस) थे। Death due to coma as a result AMI (Head Injury)."

With regard to deceased Sundari, the following was recorded:-

"Ligature mark 35 cm. x 2 cm. situated around the neck 5 cm. Below the chin in circuling complete neck Horizontally Place. Death is due to asphyxia as a Result of Anti-mortem strangulation."

7. The Investigating Officer after completing the investigation filed charge sheet under Sections 302 IPC & 3(2)5 SC/ST Act, Exhibit Ka-7 against the appellant before the Chief Judicial Magistrate, Forizabad, who committed the accused for trial to the Court of Sessions Judge, Firozabad where the case was registered as Sessions Trial No.125 of 2013, State Vs. Ram Nath & another and made over for trial from there to the Court of Additional Sessions Judge, Court No.2, Firozabad, who on the basis of the material on record framed charge against both the accused under Sections 302 IPC & 3(2)5 SC/ST Act. The accused-appellant abjured the charge and claimed trial.

8. The prosecution in order to prove its case produced as many as seven witnesses out of whom P.W.1 Bihari Lal, P.W.2 Rahul, P.W.3 Kanta Prasad were examined as witnesses of fact while P.W.4 Constable Clerk 614 Mahendra Pratap Singh, who had prepared the Chik FIR and the relevant general diary entry, P.W.5 Dr. Manoj Kumar Katara, who had conducted the post-mortem examination on the dead bodies of the deceased Ela alias Dinesh and Km. Sundary and prepared their post-mortem reports Exhibit Ka-4 & Exhibit Ka-5, P.W.6 Circle Officer Kehar Singh the Investigating Officer of the case who had completed the investigation and filed charge sheet Exhibit Ka-7 against both the accused-appellants and the P.W.7 Inspector Ramesh Chandra Tiwari, who prepared the inquest reports of the deceased Exhibit Ka-8 & Exhibit Ka-9 and other related documents, namely specific scene, photo nash, letters addressed to Chief Medical Officer, letters addressed to R.I. and Challan Lash Exhibit Ka-10, Exhibit Ka-11, Exhibit Ka-12, Exhibit Ka-13 and Exhibit Ka-14 pertaining to deceased Ela alias Dinesh and letter addressed to Chief Medical Officer, sample seal, photo nash, letter addressed to R.I and Challan nash of deceased Sundary Exhibit Ka-15, Exhibit Ka-16, Exhibit Ka-17,

Exhibit Ka-18 & Exhibit Ka-19 were produced as formal witness.

9. The statement of the accused was recorded on 24.9.2014 under Section 313 Cr.P.C. wherein he denied all the charges levelled against him.

10. During trial, the accused-appellants in their statements recorded under Section 313 Cr.P.C. on 24.9.2014 denied all the charges levelled against them and alleged false implication.

11. The learned Sessions Judge, Court No.2, Firozabad considered the submissions as well as the depositions made before him and also took the notice of the fact that all the material witnesses had turned hostile. Learned Sessions Judge after considering the evidence of D.W.1 recorded that D.W.1 Bachan Singh had stated in the cross-examination that his house was at a distance of 12 Kos from the house of Ram Nath and based upon the said deposition alone, recorded that it appears on account of circumstances that Ram Nath came to his home in the night and on seeing both the deceased in compromising position, killed both of them. The learned Sessions Judge further recorded that when the deceased Ela alias Dinesh tried to run, they were pulled and killed and because of the same mud must have appeared on the bodies. Learned Sessions Judge also recorded that it was not plausible that a person in whose residence murder took place did not report the same to the Police which fact goes against the accused Ram Nath which establishes that Ram Nath was guilty of the murders. He further recorded that in the era of modern means of transport like motorcycle a distance of 12 Kos is not much and can be covered easily. Thus, recording that the witnesses can lie but the circumstances cannot, he proceeded to hold Ram Nath guilty of offences under Section 302 IPC and proceeded to sentence Ram Nath to life imprisonment under Section 302 IPC and also imposed a fine of Rs.10,000/- and provided that on failure to pay the fine, appellant-Ram Nath will undergo a further rigorous imprisonment of three months. Hence, this appeal.

12. It is contended by the appellant's counsel that the evidence on record does not in any way established the complicity of Ram Nath, the evidence on record does not in any way implicate the appellant with the offence. There is no positive evidence on record against the appellant to establish the charges, the theory of circumstantial evidence is without any basis as there is no chain of evidence established by the prosecution and, thus, the judgment impugned in appeal is liable to be set aside.

13. Per contra, Ms. Manju Thakur, learned Additional Government Advocate tried to defend the judgment on the ground that the bodies were recovered from the house of Ram Nath and the reasoning given in the impugned judgment cannot be faulted with and the appellant has been rightly convicted and awarded the sentence.

14. We have heard the learned counsel for the parties and perused the entire lower Court record carefully.

15. The questions to be considered by us, are whether the prosecution has been able to prove its case against the appellant beyond all reasonable doubts

and whether the appellant can be prosecuted only on the basis of circumstantial evidence as has been done by the Court below.

16. There is no dispute about the fact that the instant case is based upon circumstantial evidence and no one had seen the accused-appellants committing the murder of the deceased.

17. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,** it was held by the Apex Court that, the onus is on the prosecution to prove, that the chain is complete and that falsity or untenability of the defence set up by the accused, cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Court then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must' or "should' and not "may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused".

Thus, in a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it."

18. We now proceed to evaluate and scrutinize the evidence on record in the background of the principles propounded by the Apex Court in the case of **Sharad Birdhichand Sarda (supra)** which a Court must keep in mind while deciding a case based upon circumstantial evidence.

19. P.W.1 Bihari Lal son of Viddya Ram in the statement before the Court below categorically stated in his cross-examination that he had not seen Ram Nath killing his brother Ela alias Dinesh. He also stated that he was informed of the incident at about 6.00 A.M. in the morning that his brother Ela alias Dinesh and Sundari had been killed by someone and their bodies were lying in the house of Ram Nath. He also categorically stated that he has not seen anyone killing his brother Ela alias Dinesh and Sundari, He had no information as to who had killed them. He further stated that he was unhappy on account of death of his

brother and on the instigation of certain villagers, he had signed the report. He further categorically stated that on the date of the incident, he had not seen Ayodhya Prasad and Ram Nath coming out of the house at 3.00 A.M. He also categorically stated that he had not heard Ram Nath saying that he has killed Sundari and Ela alias Dinesh and that the Police had not enquired anything from him.

20. P.W.2, Rahul son of Kundan Singh was declared hostile by the Court. He categorically stated that he had not heard Ram Nath saying that he had killed Ela alias Dinesh and his daughter Sundari nor had he heard Ram Nath saying that he had seen both of them in compromising position which could not be tolerated.

21. P.W.3, Kanta Prasad son of Chiranji Lal, categorically stated that on the date of the incident i.e. 18.5.2013 he was not in the village Niyamtpur and further stated that he had not gone to the house of Ram Nath and he was not aware as to who had killed his nephew Ela alias Dinesh and Sundari. The Session Court declared the said witness as hostile.

22. It is noteworthy that despite the fact that P.W.1 had failed to support the prosecution case, he was neither declared hostile nor he was recalled by the prosecution for re-examination. Similarly, when P.W.2 and P.W.3 Rahul and Kanta Prasad were declared hostile and upon being confronted by the D.G.C. (Criminal) during their cross-examination with their statements recorded under Section 161 Cr.P.C. in which they had allegedly supported the prosecution case, they denied having made any such statements before the Investigating Officer, P.W.6 Kehar Singh, Investigating Officer of the case, was not confronted by the D.G.C. (Criminal) with the above mentioned portions of the testimonies of P.W.2 & P.W.3.

23. P.W.4, the Clerk of the Police Station deposed that a report was lodged with regard to the said incident on which the first information report was registered. There was no deposition with regard to the incident.

24. P.W.5, the Doctor who had conducted the post-mortem examination deposed with regard to the injuries found over the bodies which had led to death of Ela alias Dinesh and Sundari.

25. P.W.6, Sri Kehar Singh, Circle Officer deposed with regard to the lodging of the first information report and drawing of the site plan as well as the arrest of the accused. He specifically stated in his cross-examination that the dead body of Ela alias Dinesh was coated with mud (Keechad). He also in his cross-examination stated that his signatures were absent on the Panchayat Nama.

26. P.W.7, Ramesh Chandra Tiwari, Inspector in his deposition stated that the body of the victim was coated with black mud. During his cross-examination, he stated that the body of Ela alias Dinesh appeared to have been taken from one spot to the other.

27. The accused in his support had adduced the evidence of D.W.1, Bachan Singh, the brother-in-law of Ram Nath who deposed before the Court below that his daughter Neeraj was getting married on 17.5.2013 and for the said marriage, Ram Nath along with entire family had

come to their village on 15.5.2013 except Sundari, who stayed in her house and that Ram Nath and his family stayed with them till 7.00 A.M. on 18.5.2013.

28. The records of the case and deposition of witnesses as quoted herein above reveal that the deposition of P.W.1 does not in any way prove or establish the complicity of the appellant. The deposition of P.W.2, who was declared as hostile also does not in any way establish the complicity of the offence in any manner. The deposition of P.W.3 also who was declared hostile does not in any way establish the complicity of the appellant with the offence in question. The depositions of P.W.4, P.W.5 & P.W.6 as already discussed herein above do not in any manner link the appellant with the commission of the offence in question.

29. Coming to the deposition of D.W.1, which is the sole basis for the learned Sessions Judge to presume the circumstances against the appellant, in the cross-examination there is neither any suggestion nor any attempt by the prosecution to establish the circumstances which could lead to the presumption of Ram Nath going from the house of Bachan Singh to his own house at a distance of 12 Kos to commit the murder. No suggestion was put forwarded to establish that Ram Nath owned any Motorcycle or any vehicle as has been recorded in the impugned judgment. There is no suggestion to establish that Ram Nath went from the house of Bachan Singh to his own house and came back after committing the murder as has been believed by the learned Sessions Judge.

30. The evidence of the witnesses considered along with the evidence of D.W.1 do not in any way link the appellant directly or indirectly with the actual act leading to the death of the deceased. It is well settled law that suspicion however, grave cannot take place of proof and the prosecution in order to succeed, cannot succeed only on the evidence which in the realm of "may be true" but has to conform to "must be true".

31. In the present case, learned Sessions Judge has erred in convicting the appellant by adopting the theory of circumstantial evidence whereas no such circumstances were either established or even came out of the evidence deposed before the learned Sessions Judge. No attempt was made by the prosecution or by the Sessions Judge to establish that now a single person, namely the appellant could murder two adults without any weapon whatsoever. The case in hand, clearly establishes that the learned Sessions Judge has completely misdirected himself in convicting the appellant without there being any evidence on record to establish his complicity with the offence in question.

32. We have no hesitation in holding that the prosecution has failed to establish its case against the appellant beyond all reasonable doubts.

33. The appeal is allowed. The judgment and order dated 28.10.2014 passed by Additional Sessions Judge, Court No.2, District Firozabad, in Special Sessions Trial No.125 of 2013, convicting the appellant for an offence under Section 302 IPC and sentencing him to life imprisonment and a fine of Rs.10,000/-, is set aside. The appellant Ram Nath is acquitted of all the charges framed against him. He shall be discharged forthwith. The appellant is in jail, he shall be

released forthwith, if he is not wanted in any other case. However, he shall comply with the mandatory requirement of provisions of Section 437-A Cr.P.C.

34. There shall be no order as to costs.

35. Let a copy of this judgement be sent to the learned Sessions Judge, Firozabad for ensuring compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

CRIMINAL APPEAL No. 5207 OF 2018

Arvind Parmar @ Banti Raja and Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Datt Dauholia, Sri Nanhe Lal Tripathi.

Counsel for the Opposite Party:
A.G.A.

Section 457 IPC. The accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing.

If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.(Para19)

This Criminal Appeal allowed.

Chronological list of Cases Cited:-

41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh. (E-2)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as "Cr.P.C.'), has been filed by the convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra, and Rahim Khan, against the judgment of conviction, dated 24.07.2018 and sentences awarded therein, by the Court of Additional Sessions Judge/Special Judge (U.P. Dacoity Affected Area Act), Lalitpur, in Sessions Trial No. 48 of 2013 (State vs. Arvind Parmar @ Banti Raja and others), arising out of Case Crime No. 701/2012, under Sections 457, 380 and 411 of Indian Penal Code (Hereinafter, in short, referred to as "IPC'), Police Station- Kotwali, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra and Rahim Khan have been sentenced with five years' rigorous imprisonment and fine of Rs.5,000/-, each, under Section 380 IPC, and Ten years' rigorous imprisonment, with fine of Rs.10,000/-, each, under Section 457 IPC, and three years' rigorous imprisonment, with fine of Rs.3,000/-, under Section 411 IPC. In case of default of deposit of fine of Rs.10,000, they will have to serve one year's simple imprisonment, in default of deposit of fine of Rs.5,000/-, they will have to serve six months' simple imprisonment and in default of deposit of fine of Rs.3,000/-, they will have to serve three months simple imprisonment, with

further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjunctures.

2. The occurrence had been said to have taken place on 7.4. 2012 and a first information report was lodged on 17.4.2012 as Case Crime No. 701 of 2012, under Sections 457 and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Bunty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Rahim Khan, appellant no.3, said to have fled from the spot. Recovery of golden ornaments was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred 7.4.2012, but the first information report was lodged on 17.4.2012. As per statement of PW-4, S.I., Sunit Kumar, arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery of golden ornaments was said to have been made from them, while appellant no.3 was said to have fled from spot, whereas it was a false recovery and false implication as there was no credible evidence against appellants, constituting offence under Sections 457, 380 IPC. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-1, dated 17.4.2012, was got lodged by the informant, Smt. Prem Lala Jain, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that on 6.4.2012, she was at Bomby, in connection with the treatment of her ailing husband and her son was at home, and while, her son, went to Chanderi at about 01.00 PM, locking the home, her brother-in-law, Nilesh Kumar Jain, came to her house on 7.4.2012 where he has seen that the locks are broken. He gave information at the Police Station and communicated to the informant telephonically. Informant, after coming to Lalitpur, on 8.4.2019, found that her two golden Kangan (Bracelet), about 2 Tola, three rings, about 1.5 Tola, two ear rings, one Mangalsutra, about 2 Tola, Bangles of 8 Guria, 4 pair, about 2 Tola, silver anklate, about 500 gram, 4 Vintex Bangles, one wad of Rs.10/- currency notes, in total Rs.1,000/-, 400 Kaldar, one Wad (*Gaddi*) of 10 rupees currency notes and change money amounting to Rs.3,00/ were stolen. Hence, this report. Case Crime No.701 of 2012, under Sections 457 & 380 IPC was got registered against unknown thieves on 17.4.2012.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team was on surveillance duty, informer gave information about presence of thieves near Cremation Ghat, ChandiMataTemple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District

Lalitpur, Sri Uday Bhan Singh and called him to Varni Four-way Junction. A Police Team led by him, with this Inspector, proceeded for ChandiMataTemple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, reisdent of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar (informant), Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others rushed to the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Kumar Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak and Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Rahim. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 was made.

6. On the basis of investigation, chargesheet was filed and after hearing learned Public Prosecutor as well as learned counsel for defence, charges for offence, punishable under Section 380, 457, 411 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Smt. Premlata Jain, informant, PW-2, Constable, Suravali Yadav, PW-3, Varun Pratap Singh, Sub Inspector, PW-4, Sunit

Kumar, Sub Inspector, PW-5, Sub Inspector, Rakesh Raj Gautam, PW-6, Head Constable, Radheshyam Sachan and PW-7, Sub Inspector, Man Singh Pal.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and 411 IPC.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. First Information Report, Exhibit Ka-2, was formally proved by PW-1, informant, Smt. Premlata Jain, and it has specifically been lodged against unknown thieves, because this witness was not present at her home at the time of alleged occurrence of theft. In examination-in-chief, this witness has said that it so happened that, while on 6.4.2012, the informant was away from her home at Bombay, leaving behind her son at home, for the last one and a half months, in connection with the treatment of her husband, who was undergoing treatment for Cancer, her son, locking the home went to her paternal aunt's home (Bua-father's Sister), at Chanderi, Madya Pradesh, on next day, i.e. 7.4.2012, her brother-in-law (Devar), Nilesh Jain, found locks put on the door of her home broken. He gave information of this incident at the concerned Police Station as well as to the informant telephonically. On coming back to her home on 8.4.2012, she found her house hold articles scattered here and there and occurrence of theft by unknown thieves took place. Two golden Kangan (Bracelet), about 2 Tola, three rings, about 1.5 Tola, two ear rings, one Mangalsutra, about 2 Tola, Bangles of 8 Guria, 4 pair, about 2 Tola, silver anklate, about 500 gram, 4 Vintex Bangles, one wad (*Gaddi*) of Rs.10/- currency notes, in total Rs.1,000/-, 400 Kaldar of 10 rupees and change money amounting to Rs.3,00/ were stolen by unknown thieves. After 4-5 months of the incident, Police claimed to have recovered one Mangalsutra, one golden garland and one golden ring from some thieves, which she identified, whereas in cross-examination she has said that recovered articles were not produced before her in the court nor she has given any specific mark of identification of Mangalsutra. When the Police made recovery, she had seen the recovered articles in the office of Superintendent of Police. When the recovery was made and who made recovery was not known to her nor she identify any thief nor she has ever seen them. She did not know any of the accused persons nor she was aware about the name and address of them. Stolen articles were not produced before her nor has she seen anyone committing theft. Meaning thereby, neither there was any specific mark of identification of stolen articles nor any recovery memo was prepared on the spot nor the same were produced before the court during trial nor this witness was previously acquainted with accused persons. Thus, this witness does not support prosecution case at all.

11. PW-2 is Constable Suryavali Yadav, who registered the first information report, has formally proved registration of registering first information report. He, in his, examination-in-chief, has stated that, while he was posted at

Police Station Kotwali, Lalitpur, as Head Moharir, on 20.4.2012, he has registered first information report of Case Crime No. 701/12, under Section 380 and 457 IPC, against unknown thieves, on the application of Smt. Premlata Jain, Wife of Sunil Kumar Jain, Resident of Gandhi Nagar, Lalitpur, which was in his hand-writing and under his Signature. First information report is paper no. 5Ka and exhibited as Exhibit Ka-2. In his cross-examination, this witness, has said that on the day of registration of first information report, he was on duty. He registered first information report on the basis of the order of the Station Officer, passed on the application of the informant. Informant was present thereat. The report was against unknown persons. From the testimony of this witness, registration of first information report against unknown persons is proved.

12. PW-3 is Sub Inspector Varun Pratap Singh. This witness, in his testimony, has stated that on 27.8.2012, while he was posted as Chowki Incharge of Nehru Nagar Chowki, under Kotwali Lalitpur and was on duty with the Inspector, Kotwali, Lalitpur, at 7.30 PM, on that very day, they arrested one thief at at a nearby place of Juvenile Care Centre, Nehru Nagar, who disclosed his name Shivam Tiwari. On his personal search, Rs.5,000/ cash was recovered. He confessed infront of them that he, alongwith his other accomplices, committed various occurrences of theft and recovered amount was given to him as his share. This recovered article was stolen from the house of Sunil Kumar Jain, whereas in his cross-examination, this witness has said that he did not remember time entered in the G.D. regarding his departure from Police Chowki as well as arrival at the Police Chowki. He also did not remember that how many copies of recovery memo were prepared or where recovery memo was prepared and how many persons signed recovery memo or what was the boundary mentioned in recovery memo. On what date, which occurrence of theft was committed by the accused persons is not known to him. Identification proceeding of the recovered articles was not conducted. Meaning thereby, testimony of this witness, which is full of contradictions and discrepancies, is not worth credit and is of no avail to the prosecution.

13. PW-4 is Sub Inspector Sunit Kumar. He, in his examination-in-chief, has stated that, while being posted as Incharge, SOG, Lalitpur, on 14.8.2012, he, alongwith his Police Team, and with the help of Police personnel of Kotwali, on the information, received from the informer, have arrested four persons, from whom ornaments of gold and silver as well as cash were recovered. Those accused persons have confessed to have committed various thefts in the District of Lalitpur. On the spot, one Mangalsutra and one golden ring, stolen from the house of Smt. Premlata Jain, Informant, were recovered, which were identified by Smt. Premlata Jain, on the spot. Recovery memo, Exhibit Ka-4, was prepared by him on the spot, which was got signed by the accused persons and the police personnel, accompanying him. Arrested persons disclosed their names, Arvind @ Banti, Jitu Parihar, Rajan and Nava, whereas in his cross-examination, this witness has said that name of the accused persons was not mentioned in any of the first information reports nor was there any eye witness account of occurrence of

theft. Identification proceeding of the recovered articles was not conducted. He did not remember, whether copy of the recovery memo was given to the accused persons or not. Who gave information to the informant of the first information report, about arrest and recovery, was not known to him. Recovered articles was not produced before him. Meaning thereby, there is discrepancies and contradictions between examination-in-chief and cross-examination of this witness, which is also at variance and as such testimony of this witness is not credible and not credit worthy at all.

14. PW-5 is Sub Inspector, Rakesh Raj Gautam, who, in his examination-in-chief, has said that, while he was posted as Sub Inspector at Kotwali, Lalitpur, on 22.8.2012, he has been entrusted with the investigation of Case Crime No.701 of 2012, under Sections 457 and 380 IPC in which final report was submitted by the previous Investigating Officer, but an information regarding recovery of articles, pertaining to this incident of occurrence of theft, was received by him. He got the statements of accused persons recorded. He also got statement of Incharge, SOG, Sunit Kmar, who arrested accused persons, recorded. He also got statements of other police persons recorded. After collecting evidence, he filed chargesheet, under Sections 457, 380, 411 and 413 IPC, which is Paper No.3Ka, Exhibit Ka-5, in his handwriting and under his signature. In his cross-examination, this witness has stated that he did not get any identification proceeding of the accused conducted nor of recovered articles. He did not remember entries made in the General Diary (G.D) nor the same were produced before him nor he recollects number of the G.D. nor recovered articles were produced before him. Meaning thereby, testimony of this witness is of no relevance to the prosecution and is shaky as such is of no avail to the prosecution.

15. PW-6 is Head Constable, Radheshyam Sachan. This witness, in his examination-in-chief, has said that this case was partly investigated by Sub Inspector Nanhe Lal Yadav. Site Plan, Exhibit Ka-6, which is on record, was in his writing and under his signature. He remained posted with him and, therefore, he identified his signature and handwriting, whereas in his cross-examination, he denied of site plan being prepared before him. Since, G.D. containing entry of his departure and arrival was not before him, he was not able to tell whether he went on the spot or not. He could not tell as to whether the site map has been rightly prepared or it was incorrect. He also did not remember, the period during which Nanhe Lal Yadav was posted with him. He said that it is wrong to say that he is not aware of handwriting or signature of Nanhe Lal Yadav. There are contradictions in the testimony of this witness. Moreover, the Testimony of this witness does not appear to be of any relevance to the prosecution.

16. PW-7 is Sub Inspector, Man Singh Pal. He, in his testimony, has stated that while he was posted at Nai Basti, under P.S. Kotwali, Lalitpur, on 17.9.2012, he accompanied his Station Officer, Uday Bhan Singh, in connection with search of accused of various occurrence of theft, on the information of informer, reached at Govind Sagar Dam, and found a suspected person sitting thereat, whom informer pointed to be Banti @ Rajan. After rounding him up, he

has been apprehended at about 23.40 PM. On personal search being made, anklates of silver, about 250 gms, were recovered from him, which, he confessed to have been stolen from the house of Niraj Nayak and he got those anklates as share of that theft. Recovery memo, on the dictation of Station Officer, was got prepared. Niraj Naiyak was called on the spot and recovered article was got identified by him. On 27.7.2012, also, while he, alongwith his Station Officer, was on round of the area in connection with search of accused of occurrence of theft, on an information of the informer, they reached at Juvenile Centre Triway-junction where a suspect was seen and on pointing of the informer him to be Shivam Tiwari, Police Team rounded him up and arrested at about 19.30 PM. On personal search being made, Rs.5,000/- in cash, one ring of about 1.5 Tola and one Silver Box (***Dibiya***) was recovered, which, he confessed to have got as share of theft, which he committed, alongwith his other accomplices, in the house of Niraj Nayak. Niraj Nayak has identified the recovered article on the spot, alongiwht Kalyan and and Sanjay Tiwari. Recovery memo was got prepared, on the dictation of Station Officer, by Varun Pratap Singh, which was readover and signature of other Police personnel was got. While, in his cross-examination, this witness has stated that he did not recollect case crime number. In first information report, there was no specific mark of identification of stolen articles and identification proceeding was not conducted as per law. There was no independent public witness nor any accused was named in the report nor occurrence of theft was seen by the informant nor any mark of identification of accused was given. There was no independent public witness of recovery. He did not remember whether copy of recovery memo was got prepared or not. Independent public witnesses were asked to become witness, but their names and address were not mentioned in the recovery memo nor he was able to tell who were asked to give evidence. Meaning thereby, this witness neither was able to tell case crime number nor there was any specific mark of identification of articles stolen nor any identification proceeding was conducted in accordance with law nor there was any independent public witness either of occurrence of theft or of recovery, so made, by the Police, resulting testimony of this witness not worth credit and full of contradiction and at variance as well and as such does not support case set up by the Prosecution.

So far as testimony with regard to arrest of Banti @ Rajan and Shivem Tiwari by th Police is concerned, since they are not appellants in this appeal, hence, testimony of this witness is of not much relevance to the prosecution in this Appeal.

17. Examination-in-chief and cross-examination of the witnesses produced by the prosecution are full of variance and contradictions. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but there is neither any specific mark of identification nor there is any corresponding evidence for

connecting with above offence of theft was there on record, which was a condition precedent for offence, punishable under Section 411 IPC.

18. Section 457 of Indian Penal Code (IPC) provides that "whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years'.

19. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

20. Allahabad High Court in ***41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,*** has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

21. In present case, no evidence of house breaking by night or lurking house-trespass by appellants was there, except alleged recovery of cash, but the same were not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above house-breaking or recovery of above ornament from convict-appellants.

22. Section 411 IPC provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a

term which may extend to three years, or with fine, or with both.

23. Apex Court in ***AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh,*** has propounded ingredients of offence, under Section 411 IPC, i.e., ingredients, which prosecution has to establish: (1) that the stolen property was in possession of the accused, (2) that some person, other than accused, had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property.

24. In present case, neither property was duly identified by any specific mark of identification nor it was established before Trial court by way of producing the same nor its identity was established in identification parade nor the same was recovered in presence of informant, who had disputed alleged preparation of recovery memo.

25. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

26. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

27. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

28. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

29. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 24.07.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

30. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

31. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

CRIMINAL APPEAL No. 1000 OF 2012

Ashok ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sunil Kumar Pathak, Sri Abhishek Mayank, Sri Ashish Upadhyay, Sri R.P. Dwivedi, Sri S.A. Ansari, Sri Sanjay Sharma, Sri Sanjay Sitanshu.

Counsel for the Opposite Party:
A.G.A.

A. Section 2 Sub-section (VIIa) "Commecrial Quantity",- the quantity in the head of small quantity upto 5 gm. and commercial quantity above 250 gms. for "Heroin". (Para 7)

B. Sudden occurrence of recovery of huge quantity of Smack (Heroin) from convict-appellant. Hence, no question of compliance of Section 42 or 43 of the Act, power of seizure and arrest in public places, arises. (Para 10)

C. Non-compliance of Section 50 of N.D.P.S. Act. Section 50 is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the N.D.P.S. Act.(Para 11 & 11(2))

Criminal Appeal dismissed.

Chronological list of Cases Cited: -

1. Ajmer Singh Vs. State of Haryana (2010) 3 Supreme Court Cases 746 in Para 14,

2. Jarnail Singh Vs. State of Punjab (2011) 3 Supreme Court Cases 521 in Para 11 and 12,

3. Ajmer Singh Vs. State of Haryana (2010) 3 Supreme Court Cases 746 in Para Nos. 19 to 21 (E-2)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal, under Section 374(2) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'), has been filed by Ashok, convict appellant, against the judgment of conviction and sentence made therein, dated 17.2.2012, passed by Court of Additional Sessions Judge, Court No. 5/Special Judge, Agra, in Special Sessions Trial No. 62 of 2005, arising out of Case Crime No. 401 of 2004, State Vs. Ashok, under Section 21 of N.D.P.S. Act (hereinafter referred to as 'Act'), Police Station Jagdishpura, District Agra, wherein convict-appellant Ashok Kumarhas been convicted for offence punishable under Section 21 of Act and has been sentenced with rigorous imprisonment of ten years and fine of Rs. 1 lac and in default two years additional rigorous imprisonment with a direction for adjustment of previous incarceration in this very case crime number, with this contention that trial Court failed to appreciate facts and law placed before it. Police arrested convict appellant from his house on 5.11.2004, for which instant telegram, complaining fact of arrest from home, to higher authorities, was sent by his wife and mother on 5-6.11.2004. Thereafter, police challened appellant on 7.11.2004 with accusation of recovery of 800 gms. of 'Heroin' from his possession whereas no such recovery was there nor prosecution could prove its case beyond

doubt. But trial Court failed to appreciate facts and law, thereby, passed impugned judgment of conviction for offence punishable under Section 21 of Act. A sentence, as above, was passed, which was excessive and deterrent. There was no compliance of provision of Section 42 of the Act. The alleged place of recovery was from busy place, with a lot of rush in that area but no public witness was taken in alleged recovery memo or First Information Report. No compliance of Section 50 of Act was made. Hence, this appeal, with prayer for setting aside the impugned judgment and sentence, made in it.

2. From the very perusal of impugned judgment and record of trial Court, it is apparent that First Information Report (Ex.Ka-2) was got lodged at Police Station Jagdishpura for offence punishable under Section 8/22 of Act, against Ashok KumarSingh son of Om Prakash Thakur, resident of 27/166 Teela Gokulpura, P.S. Lohamandi, District Agra, the then residing at House No. 271, Puspanjali Colony, Dayal Bagh, P.S. New Agra, District Agra. On 7.11.2004 at 17:00 P.M., on the basis of recovery memo (Ex. Ka-6), prepared by Station Officer Manoj Kumar Mishra, Police Station Jagdishpura, District Agra, having mention that on 7.11.2004, S.O. Manoj Kumar Mishra, along with his police team, including Sub-Inspector Pratap Singh, Sub-Inspector Bhavar Singh, Constable Devendra Kumar and Constable Arvind Kumar, by Government jeep registration No. U.P.83 G-0007, with official driver Durga Prashad, vide G.D. Entry No. 30 at 12:10 P.M., was present in area of Bodla Avas Vikas Colony, Pratap Nagar and when team proceeded towards Awadhpuri road, one person who was under suspicious circumstances, ran towards back side. He was chased and was apprehended at 14:30 P.M. in the area of Mohalla Shanti Nagar. Upon query, he was Ashok Kumar Singh son of Om Prakash Thakur, resident as above and he confessed to be with possession of smack, for which he tried to run from spot. He was told for summoning some Gazetted Officer or Magistrate for his search but he refused and agreed to be searched by this team itself. Member of police team took their personal search and ensured that nothing incriminating is with any of them. Thenafter, personal search of Ashok Kumarwas conducted, in which a plastic bag having print "Novelty Matching Center" over it was recovered from his right hand, which was with two packets, wrapped in a newspaper and kept in a polythene, of smack with five small packets of same, wrapped in paper. This was with smell of 'Smack'. The two packets were also with smell of smack. Balance and weight, for weighing the same, were tried to be obtained from nearby. But as there were no shops nearby, hence, could not be available. Hence, it was weighed by keeping it over hand and was perceived to be of about 750 gms. In those five small packets about 50 gms. Upon query, accused confessed for sale of those smack in small packets, in which small packets were of pure smack and big two packets were with lesser concentration of smack, which was being sold to people. The recovered smack was kept in same wrapper and polythene. Thenafter wrapped in a clothe, stitched and sealed on spot; a specimen seal was prepared. Offence, punishable under Section 8/22 of N.D.P.S. Act was made, hence, he was taken in custody. Recovery memo was got scribed by Sub-Inspector Pratap Singh, under dictation of

this informant. All members of team put their signature over it and accused, along with recovered articles and recovery memo, with specimen seal, was brought at police station. Where this case crime number was got registered. Investigation resulted submission of charge-sheet for offence punishable under Section 8/21 of N.D.P.S. Act. Court of Special Judge N.D.P.S. Act, after hearing learned public prosecutor and learned counsel for defence, vide order dated 15.9.2006, levelled charge against Ashok Kumarfor offence punishable under Section 8/21 of N.D.P.S. Act, for alleged recovery of 800 gms. of smack (heroin) at 14:30 P.M. Of 7.11.2004 from Mohalla Shanti Nagar within the area of Police Station Jagdishpura, District Agra. Charge was read over and explained to accused. Who pleaded not guilty and claimed for trial.

3. Prosecution examined PW-1 Constable-clerk Pratap Singh, PW-2 Constable Brijesh Kumar, PW-3 Sub-Inspector Manoj Kumar Mishra, PW-4 Constable Pratap Singh Rana, PW-5 Chauthiram Yadav, PW-6 Sub-Inspector Chandra Bhushan.

4. For having explanation, if any, of accused Ashok Kumarfor incriminating evidence led by prosecution, his statement, under Section 313 of Cr.P.C., was got recorded by Trial Judge. Accused answered alleged recovery to be wrong. Testimony of PW-2, not under his knowledge but being false. Entire evidence led by prosecution and the alleged occurrence of recovery, including investigation as well as submission of charge-sheet, was on incorrect fact. It was an accusation because of animosity.

5. In defence, DW-1 Desh Raj, DW-2 Kamod Singh, DW-3 Ram Singh and DW-4 Sushila @ Shashi were examined. Learned trial Judge, after hearing argument of learned public prosecutor as well as learned counsel for defence, passed impugned judgment of conviction for offence as above and after hearing, passed impugned sentence, written as above, against which this appeal.

6. Learned counsel for the appellate vehemently argued that convict appellant was in jail for about seven years, against award of sentence of ten years, whereas the weight of the recovered 'Smack' was not on the basis of balance weight rather it was on the basis of weighing and presuming after keeping over hand. It was not sure as to whether it was a commercial quantity or a quantity said to be in between small and commercial quantity. The weight of 800 gms. including wrapper and polythene weight was held to be 800 gms. in report of Forensic Science Laboratory. But it is not proved by prosecution as to whether entire material was sent for chemical analysis or a part thereof was sent for its analysis. Hence, the first argument is for assailing judgment of conviction and the second is regarding quantum of sentence. Court may reduce quantum of sentence to period undergone which is about seven years.

7. The Narcotic Drugs and Psychotropic Substances Act, 1985, Act No. 61 of 1985, with preamble, is an Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations, relating to Narcotic Drugs and Psychotropic Substances, to provide for the forfeiture of the property derived from, or used in, illicit traffic in Narcotic Drugs and Psychotropic Substances, to

implement the provisions of the International Convenction on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. This Central Legislation was made in operational from 16th September, 1985. Though, vide amendment inserted by Act No. 9 of 2001, with effect from 2.10.2001, Section 2 Sub-section (VIIa) "Commecrial Quantity", in relation to narcotic drugs and psychotropic substances was added in defination clause, which means, any quantity greater than the quantity specified by the Central Government by notification in the official Gazette. It was made by Ministry of Finance "Department of Revenue" vide Notification No. S.O.1055(E) dated 9.10.2001, published in Gazette of India (extraordinary) Part II, Section (II) dated 19.10.2001 at pages 15 to 32, which provides the quantity in the head of small quantity upto 5 gm. and commercial quantity above 250 gms. for "Heroin" (Diacetylmorphine) (commonly known as smack). Meaning thereby, the samll quantity is upto 5 gms. and commerical quantity is above 250 gms. of Heroin. "In between", is a quantity, contravention of each of these three categories shall be punishable. In between, Section 21 has been amended vide substituion by Act No. 9 of 2001, with effect from 2.10.2001 for punishment of contravention in relation to manufactured drug and preparation - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter- State, exports inter- State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable -

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

8. Meaning thereby, Court is with no option to give smaller sentence than given in the Act by Legislation. For a commercial quantity, the minimum sentences has been give to be not less than ten years but it may extend upto 20 years, with a fine, which shall not be less than 1 lac rupees, but, which may extend to 2 lac rupees and Court, by giving a reasoned judgment, may, for reasons, to be recorded, impose a fine exceeding 2 lac rupees. As in the present case the recovery is of 800 gms. of Heroin (Smack) which is about more than three times of limit which brings in commercial quantity, and for this there is mandatory punishment not less than ten years, with fine not less than 1 lac, and the same has been awarded by trial Judge, hence, under the legislation as has been enacted by legislation, any bargain, as has been argued by learned counsel for the convict appellant, cannot be accepted by the

Court. Hence, the argument advanced by learned counsel for period undergone i.e. seven years already suffered by convict appellant to be treated as the punishment, for offence of having Heroin, much more than heavy amount of commercial quantity, is not permissible under law and this is the lowest permissible sentence awarded by trial Court. Hence, this argument of reducing sentence is not tenable.

9. Regarding non compliance of Section 42 of Act, as vehemently argued by learned counsel for the appellant, it is to be mentioned that Section 42 substituted by Act No. 9 of 2001, with effect from 2.10.2001, provides power of entry or authorization -

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para- military or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and subset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detail and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.

10. Meaning thereby, this provision is Power of entry, search, seizure and arrest without warrant or authorization, in case of any information, previously obtained regarding commission of offence, punishable under this Act for fulfilling ingredients, written as above. Whereas in the present case, it was not a case of previous information or receiving of information, given by someone, prior to such arrest. Rather, it was a case in which police team, led by Station Officer Manoj Kumar Mishra, while being in

routine surveillance duty in its area of P.S. Jagdishpura, found one person who displayed his hesitation, on seeing police party, PW-1 and his team became suspicious. On seeing police personnel, appellant tried to ran away from the scene - it was not a case where prosecution claimed that appellant was apprehended on the basis of any earlier information having been given by any secret informer - it was also not a case of trap, rather it was a sudden occurrence of recovery of huge quantity of Smack (Heroin) from convict-appellant. Hence, no question of compliance of Section 42 or 43 of the Act, power of seizure and arrest in public places, arises.

11. Non compliance of Section 50 of Act has been vehemently argued by learned counsel for appellant. In order to appreciate the contention raised by learned counsel appearing for the appellant with regard to non compliance of Section 50 of the Act, it is necessary to notice Section 50 of the Act. It reads as under:

50. Conditions under which search of persons shall be conducted:

(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43 of the Act, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

11 (1). Apex Court in **Ajmer Singh Vs. State of Haryana (2010) 3 Supreme Court Cases 746 in Para 14** has propounded as below:

"The object, purpose and scope of Section 50 of the Act was the subject matter of discussion in number of decisions of this Court. The Constitution Bench of five Judges of this Court in the case of State of Punjab v. Baldev Singh, [(1999) 6 SCC 172], after exhaustive consideration of the decision of this court in the case of Ali Mustaffa Abdul Rahman Moosa vs. State of Kerala, [(1994) 6 SCC 569] and Pooran Mal vs. Director of Inspection (Investigation), New Delhi &Ors., [(1974) 1 SCC 345], have concluded in para 57 :

(I) When search and seizure is to be conducted under the provision of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the

possession of the illicit article, recovered from his person, during such search.

(IV) The investigation agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non compliance of the procedure i.e. informing the accused of the right under sub-Section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

11(2). Learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc., carried by the person and its non compliance could be fatal to the proceeding initiated under the Act. Apex Court in Ajmer Singh (supra) has held "We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of *Section 50* of the N.D.P.S. Act is relevant only in a situation where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of *Section 50* of the N.D.P.S. Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, this Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue, in our considered opinion, is no more res-integra in view of the observations made by this court in the case of Madan Lal vs. State of Himachal Pradesh, 2003 7 SCC 465. The Court has observed; as follows:

16. "A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (See Kalema Tumba vs. State of Maharashtra and Anr.(1999) 8 SCC257, State of Punjab vs. Baldev Singh(1999) 6 SCC 172 and Gurbax Singh vs. State of Haryana (2001) 3 SCC 28. The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."

11(3). In the present case, the recovery is from a plastic bag having printed "Novelty Matching Centre" over it and it was being carried in the right hand of the convict-appellant. There was no recovery from his personal search, rather it was recovery from a container which was being carried by convict-appellant, for which there was no requirement for application of Section 50 of the Act. But

as personal search too was taken, as was written in Ex. Ka-1 Recovery Memo. Hence, on the basis of judgment of Apex Court given in State of Rajasthan Vs. Parmanand & another AIR 2014 SC 1384, the observance of Section 50 of Act was to be taken into consideration. In the present case, it has specifically been written in First Information Report Ex. Ka-2, got lodged on the basis of recovery memo Ex. Ka-6 that "पकड़े गये व्यक्ति का नाम पता पूछते हुये भागने का कारण पूछा गया तो अपना नाम अशोक एस/ओ श्री ओम प्रकाश ठाकुर आर/ओ म0नं0 27/166 टोला गोकुल पुरा, थाना लोहामंडी आगरा हाल पता म0नं0 21 पुष्पान्जली कालोनी दयालबाग थाना न्यू आगरा, आगरा बताया तथा भागने का कारण अपने पास स्मैक होना बताया। अभि0 के पास स्मैक की जानकारी होने पर अशोक से कहा गया कि जामा तलाशी हेतु किसी राजपत्रित अधिकारी या मजिस्ट्रेट को बुलवाया जाये तो मांफी मांगते हुए बोला कि किसी को बुलवाने की आवश्यकता नहीं है। नहीं हम कहीं तलाशी के लिये जायेंगें आप लोगों ने जब हमें रंगे हाथ पकड़ लिया है तो आप पर हमें पूरा भरोसा है। आप ही जामा तलाशी ले लो।""When cause for this running and hesitation from police was asked, Ashok Kumarson of Om Prakash Thakur, resident of Houe No. 27/166 Teela Gokulpur, P.S. Lohamandi, Agra, presently residing at House No. 21, Puspanjali Colony, Dayal Bagh, P.S. New Agra, Agra, shown sign of fear as he was having Smack with him, for which he was running, after this knowledge of having Smack, he was asked for getting his personal search made before the Gazetted Officer or Magistrate summoned for, he requested excuse and mentioned that there is no need for summoning any other nor he will go anywhere else for his personal search as you have apprehended red handed, there is full faith upon you. You yourself take personal search.... (English translation by this Court itself).

11(4). The same is contention in testimony of PW-3, Sub-Inspector Manoj Kumar Mishra, and PW-4 Sub-Inspector Pratap Singh Rana. PW-3 Sub-Inspector Manoj Kumar Mishra, in his testimony, has categorically said in Examination-in-Chief "भागने का कारण पूछने पर अशोक ने बताया जो आज हाजिर अदालत है। भागने का कारण पूछने पर अशोक ने बताया कि उसके पास स्मैक है इसलिए वह हम हम लोगों का देखकर भागा था। इस पर हमने अभि0 अशोक से कहा कि अब आपकी तलाशी किसी राजपत्रित अधिकारी व मजिस्ट्रेट के समक्ष करायी जायेगी तो अशोक ने हमसे कहा था कि जब आपने हमको पकड़ ही लिया है तो हमें अब आपके ऊपर पूरा विश्वास है और हमें किसी के समक्ष तलाशी के लिए नहीं जाना। आप ही हमारी तलाशी ले लीजिए।" "when cause for running after seeing police team, was questioned, Ashok Kumaranswered that he is with Smack that is why he hesitated and ran away from police. Upon this, we asked Ashok Kumarfor his personal search in presence of some Gazetted Officer or Magistrate, but he refused with this saying that he has been apprehended by Police team, upon whom he has full faith. He will not go to someone else for his personal search and this Police team, itself may take personal search... (English translation by this Court itself). No cross-question upon this testimony is there in Examination-in-Cross, made by learned counsel for defence and this statement of Examination-in-Chief is unrebutted in cross-examination. The same is situation in regard to testimony of PW-4 Sub-Inspector Pratap Singh Rana. This is very well there in the testimony of Investigating Officer PW-5 Sub-Inspector Chauthiram, in his cross-examination. This was put in question Nos. 3, 4 and 5, recorded under Section 313 of Cr.P.C., and except a wrong sequence of occurrence no statement about non-compliance of Section 50 or not giving that option or telling about this right, was said by accused. Hence, in over all appreciation, it is apparent that provision of Section 50 was fully complied with.

12. The next argument was regarding absence of any independent public witness. Apex Court in **Jarnail Singh Vs. State of Punjab (2011) 3**

Supreme Court Cases 521 in Para 11 and 12 has propounded that none of independent witnesses in circumstances when they are not available or not agree to be witnesses, is not fatal to the prosecution. In above case, the fact involved was that police personal had noticed odd behaviour of appellant Jarnail Singh, when he was walking towards them on a path which led to the village - it was display of hesitation by appellant, on seeing police party, that police officer became suspicious - on seeing police personal, appellant tried to run away from the scene - it was not a case where prosecution claimed that appellant was apprehended on the basis of any earlier information having been given by any secret informer - it was also not a case of trap and Court held that in such circumstances it would not be possible to held that appellant was falsely implicated.

13. In the present case, prosecution has offered a plausible explanation with regard to non joining of independent witnesses, It was clearly stated by PW-3 and 4 that the place, from where, appellant was apprehended was with public, going through above path, in fact, efforts were made to bring independent public witness, but this reluctance, on the part of the persons, was neither strange nor unbelievable. Generally, people belonging to the same locality could not unnecessarily want to create bad relation/enmity with any other co-resident. Especially, would feel insecurity from such person, having been accused of committing a crime.

14. Apex Court in **Ajmer Singh Vs. State of Haryana (2010) 3 Supreme Court Cases 746 in Para Nos. 19 to 21** has held that when there is sufficient testimony of prosecution witnesses on record that efforts were made by the Investigating Party to include independent witnesses at the time of recovery but none was willing and it is true that charge under N.D.P.S. Act is serious and carries onrush circumstances. The minimum sentence prescribed under the Act is imprisonment of ten years and a fine. In this situation, it is normally expected that there should be independent evidence to support the case of prosecution. However, it is not an unavoidable rule. Therefore, in the peculiar circumstances of the case, it may not be fatal to prosecution. Court in Para No. 20 has said "We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery, made, would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable, after taking due care and caution, in evaluating their evidence." In the present case, PW-3 and PW-4 both witnesses of fact have said in their testimony that in spite of best efforts for taking independent public witnesses, none agreed to accompanying them. Then after members of police team took the search of each other for ensuring that nothing incriminating was with any of them and after that too the contraband was recovered from a bag being carried by convict appellant. There was no recovery from personal search of convict-appellant and for this there is sufficient testimony of prosecution witnesses.

Hence, argument on this score is also of no avail.

15. Learned counsel for the appellant vehemently argued that there was no weighing machine nor it was weighed and only on the basis of perception, the weight was fixed, 750 gms. for two packets; of Smack and 50 gms. for remaining five small packets in all 800 gms. Certainly at the first score, this appears to be with force. But the police team did not write that a balance was managed and recovered contraband was weighed over it, rather what was there was written as such and this entire contraband was sealed with preparation of specimen seal on spot and this was fully intact till its analysis by chemical examination at Forensic Science Laboratory, where it was held to be of weight of 800 gms. in all and the same was found to be "Smack (Heroin)".

16. Ex. Ka-6, report of Forensic Science Laboratory, Agra, duly tendered and admissible in evidence is with this mention that a content, wrapped in a cloth, and sealed as per specimen seal of monogram of U.P.P., having a polythene with its content, i.e. five small packets in a newspaper piece marked with 1 to 5 in a polythene packet each one of about 10 gm., and two packets of suspected Smack in two polythene packet, kept in a newspaper piece marked as 6 and 7, were received on 2.12.2004 and the same was as per description, mentioned in transmitting letter, the same were of that weight and in chemical analysis those suspected Smack were established to be Heroin. Meaning thereby, the contents transmitted to Forensic Science Laboratory, in intact sealed position, with specimen seal, was found to be as per specimen seal, and with above description. In chemical analysis, these contraband were found to be "Heroin". This documentary evidence has been put in question to accused, under Section 313 Cr.P.C., as question No. 6, in which the question regarding proved documentary evidence Ex.Ka-8, report of Forensic Science Laboratory, Agra, was asked, but no answer regarding this report is there. Rather in answer to question No.6 the reply is "□□□□ □□□□ □□□ □□" Charge-sheet is wrong" i.e. charge-sheet Ex.Ka-9 has been disputed to be wrong but Ex.Ka-8, Forensic Science Laboratory Report, has neither been disputed nor any answer to question was given.

17. Regarding intermediary link of taking the entire contraband, recovered on spot, to Forensic Science Laboratory for its examination, prosecution has examined PW-2 Constable Brijesh Kumar, who, in his Examination-in-Chief, has said that while being posted as constable on 2.12.2004 at Police Station Jagdishpura, he vide G.D. Entry No. 30 at about 12:05 P.M. took a sealed bundle, with specimen seal, related with Case Crime No. 401 of 2004 (STATE VS. ASHOK) under Section 8/21, from Malkhana of Police Station Jagdish Pura and deposited it under intact sealed position, along with specimen seal and letter of transmission at Forensic Science Laboratory, Agra. In between, it was never permitted to be interfered by anyone. This taking of bundle was entered in G.D. Entry No. 30 of Police Station Jagdishpura, under handwriting of Head Constable Raj Bahadur Singh, who was posted with this witness and whose writing and signature is under full acquaintance of this witness. The true copy, duly certified, by this witness,

under handwriting and signature, of above original G.D. Entry, which was brought in the Court at the time of recording of this testimony, has been filed and exhibited as Ex.Ka-4 and on the same day of 2.12.2004, vide G.D. Entry No. 50 at about 17:15 P.M., this witness got entry of return, after depositing contraband under sealed intact position at Forensic Science Laboratory, Agra, and this second copy of deposit i.e. letter of transmission was got deposited at Police Station Jagdishpura and original G.D. Entry of this deposit, in form of carbon copy, prepared in one and common process, under handwriting and signature of Constable-clerk Parshuram has been before the witness at the time of recording of his testimony. This witness was of full acquaintance of handwriting and signature of constable-clerk Parshuram, because of being posted jointly at above police station and this G.D. Entry has been exhibited as Ex. Ka-5. In cross-examination, a suggestive question has been put by learned counsel for the defence that this contraband was permitted to be tampered and was not deposited in laboratory under intact sealed position. This question has been answered in negative, with further assertion that the above bundle of above case crime number was taken from Malkhana Muharrir under sealed intact position and this along with form was deposited at Forensic Science Laboratory under receipt of same over duplicate copy and signature of receipt copy was got obtained for it. No question over this point has been asked by learned counsel for defence that this witness was not posted at above police station on above date, time and place or Ex.Ka-4 and Ex.Ka-5 were not the original G.D. Entry or this witness has not taken the sealed bundle packed along with specimen seal and requisite Form from Malkhana of police station on above date, time and place or had not deposited the same at Forensic Science Laboratory, Agra, or the weight of contraband was tampered. Rather the same testimony of Examination-in-Chief is uncontroverted in Examination-in-Cross and from it this has been fully proved that the recovered article, wrapped in a cloth, sealed on spot, with preparation of specimen seal, sent to Forensic Science Laboratory for its analysis, was deposited at police station concerned, fromwhere vide Ex.Ka-4, it was transmitted to Forensic Science Laboratory for its examination and vide Ex.Ka-5, the receipt of same was deposited back by this witness at above police station. Hence, this was intermediary link, fully proved by prosecution and in Ex.Ka-8, weight has been established. Specimen seal and its being fully intact over bundle of contraband with contraband being Heroin, has been proved by Laboratory. Hence, weight of 800 gms. in toto of Heroin, as was perceived by PW-3, on spot, and was written in recovery memo Ex.Ka-6, was substantiated by Ex.Ka-8, Forensic Science Laboratory Report. Hence, this non weighing on spot was of no adverse effect over case of prosecution, rather, it was fully proved by PW-3 and 4 that in spite of best efforts, balance for weighing contraband on spot, could not be available. Hence, whatever was actual situation, on spot, has been naturally proved by this testimony.

18. PW-1 Constable Pratap Singh is witness for registration of above case crime number on above date, time and place. This witness has said, on oath, in his Examination-in-Chief, that, while being posted as Constable-clerk at P.S.

Jagdishpura, on 7.11.2004, S.O. Manoj Kumar Mishra, along with other police personnel, did their entry at G.D. Entry No. 30 at 12:10 P.M. for their movement regarding routine duty and surveillance in the area and the original G.D. prepared for one and common process by pasting carbon, with signature of S.O. Manoj Kumar Mishra was present before this witness at the time of recording of his testimony. He being posted with S.O. Manoj Kumar Mishra, at above police station, was fully aware of his handwriting and siganture and the G.D. Entry, duly certified to be true copy under handwriting and signature of this witness, has been proved and exhibited as Ex.Ka-1. The return of this police team on the same day at 17:00 P.M., along with one sealed bundle of recovered 'Smack' with specimen seal was entered in General Diary Entry of police station concerned. On the basis of recovery memo presented by this police team chick F.I.R. and thereby registration of this case crime number vide entry No. 38 at 17:00 P.M., was prepared by this witness under his handwriting and signature. This Chick F.I.R. has been fully proved and exhibited as Ex.Ka-2 and this General Diary Entry, vide which, this case crime number was lodged under handwriting and signature of this witness, has been duly proved and exhibited as Ex.Ka-3. Accused Ashok Kumarwas put in lock up and contraband bundle under sealed and intact position, along with specimen seal, prepared on spot, was deposited in Malkhana and this remained intact with no chance on interference till its taking to Laboratory. Information of this registration of case crime number was transmitted to senior officers by R.T. Set. In cross-examination, no question regarding Ex.Ka-1, Ex.Ka-2 and Ex.Ka-3 has been put by learned counsel for defence. Except suggestive question that this registration was under influence of Station Officer and this was a false concoction. This has been answered in negative. This witness, in cross-examination, has specifically said that this case crime number was got registered by Station Officer Manoj Kumar Mishra, who was present at police station and this contraband article was deposited in Malkhana by this witness himself because he was incharge of Malkhana on that day. No question regarding any likelihood of tampering with Malkhana or deposit of contraband as well as specimen seal, not at Malkhana, was put by learned counsel for defence. The entire testimony of Examination-in-Chief of this witness is almost uncontroverted. This witness is formal, fully reliable witness.

19. PW-3 S.O. Manoj Kumar Mishra , in his Examination-in-Chief has supported the contention of prosecution written as above and has proved material Ex. 1 to 11 as well as recovery memo Ex. Ka-6. In cross-examination, this witness has specifically said that contraband bundle was placed before Court at the time of remand where case crime number and section and Signature along with date and seal of Special Judge is there over the cloth of bundle i.e. the same bundle which was placed instantly at the time of remand before Special Judge, with mention of this case crime number and section, has been produced before this witness at the time of trial and this recovered article was Smack. He was given a suggestive question that this accused was taken from his house on 5.11.2004 and a false accusation was got lodged, which has been answered in negative. There is no embellishment, material contradiction or

exaggeration in testimony of this witness, rather, he is fully reliable natural witness.

20. PW-4 Pratap Singh Rana is another witness of fact in full corroboration with testimony of PWs and having no contradiction in his cross-examination, fully reliable witness.

21. PW-5 Chauthi Ram Yadav was first Investigating Officer. While being posted as Sub Inspector at Police Station Jagdishpura, Agra, on 7.11.2004, this investigation of case crime No. 401 of 2004, under Section 8/22 of N.D.P.S. Act (State Vs. Ashok) Police Station Jugdishpura, was entrusted to this Investigating Officer on 8.11.2004. He presented at the place of occurrence and upon pointing of Sub-Inspector Chand Bhushan Singh, spot map, Ex.Ka-7, was got prepared, under handwriting and signature of this witness, which is on record. He formally proved investigation, made by him, and he has proved in his cross-examination that compliance of Section 50 was made by informant and his co-police personnel Pratap Singh. The contradiction was produced before Court at the time of first hearing. This witness is with no material contraction or exaggeration.

22. PW-6 Sub-Inspector Chand Bhushan Singh is the Investigating Officer, who has submitted charge-sheet Ex.Ka-9, in his handwriting and signature. He has proved Ex.Ka-8, report of Forensic Science Laboratory, wherein report of Heroin was there. In cross-examination, this witness has reiterated the statement, made in Examination-in-Chief, there is no contradiction or exaggeration.

23. While being asked under Section 313 of Cr.P.C., accused has taken plea of false implication for which he has examined Deshraj as DW-1. But Deshraj, who stood in Examination-in-Chief for proving a telegram alleged to be made by Smt. Shashi, wife of accused, on 6.11.2004 at about 12:10 P.M., as telegram No. A-21. But in Examination-in-Cross, he said that he was with no governmental document, as none was available and there is no original copy of alleged telegram nor of its receipts, rather, it is a photostat copy which can be prepared by manipulation. This alleged telegram was with no signature or receiving of office. His testimony is on the basis of memory and not on Government documents i.e., neither original telegram nor original receipt nor any document of its sending or receipt of telegram proved by him, rather his testimony was based on his memory, i.e., not supported with any documentary evidence.

24. DW-2 Pramod Singh is witness of fact, that Ashok Kumarwas taken by police on 5.11.2004, from his home, but in cross-examination he has said that he has not said at any previous time about his contention being given in his testimony and this is with a view to get accused acquitted. No complaint or report to any police authority or any statement under Section 161 of Cr.P.C. was ever made by this witness and he being an acquaintance with accused had come to Court for giving his evidence that too a sketchy evidence is there.

25. DW-3 is Ram Singh. But his testimony is on the basis of statement given by his wife Sandhya Devi, who was present therat, i.e., this witness is with no first hand information, rather it was his wife Sandhya Devi who has narrated

tothis witness. Hence, this witness is hearsay witness.

26. DW-4 is Shushila @ Shsashi Devi, wife of convict-appellant Ashok. She, in her Examination-in-Chief, has said that her husband was taken by police on 5.11.2004 from her home. A telegram to National Human Right Commission was sent by her. Subsequently, it came to notice that accused has been challaned by S.O. Jagdishpura. In cross-examination this witness has said that she is illiterate lady, not aware of date and time of arrest or sending of telegram. She is not aware of her date of birth. Her husband was taken on 5th but not under her knowledge of month or year. Her testimony is not with force for creating doubt in a proved case of prosecution.

27. Upon above facts and circumstances and testimony, learned Trial Court passed impugned judgment of conviction and order of sentence. There occurred no failure in appreciation of law, evidence and facts placed before the Court. Thereby this appeal merits its dismissal.

28. Accordingly, this Criminal Appeal is **dismissed.**

29. Convict-appellant Ashok Kumar who is on bail is being directed to surrender before learned Trial Court within 15 days of judgment, from where he shall be taken in custody by learned Trial Court and be sent for suffering remaining sentence.

30. Record of trial Court along with certified copy of the judgment be transmitted to learned Trial Court at an earliest, for follow up.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

JAIL APPEAL No. 5632 OF 2007

Raja Hussain ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Ms. Nishi Mehrotra (A.C.)

Counsel for the Opposite Party:
Sri Rishi Chadha (A.G.A.)

A. Section 134 Evidence Act. - Non examination of all witnesses - Legal position - it is well settled principle of law that it is not necessary for the prosecution to produce all the witnesses in support its case. Quality of witnesses is material not the quantity of witnesses. Time honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise. (Para 36 & 37)

B. It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. (Para 45)

C. Direct evidence, worthy of credence. Then motive does not carry much weight. Thus, merely because that there was no strong motive to commit the offence, prosecution case cannot be disbelieved.(Para 46)

D. Delay in lodging FIR – duly explained. No adverse inference can be drawn

against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR 16 would automatically render the prosecution case doubtful. (Para 49)

Conviction upheld. Jail Appeal dismissed.

Chronological list of Cases Cited: -

1. Namdeo v. State of Maharashtra (2007) 14 SCC 150,

2. Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381,

3. Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251,

4. Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614,

5. Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,

6. State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,
7. Dalip Singh v. State of Punjab, AIR,1953, SC 364,

8. Dharnidhar v. State of UP (2010) 7 SCC 759,

9. Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,

10. Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196

11. Ravinder Kumar &Anr. Vs. State of Punjab", (2001) 7SCC 690,

12. Amar Singh Vs. Balwinder Singh &Ors. (2003) 2 SCC 518,

13. Tara Singh V. State of Punjab AIR (1991) SC 63,

14. Sahebrao &Anr. Vs. State of Maharashtra (2006) 9 SCC 794,

15. Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009,

16. Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,

17. Sachin Kumar Singhraha v. State of Madhya Pradesh in Criminal Appeal Nos. 473-474 of 2019,

18. Criminal Appeal No. 56 of 2018, Smt. Shamim v. State of (NCT of Delhi),

19. Inspector of Police v. Saravanan &Anr., AIR 2009 SC 152,

20. Arumugam v. State, AIR 2009 SC 331,

21. Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334;

22. Dr. Sunil Kumar Sambhudayal Gupta &Ors. v. State of Maharashtra, JT 2010 (12) SC 287,

23. Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323,

24. Sham Sunder vs. Puran, (1990) 4 SCC 731,
25. M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175 (E-2)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This jail appeal has been filed by accused-appellant Raza Hussain through Senior Superintendent, Central Jail, Varanasi against judgment and order dated 04.03.2006 passed by Sri Alla Rakkhey Khan, Additional Sessions Judge (FTC-I), Kushinagar at Padrauna in Sessions Trial No.56 of 2002, (State versus Raza Hussain), under Sections 302 and 324 IPC. By the impugned judgment accused-appellant has been convicted under Sections 302 and 324 IPC. Under Section 302 IPC, he has been sentenced to undergo life imprisonment along-with fine of Rs.25,000/-. In the event of default of payment of fine, he has to undergo

further one year's simple Imprisonment. He has been sentenced to undergo three years Rigorous Imprisonment, under Section 324 IPC and also with a fine of Rs.5,000/-. In case of default in payment of fine, three months simple Imprisonment has to be suffered by him. Both the sentences have been directed to run concurrently.

2. The facts emanating from Fist Information Report (hereinafter referred to as "FIR") and the material available on record may briefly be stated as under for adjudication of this appeal:-

3. Informant Abdul Hannan, PW-1 son of Mukhtar Khan resident of village Dhanauji Khurd was village Pradhan. On 10.02.1990 at about 10:00 P.M., Raza Hussain younger brother of Abdul Haq son of Rasheed Miyan had come from Gauhati, (Assam) at the house of Abdul Haq. He called Abdul Haq and when Abdul Haq opened the door, Raza Hussain stabbed knife in his stomach. When his wife Husna Bano went to rescue him, accused stabbed her also in her stomach. On hearing noise, Zahrul Haq and his wife rushed to save them but Raza Hussain assaulted Zahrul Haq also with knife on his back. Thereafter, Raza Hussain could succeed in fleeing away after throwing the knife. On alarm being raised, Mohd. Hussain, Khurshid and many other persons of the village reached the place of occurrence and took injured persons to FazilnagarHospital, where they were medically examined. Noticing deteriorating condition of injured persons, Informant and others took them to DeoriaCivilHospital, where Doctors referred them to MedicalCollege, Gorakhpur. All the injured were then taken to MedicalCollege, Gorakhpur on 11.02.1990 in the morning. Due to strike of Doctors, injured could be not admitted or attended. Injured Smt. Husna Bano died at 09:00 A.M. and Abdul Haq at 09:30 A.M. on 11.02.1990 in the Hospital.

4. Postmortem of Smt. Husna Bano was conducted on 11.02.1990 and her last rites were observed in the Village. Postmortem of Abdul Haq was conducted on 12.02.1990. Since family members and other persons were busy in taking care of deceased in Hospital, PW-1, Informant went to Police Station Patherwa, District Deoria and handed over written report Ex.Ka-1 containing aforesaid details at the Police Station. On the basis of written report Ex.Ka-1 filed by PW-1 Abdul Hannan, chick FIR Ex.Ka-10 was prepared and case under Section 302 and 324 I.P.C. was registered against accused-appellant Raza Hussain, on 12.12.1990 at 9:15 A.M.

5. After registration of Case, Investigation was initiated by PW-7 Prem Singh Bist, the then Station Officer (hereinafter referred to as 'SO') of Police Station Patherwa, District Deoria. He rushed to spot, recorded statement of PW-1 Abdul Hannan, PW-2 Khurshid Alam, Amzad Ali, Mohd. Hussain, Imtyaz Ali and Jamshed. On indicating place of occurrence by witnesses, Investigating Officer (hereinafter referred to as 'IO') prepared site plan Ex.Ka-8. He took in possession an earthen lamp (*Dhibri*) from rooms of Abdul Haq and Zahrul Haq and handed over the same in custody of Rashidan and prepared recovery memo Ex.Ka-2. Blood stained knife lying on the spot was taken in possession, and sealed recovery memo Ex.Ka-3 was prepared in respect thereof. Thereafter, he recorded statements of other witnesses and made efforts for searching the accused.

6. PW-5 Dr. S.K. Sharma had examined injured Abdul Haq (deceased)

on 10.02.1990 at 11.30 P.M and prepared injury report Ex.Ka-4. He found following injuries on his person :-

Punctured wound 3 cm x 1.5 cm x depth not measured, on the middle and upper part of the right half of abdominal wall, 4 cm away from middle and 17 cm below right nipple. Pain and distension of abdomen present, three stitches were applied. Referred to Surgeon, DistrictHospital Deoria (suspected peritonitis).

7. The same Doctor PW-5 had examined injured Zahrul Haq on 10.02.1990 at 11.45 P.M and prepared injury report Ex.Ka-5. He found following injuries on his person :-

Punctured wound 3.5 cm x 1.5 cm x depth not measured, lying medial on the middle of left half of back, 5 cm away from midline and 20 cm below inferior angle of left scapula. Referred to Surgeon, DistrictHospital Deoria for opinion and management. Three stitches were applied.

8. The same doctor PW-5 had also examined injured Husna Bano (deceased) on 10.02.1990 at 11.55 P.M and prepared injury report Ex.Ka-6. He found following injuries on her person :-

Punctured wound 3.5 cm x 1.5 cm x depth not measured, on the middle and upper part of abdominal wall 2 cm left to midline and 7 cm above the umbilicus. Three stitches were applied. Injuries to be kept under observation. Referred to DistrictHospital, for Surgeon opinion and management.

9. As stated above, Husna Bano and Abdul Haq succumbed to their injuries in the morning of 11.02.1990 in Hospital.

10. Autopsy on the dead body of Husna Bano was conducted by PW-8 Dr. O.N. Gupta on 11.02.1990 at 3:30 P.M. According to him, deceased was aged about 30 years and of average body built; her eyes and mouth were half closed; rigor mortis was present in all four limbs. He found following ante-mortem injuries on her person :-

1. A stitched wound of 1½ cm long with three stitches in the middle of the epigastric region. On opening the stitches the wound was found cavity deep, stomach punctured in area of 1 cm x 1 cm region. Stomach containing undigested food which was coming out of wound of stomach. About 1½ liter of blood present in Abdomenal cavity.

11. According to doctor Husna Bano died due to hamarrage and shock as a result of ante-mortem injuries. He prepared autopsy report Ex.Ka-11-A.

12. Autopsy on the dead body of Abdul Haq was conducted by Dr. P.N. Pandey, PW-6 on 12.02.1990 at 5:00 P.M. According to him, deceased was aged about 35 years and of average built body; rigor mortis was present all over the body except upper limb; no decomposition; eyes closed; mouth and face pale; nails and lips livid. He found following ante-mortem injuries on his person :-

Stitched wound with 3 stitches on the right side epigastrium 8 cm below the lung right costal margin in mid Clavicle bone. On opening, the wound was cavity deep with clotted blood 3 Lbs in peritoneal cavity. Omentum was cut with the mesentery of the traversa column, mesenteric and arotal vessals cut, small cut mark ½ cm x ½ cm x lumen deep on the lower part of transverse column. A cut mark ½ cm x ½ cm x 1 cm

deep on the right Lobe of liver, anterior aspect, clotted blood present.

13. In the opinion of doctor, death had occurred due to hamarrage and shock as a result of ante-mortem injuries. He prepared postmortem report Ex.Ka.-7.

14. After conclusion of the investigation, PW-7, Prem Singh, I.O., submitted charge-sheet Ex.Ka-09 in Court against accused-appellant under Section 302 and 324 I.P.C.

15. CJM, Deoria took cognizance of the offence against accused-appellant. Case, being exclusively triable by Court of Sessions, committed to Sessions Court on 06.05.2002. It was registered as Sessions Trial No.56 of 2002. Learned Sessions Judge framed charges against accused-appellant on 25.02.2003 as under:-

"I, D.P. Varshney, Sessions Judge, Kushinagar at Padrauna do hereby charge you Raza Hussain as follows: -

Firstly - That on 10th February, 1990 at 22:00 hours at Village Dhanauji Khurd lying within the local limits of Police Station Pataherawa, District Kushinagar you committed murder of Abdul Haq and his wife Hushbano and thereby committed an offence punishable under Section 302 IPC and within my cognizance.

Secondly - That on the aforesaid date, time and place, you also caused knife injuries on the person of Jahirulhaq and thereby committed an offence punishable under Section 324 IPC and within the cognizance.

And I hereby direct that you be tried on the said charge."

16. Accused-appellant pleaded not guilty and claimed trial.

17. In order to prove guilt of accused, prosecution examined as many as eleven witnesses, out of whom, PW-1 Abdul Hannan (Gram Pradhan), PW-2 Khursheed Alam, PW-3 Zahrul Haque, PW-4 Nazma Khatoon (wife of Zahrul Haque PW-3) are witnesses of fact. PW-5 to 11 are formal witnesses.

18. **PW**-5 Dr. S.K. Sharma had initially examined injuries of deceased Abdul Haque, injured Zahrul Haque and deceased Husna Bano and proved injury reports Ex.Ka-4, 5 and 6 respectively; **PW**-6 Dr. P.N. Pandey, had conducted postmortem on the dead body of Abdul Haque and proved injury report Ex.Ka-7; **PW**-8 Dr. O.N. Gupta had conducted postmortem on the dead body of deceased Husna Bano and proved postmortem report Ex.Ka-11-A; **PW**-9 Tribhuwan is a Ward-Boy, who had gone to Kotwali Gorakhpur along with information papers no. 14-Ka/9 and 14-Ka/2 with respect to death of Abdul Haque and Husna Bano; and **PW**-7 Prem Singh Bist is the I.O. and has proved site plan Ex.Ka.-8, recovery memo in respect of earthen lamp Ex.Ka-2, as also Ex.Ka-3 recovery memo in respect of blood stained knife. He has also proved charge sheet Ex.Ka-9 and stated that he recognizes writing and signatures of Constable Moharrir Dev Nath Singh, who had prepared Chick FIR Ex.Ka-10 and had made entry in the G.D., a copy whereof is Ex.Ka-11. **PW**-10 S.I. Mahendra Pratap Singh has proved inquest Ex.Ka-12 in respect of deceased Abdul Haque, Photo Nash Ex.Ka-13, Chalan Nash Ex.Ka-14, Paper police form no. 13 Ex.Ka-15 and request to C.M.O. for post mortem Ex.Ka-16. **PW**-11 C.P. Manmohan Misra has proved handwriting

and signatures of S.I. Shyam Nandan Singh, who at the relevant time had visited the hospital and prepared inquest Ex.Ka-17 in respect of deceased Husna Bano. He has stated that relevant documents Photo Nash Ex.Ka-18, letter to C.M.O. to District Hospital Ex.Ka-19, Chalan Nash Ex.Ka-20 and letter to S.P. Ex.Ka-21 had been written and signed by S.I. Shyam Nandan Singh.

19. After closure of prosecution evidence, accused-appellant was examined under Section 313 Cr.P.C. He has stated prosecution story to be false and concocted and that witnesses were deposing falsely. Documents prepared by Police and Health Department are stated to be false. According to him in order to usurp the land of accused-appellant, Pradhan in connivance with Pattidars of accused has got him implicated in the false case. He has stated that he was not present at his house.

20. On appreciation of evidence available on record and after hearing both the parties, learned Additional Sessions Judge recorded the verdict of conviction and sentence against the accused-appellant as stated above.

21. Feeling aggrieved, accused-appellant has approached this Court through Senior Superintendent, Central Jail, Varanasi assailing the impugned judgement.

22. We have heard Ms. Nishi Mehrotra, Amicus Curiae for appellant and Sri Rishi Chaddha, learned AGA for State at length and have gone through the record carefully with the valuable assistance of learned Counsel for parties.

23. Leaned Amicus Curiae appearing for accused-appellant assailed the impugned judegment and order and advanced arguments as under:-

(i) There is no eye witness of the case. None has seen the real incident. PWs 1 and 2 themselves admitted that they have not seen any person assaulting and they reached on the spot after the real incident.

(ii) No independent witness has been produced by prosecution. PW-4 Nazma Khatoon is wife of PW-3 Zahrul Haq (injured) and she cannot be termed as independent witness.

(iii) No other witness is produced by prosecution whereas FIR itself recites that Mohd. Hussain, Khursheed and other villagers have reached there. Mohd. Hussain is said to be eye witness but she could not be produced by prosecution, therefore, presumption under Section 114(g) of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872") goes against prosecution.

(iv) There is no motive of incident to accused to commit the present crime.

(v) FIR has been lodged, two days after the incident without any proper explanation.

(vi) There are major contradiction in the statement of witnesses which may render the prosecution case doubtful.

(vii) Medical evidence does not support the prosecution version.

(viii) Prosecution failed to establish its case beyond reasonable doubt against accused and accused is entitled to benefit of doubt and deserves acquittal.

24. Learned AGA for the State opposed submissions of learned Amicus Curiea for accused-appellant and contended that accused is named in the FIR; he is brother of Abdul Haq; PW-3 is

injured witness and PW-4 is eye witness; she, being wife of PW-3, is natural witness; PW-3 is injured and his presence cannot be doubted; Medical evidence is totally compatible with ocular version; prosecution proved its case beyond reasonable doubt and Trial Court has rightly convicted him. He sought dismissal of appeal.

25. Although time, date and place of occurrence, death of Abdul Haq and Hushna Bano and injury of PW-3 could not be disputed from the side of defence but according to Advocate, he is not responsible for causing death of Abdul Haq and Hushna Bano. We find that injuries found on the person of PW-3 are established by prosecution. Even otherwise from the evidence of PWs 1 to 4 time, date and place of incident stands established.

26. Only question remains for consideration is "whether accused-appellant committed murder of Abdul Haq and Smt. Hushna Bano, and caused injury to PW-3 Zahrul Haq by inflicting knife; and Trial Court has rightly convicted accused-appellant?"

27. Now, we would like to briefly consider the statement of witnesses examined by prosecution and some important decisions on the point.

28. Point nos.1, 2 and 3 of arguments made by learned Amicus Curiae for appellant are being dealt altogether.

29. PW-1 Abdul Hannan has deposed that on the fateful day at about 10:00 PM in the night, he was sleeping in his house. Hearing shrikes of Abdul Haq, Zahrul Haq and Husna Bano, he came out of his house and reached there and saw that all the three persons with knife injuries. They were shouting that accused Raza Hussain has assaulted them with knife. When Zahrul Haq, PW-3 came to save them, accused assaulted him with knife on the back. Accused-appellant ran away from the spot throwing knife. All the injured were taken to PHC Fazilnagar, from where they were referred to DistrictHospital, Deoria but in Deoria hospital injured were not admitted and referred to GorakhpurMedicalCollege. Victim Husna Bano and Abdul Haq succumbed to injuries. He has further deposed that there was a dispute of partition between accused and deceased due to which accused committed murder of his brother and his wife. PW-1 being Pradhan of village presented written Tehrir (Ex.Ka-1) in the police station concerned. Witness has proved recovery of knife. Witness stated in the cross-examination that he has not seen anybody killing deceased. In this way PW-1 is not an eye witness of incident. He has proved other circumstances which happened after incident. Witness stated in cross-examination that he has not seen any one assaulting. He reached ten minutes after the incident.

30. PW-2, Khurshid Alam deposed that at about 10:00 PM in the fateful night, he was sleeping in his house. On hearing noise of villagers, he arrived at spot and saw that beneath of Neem tree, victim Abdul Haq, his wife Husna Bano and one Zahrul Haq were injured. Abdul Haq was shouting that Raza Hussain stabbed knife to him and his wife Hushna Bano. Abdul Haq and Hushna Bano received knife injuries on stomach and Zahrul Haq received knife injury on his back. Incident was witnessed by PW-2

himself and Mohd. Husain and other villagers. It is further deposed by him that Hushna Bano and Abdul Haq succumbed to injuries in GorakhpurHospital. In cross-examination, he stated that he has not seen any person inflicting knife. He has arrived at spot after 6 - 7 minutes of incident.

31. PWs 1 and 2 admitted in their cross-examination that they were not present on spot at the time of incident but both told that when they reached on spot injured Abdul Haq was shouting that accused Raza Hussain assaulted him and his wife Hushna Bano with knife. In this way both the witnesses have not seen actual incident.

32. PW-3, Zahrul Haq deposed that on the fateful night at about 10:00 PM, on hearing shrieks of Abdul Haq, he reached the spot and saw that Raza Hussain was inflicting knife blow to Abdul Haq. When his wife Hushna Bano rushed to save her husband, accused-appellant inflicted knife blow to Hushna Bano also. When he (witness) rushed to save them, accused inflicted knife blow to him on his back. Thereafter accused ran away from the spot throwing knife at some distance. Incident was seen by his wife Nazma Khatoon and Mohd. Khurshid Hussain in the light of lantern. All the injured persons were taken to PHC Fazilnagar where from they were referred to DistrictHospital, Deoria. On that date, there was a strike of doctors in Deoria hospital, then injured were taken to GorakhpurMedicalCollege wherefrom due to strike of doctors, they went to DistrictHospital, Gorakhpur. On the next day of incident Hushna Bano and Abdul Haq succumbed to injuries. Due to enmity regarding land, accused Raza Hussain murdered his brother and his Bhabi (wife of brother).

33. PW-4 Nazma Khatoon deposed that in the fateful night at 10:00 PM, she slept after taking meal. When she heard noise, she woke up and rushed there and saw that accused-appellant Raza Hussain got opened the door of his brother Abdul Haq. When Abdul Haq opened door, accused-appellant Raza Hussain stabbed the knife in the stomach of Abdul Haq. Hushna Bano came to save her husband, accused-appellant also stabbed knife in her stomach. On the noise, she and her husband rushed to save them, then accused-appellant Raza Hussain inflicted knife injuring on the back of her husband and ran away from there throwing knife at some distance. On the noise, Mohd Hussain, Khurshid and some other persons came there and took all three injured persons to Government Hospital Fazilnagar wherefrom they referred to District Hospital Deoria, thereafter to medical college, Gorakhpur but due to non-availability of doctors, three injured persons were admitted to District Hospital, Gorakhpur where Abdul Haq and Hushna Bano succumbed to injuries on next date.

34. PWs 3 and 4 withstood lengthy cross-examination but nothing material could be brought so as to disbelieve their statements on oath. PW-3 Zahrul Haq is injured witness and PW-4 is an eye witness and wife of PW-3. Both the witnesses have supported prosecution case. PW-4 deposed that on the shrieks of Abdul Haq, she himself and her husband (PW-3) reached the spot. PW-3 was injured in the same incident and PW-4 being wife of PW-3 are natural witnesses and their presence on spot can not be doubted.

35. From the statements of PWs 3 and 4, injured and eye witness respectively and that of PWs 1 and 2 who proved that when they reached on spot Abdul Haq was shouting that Raza Hussain assaulted them with knife, it is established that accused Raza Hussain assaulted Abdul Haq, Smt. Hushan Bano and PW-3 Zahrul Haq by causing injuries with knife. Later on Abdul Haq and Smt. Hushna Bano succumbed to injuries.

36. So far as legal position for non-examination of entire witnesses are concerned, it is well settled principal of law that it is not necessary for the prosecution to prove all the witnesses in support its case, quality of witnesses is material not the quantity of witnesses. In view of Section 134 of Act,1872, we do not find any substance in the submission of learned counsel for the appellant. Section 134 of Act, 1872, reads as under:-

"134. Number of witnesses.-No particular number of witnesses shall in any case be required for the proof of any fact."

37. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

38. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is material. Quantity of evidence was never considered to be a test for deciding a criminal trial and emphasis of Court is always on quality of evidence. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

39. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing reliance on earlier judgments including **Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.**

40. In **Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,** Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness

inspires confidence then conviction can be based solely upon it."

41. In **State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused in the criminal case. The testimony of a sole witness must be confidence-inspiring, leaving no doubt in the mind of the Court.

42. So far as question of interested witness is concerned, it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364,** where Court has held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

43. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

44. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(*Vide:* ***Bhagalool Lodh &Anr. v. State of UP, AIR 2011 SC 2292; and Dhari &Ors. v. State of U. P., AIR 2013 SC 308).*****"**

45. It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

46. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance in the argument advanced by learned counsel for appellants.

47. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

48. So far as the question of delay in lodging FIR is concerned, FIR itself recites that all the three injured persons were taken to FazilnagarHospital for treatment, where they were medically examined in the night. On seeing serious condition of victims they were taken to District Hospital, Deoria where from Doctor referred the victims to Medical College, Gorakhpur but due to strike of Doctors they could not be admitted in Medical College and they were got admitted in District Hospital Gorakhpur. On 13.02.1990, victim Hushna Bano succumbed to injuries at 09:00 AM and Abdul Haq breath the last at 09:30 AM in the Hospital. In this way delay in FIR is properly explained.

49. It is well settled, if delay in lodging FIR has been explained from the evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. In **"Ravinder Kumar &Anr. Vs. State of Punjab", (2001) 7SCC 690,** Court has held;

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that

even a promptly FIR is not an unreserved guarantee for the genuineness of the version incorporated therein. When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquility of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident."

50. In **Amar Singh Vs. Balwinder Singh &Ors. (2003) 2 SCC 518,** Court held :

"In our opinion, the period which elapsed in lodging the FIR of the incident has been fully explained from the evidence on record and no adverse inference can be drawn against the prosecution merely on the ground that the FIR was lodged at 9.20 p.m. on the next day. There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."

51. In this connection it will also be useful to take note of the following observation made in **Tara Singh V. State of Punjab AIR (1991) SC 63.**

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer

scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstance of each case."

52. In **Sahebrao &Anr. Vs. State of Maharashtra (2006) 9 SCC 794,** Court has held:

"The settled principle of law of this Court is that delay in filing FIR by itself cannot be a ground to doubt the prosecution case and discard it. The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory."

53. From the above discussed exposition of law, it is manifest that prosecution version cannot be rejected solely on the ground of delay in lodging FIR. Court has to examine the explanation furnished by prosecution for explaining delay. There may be various circumstances particularly number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him in pursuance of the incident that has taken place. If prosecution explains the delay, Court should not reject prosecution story solely on this ground. Therefore, the entire incident, as narrated by witnesses, has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of prosecution. Even if there is some unexplained delay, court has to take into consideration whether it can be termed as abnormal. Recently in **Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009, decided on 27.11.2018,** it has been observed by Supreme Court that in some cases delay in registration of FIR is inevitable. Even a long delay can be condoned if witness has no motive for falsely implicating the accused.

54. In this case, as we have already said, delay has been properly explained. The contention, therefore, that there is undue delay in lodging F.I.R. is not acceptable, hence rejected.

55. In so far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance with submissions raised by learned counsel's and find that the same do not go to the root of case and accused-appellant are not entitled to get benefit of the same.

56. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

57. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh*** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not

go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

58. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

59. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

60. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan &Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta &Ors. v.**

State of Maharashtra, JT 2010 (12) SC 287].

61. Learned Amicus Curiae appearing for appellant advanced her arguments and submitted that medical evidence does not support prosecution case, therefore, accused-appellant is entitled to benefit of doubt and they are liable to be acquitted.

62. Here we would like to consider the submissions of PW-5 Doctor S.K. Sharma posted in PHC Fazilnagar, District Deoria conducted medical examination of Abdul Haq at 11:30 PM on 10.2.1990 in the night and found punctured wound 3 cm x 1.5 cm in stomach. On the same day at about 11.45 PM, he examined Zahrul Haq and found punctured wound 3.5 cm x 1.5 cm over the left scapula. He examined Smt. Hushna Bano at about 11.50 PM and found punctured wound 3.5 cm x 1.5 cm on the left side of stomach. He opined that injuries found on their person of victimss were fresh and possible to be occurred from sharp cutting weapon like knife. Doctor further opined that injuries on the person of Abdul Haq and Hushna Bano were sufficient to cause death in ordinary course of nature. He proved medico legal report as Ex.Ka-4, 5 and 6.

63. PW-6, Dr. P.N. Pandey, conducted autopsy over the dead body of Abdul Haq and proved post mortem. He opined that death was due to shock and hemorrhage on account of ante mortem injuries which was possible on 10.2.1990 at about 10 PM due to sharp cutting weapon like knife.

64. Both the doctors proved injuries on the part of victims and injuries were found to be caused by knife. PW-3 also sustained knife injuries over the left scapula which was supported by PW-5 Dr. S.K. Sharma. As per prosecution accused inflicted knife injury to Abdul Haq, Smt. Hushna Bano and PW-3 Zahrul Haq. There is no difference between medical evidence and ocular evidence. Medical evidence is totally compatible with the ocular version, therefor, we are not inclined to accept the argument of Amicus Curiae on this behalf and rejected the same.

65. In the entirety of the facts and circumstances and legal preposition discussed herein before, we are satisfied that prosecution has successfully proved its case beyond reasonable doubt against accused-appellant and Trial Court has rightly convicted him for having committed an offence under Section 302 read with 324 IPC. Appeal is devoid of merit and liable to be dismissed.

66. So far as sentence of accused-appellants is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

67. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be

proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175**].

68. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence, weapon used in commission of murder and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellants by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no ground appears to interfere in the matter on the point of punishment imposed upon him.

69. We, therefore, find no merit in appeal. Present jail appeal lacks merit and is accordingly, **dismissed** and judgement and order dated 04.03.2006 passed by Additional Sessions Judge (FTC-I), Kushinagar at Padrauna in Sessions Trial No.56 of 2002, under Sections 302 and 324 IPC, is **maintained and confirmed.**

70. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

71. Before parting, we provide that Ms. Nishi Mehrotra, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

JAIL APPEAL No. 1144 OF 2017

Lal Mohan ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Jay Ram Pandey, Sri Rajesh Kumar.

Counsel for the Opposite Party:
Sri Rishi Chadha (A.G.A.), Sri Vikas Sahai (A.G.A.).

A. Evidence - of relative. Mere relationship is not sufficient to discard otherwise trustworthy ocular testimony. (Para 30)

It is settled that merely because witnesses are close relatives of victim, their testimony cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person.(Para 31)

B. Motive. Where direct evidence is worthy of credence, motive does not carry much weight - Thus merely because that there was no strong motive to commit the offence, prosecution case cannot be disbelieved. (Para 34)

C. Delay in FIR - There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. (Para 40)
If prosecution explains the delay, Court should not reject prosecution story solely on this ground. Therefore, the entire incident, as narrated by witnesses, has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of prosecution. Even if there is some unexplained delay, court has to take into consideration whether it can be termed as abnormal.(Para 45)

D. Punishment for a crime must not be irrelevant but must conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against criminals. (Para 48)

Jail Appeal partly allowed. Conviction under Section 304 I.P.C. modified.

Chronological list of Cases Cited: -

1. Dalip Singh v. State of Punjab, AIR,1953, SC 364,

2. Dharnidhar v. State of UP (2010) 7 SCC 759,

3. Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,

4. Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,

5. Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,

6. Criminal Appeal No. 56 of 2018, Smt. Shamim v. State of (NCT of Delhi),

7. Ravinder Kumar &Anr. Vs. State of Punjab", (2001) 7SCC 690,

8. Amar Singh Vs. Balwinder Singh &Ors. (2003) 2 SCC 518,

9. Tara Singh V. State of Punjab AIR (1991) SC 63: -

10. Sahebrao &Anr. Vs. State of Maharashtra (2006) 9 SCC 794,

11. Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009,

12. Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323,

13. Sham Sunder vs. Puran, (1990) 4 SCC 731,

14. M.P. v. Saleem, (2005) 5 SCC 554,

15. Ravji v. State of Rajasthan, (1996) 2 SCC 175]. (E-2)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Against judgment and order dated 04.02.2017 passed by Additional Sessions Judge, F.T.C.-2, Ballia in Sessions Trial No.242 of 2013, Crime No.125 of 2003, under Sections 326 and 304 IPC, Police Station Garwar, District Ballia, accused-appellant has preferred present jail appeal under Section 383 Cr.P.C. from Jail through Superintendent District Jail, Ballia. By impugned judgement, appellant has been convicted under Section 304 I.P.C. and sentenced to undergo imprisonment for life with fine of Rs.

10,000/- and in default of payment of fine, three months imprisonment but acquitted under Section 326 I.P.C.

2. Factual matrix of case as emerging from First Information Report (hereinafter referred to as "FIR") as well as material placed on record is as follows.

3. P.W.-1 Sri Ram submitted a written report Ex.Ka-1 in Police Station Garwar, District Ballia stating that on 10.8.2003 at about 8:30 PM, his daughter-in-law Smt. Vimla Devi with her daughter Gudia aged about one and half year was returning home from his Dera (a structure being built in the agricultural field to stay for short duration). As usual when she reached the place between Dera and home, accused Lal Mohar came with petrol and sprinkled petrol on both of them and set them on fire. Due to burn, his daughter-in-law started crying, then to rescue them, he (PW-1) and many persons of the village rushed there and took them to DistrictHospital, Ballia for medical treatment. Gudia succumbed to injuries whose post mortem was conducted on 11.8.2003 in Ballia. Later on Vimla Devi succumbed to death due to burn injuries.

4. On the basis of written report Ex.Ka-1, Chick F.I.R. Ex.Ka-3 was registered by PW-4, Satya Narain Mandal, as Case Crime No.125 of 2003 against accused-appellant under Section 304, 326 I.P.C. An entry of case was made in General Diary (herein after referred to as 'GD') on the same day, copy whereof is Ex.Ka-6.

5. Km. Gudia and Smt. Vimla Devi were medically examined by Dr. Jitendra Kumar Singh on 10.8.2003 in DistrictHospital, Ballia.

6. Immediately, after registration of case, investigation was undertaken by S.I. Jagdish Yadav. He proceeded to spot and held inquest over the dead body of Vimla Devi and sent it for post mortem, visited spot, prepared site plan Ex. Ka-7.

7. PW-8, Dr. P.K. Rai, conducted autopsy over the dead body of Km. Priya (Gudiya) aged about one and half year and found ante-mortem superficial to deep burn injuries. In the opinion of doctor, death might have been caused at about 7:10 AM on 11.8.2003 and death was possible due to shock on account of ante-mortem burn injuries.

8. PW-6 Dr. R.N. Upadhyay, conducted autopsy over the dead body of deceased Vimla Devi and found ante-mortem burn injuries over the dead body except upper portion of abdomen, right shoulder, head and upper portion of thigh. Doctor opined that death would have been caused due to infection and ante-mortem burn injuries.

9. PW-7 S.I. Atma Ram, after completing investigation submitted charge sheet Ex.Ka-13 against the appellant under Section 304 and 326 I.P.C.

10. Case, being triable by Court of Sessions, was committed by Chief Judicial Magistrate to Court of Sessions for trial after compliance of Section 207 Cr.P.C.

11. Trial Court framed charges against accused-appellant on 16.9.2013

under Sections 326 and 304 IPC. Charges read as under:

आरोप

मैं सी0 एम0 तिवारी (एच0जे0एस0) सत्र न्यायाधीश, बलिया आप अभियुक्तगणः–

1– लाल मोहर पुत्र श्रीराम भर

साकिन केशरूआ थाना सुखपुरा जिला बलिया।

के विरूद्ध निम्नलिखित आरोप विरचित करता हूँ :–

1– यह कि दिनांक 10.08.2003 को समय करीब 8.30 बजे साकिन कुल्हाडा मौजा रतसड़ खुर्द थाना गड़वार जिला बलिया मे आपने वादी श्रीराम की बहू विमला देवी और विमला देवी की पुत्री गुडिया उम्र डेढ वर्ष के शरीर पर पेट्रोल छिड़ककर सलाई से आग लगा दिया, जिसे विमला देवी और गुडिया जल गयी। इस प्रकार आपने खतरनाक आयुधों द्वारा स्वेच्छया उपहति कारित किया जो धारा– 326 भारतीय दण्ड संहिता के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

2– यह कि उपरोक्त दिनांक, समय और स्थान पर आपने वादी श्रीराम की बहू विमला देवी की पुत्री गुडिया उम्र डेढ वर्ष के शरीर पर पेट्रोल छिड़ककर सलाई से आग लगा दिया, जिससे वे दोनो जल गयी और जलने के कारण डेढ वर्षीय गुडिया की मृत्यु हो गयी। इस प्रकार आपने हत्या की कोटि में न आने वाला आपराधिक मानव वध कारित किया जो धारा– 304 भारतीय दण्ड संहिता के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

तदैव आपको को निर्दिष्ट किया जाता है कि आपका विचारण उक्त आरोपों में न्यायालय द्वारा किया जाएगा।

C H A R G E

I, C.M. Tiwari (HJS), Sessions Judge, Ballia, do hereby charge you the accused (1) ***Lal Mohar*** *S/o Shriram Bhar R/o Keshrua, PS Sukhpura, District Ballia with the following offence:*

1. That on 10.08.2003 at around 8:30 o'clock at Kulhara, Village Ratsarh Khurd, PS Gadwar, District Budaun, you sprinkled petrol on the bodies of the complainant Shriram's daughter-in-law Vimla Devi and her 1½-year-old daughter Gudia and set them afire with a matchstick, as a result of which Vimla Devi and Gudia got burnt. In this way, you have voluntarily caused grievous hurt by dangerous weapons which is punishable u/s 326 IPC and is within the cognizance of this court.

2. That on the aforesaid date, time and place, you sprinkled petrol on the bodies of the complainant Shriram's daughter-in-law Vimla Devi and her 1½-year-old daughter Gudia and set them afire with a matchstick, as a result of which Vimla Devi and Gudia got burnt, and 1½-year-old Gudia died due to burns. In this way, you have committed culpable homicide not amounting to murder, which is punishable u/s 304 IPC and is within the cognizance of this court.

It is hereby directed that you, the accused, be tried by this court for the aforesaid offences.

(English Translation By Court)

12. Accused-appellant denied charges, pleaded not guilty and claimed trial.

13. In order to substantiate its case, prosecution examined as many as nine witnesses, out of whom PW-1 Sri Ram, PW-2-Manish and PW-9 Muneeb Rajbhar are witnesses of fact; PW-3 Radhey Shyam (Panch witness of inquest), PW-4 Head Constable, Satya Narain Mandal, PW-5 Dr. Anoop Kumar Singh proved signature of Dr. Jitendra Kumar Singh, PW-6 Dr. R.N. Upadhyay, conducted autopsy of Vimla Devi, PW-7 S.I. Atma Ram Yadav and PW-8 Dr. P.K. Rai conducted post mortem on the dead body of Km. Gudia, are formal witnesses.

14. On closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by Court explaining entire evidence and other incriminating circumstances. In

statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto and desired to produce defence evidence. In response of question no. 6, accused-appellant said that he was innocent and has not committed any crime but did not adduce any evidence.

15. Trial Court after appreciating entire evidence led by prosecution on record and hearing counsel for parties, found appellant guilty and convicted him as stated above. Feeling aggrieved with impugned judgement of conviction, present appeal has been filed through Jail.

16. We have heard Sri Rajesh Kumar, learned counsel for appellant and Sri Rishi Chaddha, learned A.G.A for State-respondent at length and have gone through the record available on file carefully.

17. Learned counsel for appellant assailing impugned judgement of conviction of accused-appellant, advanced his submissions, in the following manner :-

(i) There is no independent witness. PWs-1, 2 and 9 are related to deceased persons, therefore, their evidence is not sufficient to base the conviction.

(ii) Witnesses of prosecution did not see accused committing crime.

(iii) There is no motive to accused-appellant to commit the present crime.

(iv) Medical evidence does not support prosecution case.

(v) There are major contradictions in evidence of witnesses rendering prosecution case doubtful.

(vi) F.I.R. was lodged by complainant with inordinate delay but no explanation.

(vii) Prosecution has failed to prove its case beyond reasonable doubt and Trial Court did not appreciate evidence properly and only convicted accused-appellant.

(viii) Punishment awarded by Trial Court is harsh and excessive and he must be dealt with sympathetic consideration.

18. Learned AGA for State opposed submissions and stated that accused is named in F.I.R.; relation of witnesses with victim or accused is not a ground to discard the evidence of relatives; PWs.1, 2 and 9 are witnesses of fact, supported prosecution case and it is a case of direct evidence, prosecution has established his case beyond reasonable doubt and Trial Court has rightly convicted accused-appellant.

19. Although time, date, place and nature of injuries as well as death of victims could not be disputed from the side of accused-appellant but according to Advocate for accused-appellant, he is not responsible for causing death of Vimla Devi and Gudiya by causing burn injuries. Even otherwise, from the evidence of prosecution, death of Vimla Devi stands established due to burn injuries.

20. Thus the only questions for consideration of this Court is, "whether accused-appellant has caused death of Vimla Devi and her daughter Gudia and Trial Court has rightly convicted accused-appellant for causing death of Vimla Devi and her daughter Gudia punishable under Section 304 I.P.C.?"

21. Now, we may proceed to consider rival submissions of learned counsel for the parties and briefly, evidence of prosecution and some important decisions.

22. PW-1, Sri Ram has deposed that on 10.8.2003 at about 8:30 PM, he was in his Dera; his daughter-in-law Vimla Devi with her daughter Gudia aged about one and half year was returning to home after providing meal to him; when she reached near sugar cane field of one Jai Narayan Singh, accused-appellant Lal Mohar came there with petrol in a plastic can and sprinkled petrol on his daughter-in-law Vimla Devi and grand daughter Gudia and set them at fire; his younger son Manish, PW-2, was with Vimla Devi at that time; on hearing shrieks of Manish and his daughter-in-law, he (PW-1) and other persons of same village rushed to rescue them whereupon accused-appellant ran away but was identified in the light of Torch; both injured persons were taken to District Hospital, Ballia for medical treatment in a serious position where Gudia succumbed to burn injuries on the next day during treatment in hospital and Vimla Devi succumbed to injuries in District Hospital, Ballia during treatment after 18-19 days of incident.

23. PW-1 stated in his cross-examination that at the time of incident, he was in his Dera, reached the place of incident on hearing noise of villagers; his Dera is at the distance of 10-20 Lattha from the place of occurrence; and that his daughter-in-law was being taken to hospital from spot by the people of village Tola and he was near his house. From this statement made in cross-examination, PW-1 does not appear to be an eye witness although, he told that he has seen accused running away from spot and proved presence of PW-2 Manish with Vimla Devi on spot.

24. PW-2 Manish deposed that on 10.8.2003 at about 8:30 PM, he was returning to his house from Dera with his Bhabhi Smt. Vimla Devi; when he reached near sugar cane field of Jai Narayan Singh, accused came out of Sarpat (Long grass) with petrol in a plastic can and poured petrol on victim and Gudia and set them at fire; on making noise his father and other villagers reached there; Vimla Devi and her daughter were taken to District Hospital, Ballia for treatment where Gudia succumbed to death in next morning and Vimla Devi died in District Hospital, Ballia after 17 days.

25. PW-9 Muneeb Rajbhar deposed that on 10.8.2003 at about 8:30 PM, his Bhabhi Vimla Devi along with her daughter Gudia aged about one and half year were going to home from Dera; when she reached near sugar cane field of one Jai Narayan Singh, accused-appellant sprinkled petrol on them and set them at fire; he was little behind the victim; on hearing alarm raised by Vimla Devi and his brother Manish (PW-2), he and his father arrived at spot whereupon accused-appellant ran away from spot but he was identified by him in the light of Torch; he chased him but accused succeeded in making good escape; Vimla Devi and Gudia were taken to District Hospital, Ballia where Gudia succumbed to death on the next day but Vimla died after 17 days in hospital.

26. Both witnesses withstood sufficient cross-examination from the side of accused but no material could be

brought so as to disbelieve their statement.

27. PW-3 Radhey Shyam, is witness of inquest, who proved inquest report of Gudia as Ex.Ka-2; PW-4, H.C. Satya Narayan Mandal proved registration of F.I.R. on the basis of written report Ex.Ka-1; PW-5 Dr. Anoop Kumar Singh proved signature of Dr. Jitendra Kumar Singh conducting medical examination of Vimla Devi and Gudia, proved medico legal reports' PW-6 Dr. R.N. Upadhyay, conducted autopsy over the dead body of Vimla Devi and proved post mortem report as Ex.Ka-10; and PW-8 Dr. P.K. Rai conducted post mortem report of Km. Gudia and proved post mortem report Ex.Ka-14.

28. Presence of PW-2 and PW-9 appeared quite natural on the spot and there was no reason to them to falsely implicate accused-appellant in the present case. In the statement under Section 313 Cr.P.C. accused did not suggest anything as to why witnesses deposed against him.

29. PW-1 and PW-2 established that they noticed accused running from spot. Statement of PWs.-1, 2 and 9 established that accused-appellant sprinkled petrol on Vimla Devi and her daughter Gudia and set them at fire causing serious burn injuries due to which they succumbed to death in hospital in respective times.

30. Now, next thing to be considered is that PWs.-1, 2 and 9 are relatives of deceased have their evidence whether be treated to be trustworthy or not. This submission is thoroughly misconceived. Mere relationship is not sufficient to discard otherwise trustworthy ocular testimony and it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364** wherein Court has held :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

31. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an*

interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"

32. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: ***Bhagalool Lodh &Anr. v. State of UP, AIR 2011 SC 2292; and Dhari &Ors. v. State of U. P., AIR 2013 SC 308****)."*

33. It is settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible evidence.

34. So far as argument made by learned counsel for appellant regarding motive is concerned, we are not impressed with the submission advanced by learned counsel for appellant as it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

35. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

36. According to Advocate for appellant, medical evidence is not compatible with ocular evidence. We are not in agreement with the same for the reasons that PW-2 and PW-9 supporting prosecution case was deposed that accused-appellant came with petrol in Plastic Can and poured on the victims and set them at fire due to which Vimla Devi and Gudia received serious burn injuries. Doctor opined that death of both victims would have been caused due to ante-mortem burn injuries. In this way medical evidence is totally compatible with oral version.

37. In so far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance with submissions raised by learned counsel's and find that the same do not go to the root of case and accused-appellant are not entitled to get benefit of the same.

38. In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,*** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

39. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of the Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, ***Smt. Shamim v. State of (NCT of Delhi),*** decided on 19.09.2018.

40. Learned counsel for the accused-appellant argued that PW-1 lodged F.I.R. of the incident against accused-appellant after four days of incident and he has not given proper explanation. Delay in lodging F.I.R. demolishes the prosecution story, hence, accused-appellant is entitled to get benefit of doubt. So far as delay in F.I.R. is concerned, we are not in agreement with the argument advanced by learned counsel for the accused-appellant for the reasons that delay has been explained by informant in written report Ex.Ka-1. It is well settled, if delay in lodging FIR has been explained from the evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful.

41. In **"Ravinder Kumar &Anr. Vs. State of Punjab", (2001) 7SCC 690,** Court has held;

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly FIR is not an unreserved guarantee for the genuineness of the version incorporated therein. When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might

take some appreciable time to regain a certain level of tranquility of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident."

42. In **Amar Singh Vs. Balwinder Singh &Ors. (2003) 2 SCC 518,** Court held :

"In our opinion, the period which elapsed in lodging the FIR of the incident has been fully explained from the evidence on record and no adverse inference can be drawn against the prosecution merely on the ground that the FIR was lodged at 9.20 p.m. on the next day. There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."

43. In this connection it will also be useful to take note of the following observation made in **Tara Singh V. State of Punjab AIR (1991) SC 63:-**

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstance of each case."

44. In **Sahebrao &Anr. Vs. State of Maharashtra (2006) 9 SCC 794,** Court has held:

"The settled principle of law of this Court is that delay in filing FIR by

itself cannot be a ground to doubt the prosecution case and discard it. The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory."

45. From the above exposition of law, it is manifest that prosecution version cannot be rejected solely on the ground of delay in lodging FIR. Court has to examine the explanation furnished by prosecution for explaining delay. There may be various circumstances particularly number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him in pursuance of the incident that has taken place. If prosecution explains the delay, Court should not reject prosecution story solely on this ground. Therefore, the entire incident, as narrated by witnesses, has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of prosecution. Even if there is some unexplained delay, court has to take into consideration whether it can be termed as abnormal. Recently in **Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009, decided on 27.11.2018,** it has been observed by Supreme Court that in some cases delay in registration of FIR is inevitable. Even a long delay can be condoned if witness has no motive for falsely implicating the accused.

46. Considering the entire facts and circumstances of the case, statement of witnesses, evidence of prosecution into entirety and legal proposition discussed herein before, we have no hesitation to say that accused-appellant caused death of Vimla Devi and Gudiaya by causing burn injuries and committed offence punishable under Section 304 I.P.C. Trial Court has rightly convicted accused-appellant, therefore, conviction of accused appellant under Section 304 I.P.C. is maintained and confirmed. Criminal appeal lacks merit and liable to be dismissed on merit.

47. So far as sentence of accused-appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

48. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should

conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175**].

49. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence and the manner in which it was executed or committed. We **partly allow** this appeal. We confirm appellant's conviction under Section 304 I.P.C. and modify order of sentence to under go **rigorous imprisonment for a period of 14 years and fine of Rs. 25,000/-.** In default of payment of fine, he shall further undergo simple imprisonment for one year imprisonment. He shall be entitled to set off under Section 428 Cr.P.C.

50. Lower Court record along with a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action and to apprise the accused-appellant through Jail Authority.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

JAIL APPEAL No. 8577 OF 2008

Preetam Singh ...Appellant

Versus

State ...Opposite Party

Counsel for the Appellant:
From jail, Sri Jai Singh Parihar, Sri Noor Mohammad, Sri Rajshree Malviya (A.C.)

Counsel for the Opposite Party:
Sri Rishi Chadha, A.G.A.

A. Section 302 and 201 IPC. Jail Appeal against conviction- circumstantial evidence - direct evidence and motive-
In circumstantial evidence, law postulates, twin requirements to be satisfied. First, every link in chain of circumstances, necessary to establish the guilt of accused, must be established by prosecution beyond reasonable doubt; and second, all circumstances must be consistent only with guilt of accused. (Para 24)

There cannot be any dispute as to the well settled proposition that circumstances from which conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. (Para 25)

B. Infirmity or fault by investigating agency. Whether benefits the accussed. Held:-It is well settled that any infirmity committed by Police Officer or faulty investigation would not help accused. Recovery of dead body is well supported by public witnesses.(Para 35)

C. Motive – Whether necessary. Held:- Where direct evidence is worthy of credence, can be believed, then motive does not carry much weight. Thus, merely because that there was no strong motive to commit the offence, prosecution case cannot be disbelieved. (Para 37)

D. Evidence Act-section 134 - whether prosecution must produce all witnesses. Held:- It is not necessary for the prosecution to produce all the witnesses in support its case. Quality of witnesses is material not the quantity of witnesses. In fact, it is not the numbers, the quantity, but the

quality that is material. Time honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise. (Para 39 & 40)

Conviction upheld. Jail Appeal dismissed.

Chronological list of Cases Cited: -

1. Hanumant v. The State of Madhya Pradesh, AIR 1952 SC 343,

2. Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063,

3. Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,

4. Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,

5. C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,

6. Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45,

7. Shivu and Another v. 13 Registrar General High Court of Karnataka and Another, 2007(4) SCC 713

8. Tomaso Bruno v. State of U.P., 2015(7) SCC 178.

9. State of U.P. vs. Satish, 2005(3) SCC 114,

10. Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,

11. Namdeo v. State of Maharashtra (2007) 14 SCC 150,

12. Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381,

13. Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251,

14. Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614,

15. Yakub Ismailbhai Patel Vs. State of Gunjrat (2004) 16 12 SCC 229,

16. State of Haryana v. Inder Singh and Ors. (2002) 9 SCC 537,

17. Sumer Singh vs. Surajbhan 18 Singh and others, (2014) 7 SCC 323,

18. Sham Sunder vs. Puran, (1990) 4 SCC 731,

19. M.P. v. Saleem, (2005) 5 SCC 554,

20. Ravji v. State of Rajasthan, (1996) 2 SCC 175 (E-2)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This jail appeal has been filed by accused-appellant, Preetam Singh through Senior Superintendent of Jail, Lalitpur against judgment and order dated 23.01.1998 passed by Sri Jai Singh, Additional Sessions Judge/Special Judge E.C. Act, Lalitpur in Session Trial No. 99 of 1997, (State v. Preetam Singh), arising out of Case Crime No. 19 of 1997, Police Station Saujna, under Sections 302 and 201 IPC. By impugned judgment, accused-appellant has been convicted and sentenced under Section 302 IPC for life imprisonment and under Section 201 IPC for one year rigorous imprisonment. Both the sentences shall run concurrently.

2. Prosecution story, in brief, is that on 10.05.1997, PW-3 Kalyan Singh submitted a written report Ex.Ka-1 in the Police Station Saujana, District Lalitpur stating that accused Preetam Singh was working in his house for Rs.300/- per month and payment was to be made after completion of one year. Accused, left his house after working two months only. Accused came back and told him to settle the amount whereupon he answered that when it was decided that payment would be made after completion of one year, why he was demanding in between. Thereupon accused-appellant pressurized him before PW-1 Swaroop and one Dhuman Singh (not

examined) to pay at once and extended threat that in the event of nonpayment, he would take life of one of his sons. Information took it lightly. On 08.05.1997 at about 10:00 AM accused took his son (victim) aged about eleven years to Mahrauni, at the pretext of wearing shoes. Witness Janki Prasad and Bhagirath resident of same village saw victim Nanhey Raja in the company of accused-appellant, taking by the bus. When victim did not come back, Information asked Preetam Singh about the boy and traced out his son but accused-appellant did not give satisfactory response. It was suspected that accused-appellant abducted victim with intention to kill. Accused was taken to Police Station by informant with the help of Swaroop Singh, Amrit Singh and Kalyan Singh.

3. On the basis of Written Tehrir Ex Ka-1, chick FIR, Ex.Ka-5 was registered in Police Station concerned by Constable Clerk Nanhey Lal PW-6 as Case Crime No. 19 of 1997, under Section 364 IPC against accused-appellant, entry of case was made in General Diary, copy whereof is Ex. Ka-6.

4. Immediately after registration of case, PW-8, SI Mahaveer Singh, commenced investigation on the direction of C.O., took relevant papers, recorded statement of witnesses, recorded disclosure statement of accused in Police custody before Kalyan Singh and Chhatrapal, recovered dead body of Nanhey Raja from river and knife allegedly to be used in commission of offence from root of tree at pointing out of accused-appellant before PWs 3 and 5, prepared recovery memo of dead body and knife Ex.Ka-3. Inquest over the dead body of deceased was held by SI Syed Ali Hashmi who prepared inquest report Ex.Ka-4 and other papers relating thereto and sent body for postmortem, prepared site plan Ex.Ka-14 and converted case under Section 302 and 201 IPC.

5. PW-4 Dr. Khem Chandra, posted as Medical Officer on 12.05.1997 in District Hospital, Lalitpur, conducted autopsy over the dead body of Nanhe Raja, aged about 12 years and prepared postmortem report Ex. Ka-2, expressing his opinion that death was possible at about three days prior to postmortem and death might have been caused due to asphyxia as a result of ante mortem strangulation. Doctor found following ante-mortem injuries on the body of deceased, which read as under :-

i. Wound 2cm x 0.5cm x muscle deep over the left side of the chest between 4th and 5th intramuscular space 2.5cm medial from the left nipple.

ii. Wound 2.5cm x 1cm x 1cm deep over the middle of upper abdomen 3cm below from the xiphisternum. Nature of wound injury no.1 and 2 cannot be given due to putrefied body.

iii. During dissection of front of neck the right side of communication of hyoid bone found fractured and ecchymosis found around it.

6. PW-7 SI Bhagwat Singh under took further investigation of the case, perused record, visited spot, prepared site plan Ex.Ka-7, recorded statements of Dhuman Singh, Janki Prasad, Bhagirath, Kalyan Singh, Sumer Singh and Smt. Munni, Chattrapal Singh and other witnesses and after completing entire formalities of investigation submitted charge-sheet Ex.Ka-8 against accused-appellant under Section 302 and 201 IPC.

7. Case, being exclusively triable by Court of Sessions, after making compliance under Section 207 Cr.P.C. by Chief Judicial Magistrate concerned, case was committed to Sessions Judge, Lalitpur where from it was tranferred to Court of Special Judge (E.C. Act), Laliptur.

8. Trial Court framed charges on 05.11.1997 against accused Preetam Singh under Sections 302 and 201, which reads as under :-

"मैं, जय सिंह, अपर सत्र न्यायाधीश/विशेष न्यायाधीश (ई0 सी0 एक्ट), ललितपुर आप अभियुक्त प्रीतम सिंह पुत्र मान सिह निवासी ग्राम दतया थाना बराठा जिला सागर म0 प्र0, पर निम्न आरोप लगाता हूँ।

प्रथम– यह कि दिनांक 8.5.97 का समय करीब 10 बजे आप वादी कल्याण सिंह निवासी ग्राम सौजना थाना सौजना, ललितपुर के लड़के नन्हे राजा को जूता पहनने के बहाने ग्राम छपरट से जामुनी नदी के किनारे जंगल में ले गये और चाकू से उसकी हत्या कर दी व इसके द्वारा आपने ऐसा अपराध किया जो भा0 दं0 सं0 की धारा 302 के अन्तर्गत दण्डनीय है व इस न्यायालय के संज्ञान में है।

द्वितीय– यह कि उपरोक्त दिनांक स्थान व समय पर आपने वादी के लड़के नन्हे राजा की चाकू से हत्या करने के उपरान्त , साक्ष्य नष्ट करने के उद्देश्य से और अपने आप को कानून से बचाने के उद्देश्य से मृतक नन्हे राजा की लाश को नदी में धकेल दिया व इसके द्वारा आपने ऐसा अपराध किया जो भा0 दं0 सं0 की धारा 2010 के अन्तर्गत दण्डनीय है व इस न्यायालय के संज्ञान में है।

अतएव एतद द्वारा मैं यह निर्देश देता हूँ कि उक्त आरोप के लिए आपका परीक्षण इस न्यायालय द्वारा किया जायेगा।

दिनांक 5.11.97

आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया। अभियुक्त ने आरोप से इन्कार किया और विचारण की मांग की। "

"I, Jai Singh, Addl Sessions Judge/ Special Judge (E.C. Act), Lalitpur, charge you, accused Pritam Singh s/o Maan Singh r/o Village Dataya, P.S. Varatha, Distt Sagar, MP, with the following offence:-

First- That on 8.5.97 at around 10 am you took Nanhe Raja son of the complainant Kalyan Singh r/o Village Saujna, Lalitpur from Village Chhaprat to the jungle along the bank of Jamuni river on the pretext of putting on shoes and killed him with a knife, thereby committing an offence punishable u/s 302 IPC which is in the cognizance of this court.

Second- That on the aforesaid date, place and time you, after having killed complainant's son Nanhe Raja with a knife, pushed his body in the river with an intent to destroy evidence and to save yourself from the clutches of law. Thus, you have committed an offence punishable u/s 201 IPC; which is in the cognizance of this court.

Hence, it is hereby directed that you be tried by this court for the aforesaid charges."

(English Translation by Court)

9. Accused-appellants pleaded not guilty and claimed trial.

10. In order to substantiate its case, prosecution examined as many as eight witnesses in the following manner :-

Sr. No.	Name of PWs	Nature of witness	Paper proved
1	Swaroop Singh	Fact	Nil
2	Janki Prasad	Fact	Nil
3	Kalyan Singh	Fact	Ex.Ka-1
4	Dr. Khem Chandra	Formal	Postmortem Report Ex.Ka-2
5	Chhatrapal Singh	Fact	Recovery memo of dead body Ex.Ka-3
6	Constable Nanhe Lal	Formal	Ex.Ka-5 & 6
7	SI Bhagwati Singh	Formal	Inquest Ex.Ka-4, Site Plan Ex.Ka-7

			& Charge sheet Ex.Ka-8
8	SI Mahaveer Singh	Formal	Ex.Ka-14

11. Subsequent to closure of prosecution evidence, statement of accused under Section 313 was recorded by Trial Court, explaining entire evidence and other incriminating circumstances. In the statement, accused-appellant denied prosecution story in toto; entire story is said to be wrong, claimed false implication but did not chose to lead any defence evidence.

12. Trial Court after hearing learned counsel for parties and analysing entire evidence (oral and documentary) led by prosecution, found accused-appellants guilty, convicted and sentenced, as stated above.

13. We have heard Smt. Rajshree Malviya, learned Amicus Curiae for appellant and Sri Rishi Chaddha, learned AGA for State and travelled through record with valuable assistance of learned counsel for parties.

14. Learned counsel for accused-appellants assailed order of conviction and sentence, took us through the record and advanced following submissions :-

i. There is no eye witness of murder of Nanhey Raja. Case of prosecution rests upon circumstantial evidence.

ii. PW-2 Janki Prasad is the only witness who has last seen the deceased in association with accused.

iii. PW-3 proved disclosure statement of accused and recovery of dead body and knife which bears no signature of accused.

iv. There is no strong motive to commit murder of Nanhey Raja. Motive shown by prosecution is not sufficient to commit murder.

v. Witness Bhagirathi mentioned in the FIR has not been produced from the side of prosecution.

vi. There is no complete chain of circumstantial evidence leading guilt of accused.

vii. Prosecution did not proved its case beyond reasonable doubt.

viii. Trial Court has not appreciated the evidence in right perspective as per law and wrongly convicted the accused.

15. Learned AGA opposed the submission and submitted that accused is named in FIR; there is sufficient motive to the accused to commit the crime; dead body of victim was recovered at the pointing of accused from river and according to postmortem report victim was assassinated, hence there is complete chain of circumstantial evidence leading to guilt of accused. Trial Court has rightly convicted accused-appellant.

16. Recovery of dead body of deceased from river and knife allegedly used in the commission of offence at the pointing out of accused as stated by prosecution could not be disputed by the accused-appellant but according to Advocate he is not responsible for committing murder of Nanhey Raja. From the statement of Doctor and I.O., recovery of dead body from the river at the pointing of accused-appellant and murder of Nanhey Raja stands established.

17. The only question remains for consideration is "whether accused-appellant committed murder of Nanhey Raja or not

and Trial Court has rightly convicted him under Section 302 IPC or not?"

18. We may now proceed to consider rival submission of learned Counsel for partied and evidence in brief available on record.

19. Only evidence from the side of prosecution to connect the accused-appellant with the present crime is threat given by accused to Informant, last seen theory of victim in association of accused-appellant as disclosed by PW-2, disclosure statement of accused before Police and recovery of dead body and knife, allegedly used in commission of murder, at the pointing out of accused whereupon Trial Court believed and found accused guilt for committing murder of Nanhey Raja, an offence punishable under Section 302 IPC.

20. PW-1 has deposed that he was sitting in the home of Kalyan Singh along-with one Jhuman Singh at about 10:00 AM on the fateful day; accused Preetam Singh came there and told Kalyan Singh to settle the amount whereupon Kalyan Singh said that it was decided that payment would be made after completion of one year; Preetam Singh pressurized him to make payment at once and threatened that in the event of non payment, he would kill one of his child; Preetam Singh left from there; after two days PW-1 went to Mehrauni Bazar along-with one Kalyan Singh son of Sumer Singh, Kalyan Singh who Informant met him and asked about his child; Preetam Singh was also enquired by them in the house of accused but he did not say anything; and then he was taken to Police Station where Kalyan Singh PW-3 lodged FIR against him (Preetam Singh).

21. PW-2 Janki Prasad deposed that about seven months prior to date of statement i.e. 02.12.1997 he was sitting at his door at about 10:00 AM and saw that accused Preetam Singh and Nanhey Raja (victim) were going some where. His house is adjacent to house of Kalyan Singh (Informant). When he enquired from Preetam Singh where he was going, he told that, he was taking Nanhey Raja to Mehrauni for wearing shoe. Thereafter Nanhey Raja did not come back to village and nobody has seen him. On third day he came to know that accused Preetam Singh has assassinated Nanhey Raja. He identified accused-appellant in the Court.

22. PW-3 deposed that at about 10:00 AM, seven months ago, he was sitting in his house along-with Dhuman Singh and Swaroop Singh, accused Preetam Singh came there and demanded money whereupon he said that you have not completed my work whereas Rs.300/- per month along-with food was settled and payment was to be made after completion of one year, though he worked only two months; accused Preetam Singh demanded money at once and threatened that he would kill one of his son; next day at about 10:00 AM accused Preetam Singh came to his house when he was not present; accused took his son Nanhey Raja (victim) aged about eleven years on the pretext of purchasing shoe; witnesses Janki Prasad and Bahgirath saw accused Preetam Singh taking Nanhey Raja; his son Nanhey Raja did not come back to his house; third day he went to father of accused, where he inquired of Preetam Singh about his son but Preetam Singh told nothing; he met Swaroop Sing PW-1 and Kalyan Singh son of Sumer Singh in Mehrauni Bazar; he told both of them that his son is missing; he enquired of Preetam Singh but he did not disclose any thing; thereafter they took Preetam Singh to Police Station Saujana and FIR was lodged by PW-3.

23. PW-5 deposed that accused Preetam Singh in his disclosure statement admitted his guilt stating that he took victim Nanhey Raj son of Kalyan Singh on the pretext of getting shoe at Mehrauni Bazar and showed a picture in Talkies. After seeing picture, they slept out of Talkies and took Nanhey Raja on foot and killed him by inflicting knife injury and pushed dead body in river and knife used in the commission of offence was hidden in the root of tree after cleaning the blood from it. He led Police party to river and showed the place where dead body was pushed, took out knife from root of tree and handed over to Police. Police prepared recovery memo Ex.Ka-3 before him, held inquest over the dead body, prepared inquest report Ex.Ka-4 before him, put his signature.

24. In a case, which rests on circumstantial evidence, law postulates, twin requirements to be satisfied. First, every link in chain of circumstances, necessary to establish the guilt of accused, must be established by prosecution beyond reasonable doubt; and second, all circumstances must be consistent only with guilt of accused.

25. In the case in hand there is no eye witness of occurrence and case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that circumstances from which conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

26. In **Hanumant v. The State of Madhya Pradesh, AIR 1952 SC 343,** as long back as in 1952, Hon'ble Mahajan, J. expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

*"... **circumstances should be of a conclusive nature** and tendency and they should be **such as to exclude every hypothesis but the one proposed to be proved**..... it must be such as to show that **within all human probability the act must have been done by the accused.** " (emphasis added)"*

27. In **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063,** Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

28. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,** Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

(1) the circumstances from which the conclusion of guilt is to be

drawn should be fully established. The ***circumstances concerned 'must or should' and not 'may be' established.***

(2) the facts so established should be consistent only with the ***hypothesis of the guilt of the accused,*** *that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a ***chain of evidence so complete as not to leave any reasonable ground*** *for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

(emphasis added)

29. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

(1) the ***circumstances*** *from which an inference of guilt is sought to be drawn,* ***must be cogently and firmly established;***

(2) those circumstances should be of a ***definite tendency unerringly pointing towards guilt of the accused;***

(3) the circumstances, taken cumulatively; should form a ***chain so complete that there is no escape from the conclusion that within all human probability*** *the crime was committed by the accused and none else; and,*

(4) the ***circumstantial evidence*** *in order to sustain conviction must be* ***complete and incapable of explanation*** *of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

(emphasis added)

30. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,** Court said:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the ***conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature.*** *Moreover, all the circumstances should be complete and there should be* ***no gap left*** *in the chain of evidence. Further, the proved* ***circumstances must be consistent only with the hypothesis of the guilt of the accused*** *and totally inconsistent with his innocence. "*

(emphasis added)

31. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgement said:

"(1) the ***facts*** *alleged as the* ***basis of any legal inference must be clearly proved and beyond reasonable doubt*** *connected with the factum probandum;*

(2) the ***burden of proof is always on the party who asserts*** *the existence of any fact, which infers legal accountability;*

(3) in all cases, whether of direct or circumstantial evidence the ***best evidence must be adduced*** *which the nature of the case admits;*

(4) in order to justify the inference of guilt, the ***inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,*** *upon any other reasonable hypothesis than that of his guilt,*

*(5) i****f there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.****"*

(emphasis added)

32. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in **Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713** and **Tomaso Bruno v. State of U.P., 2015(7) SCC 178.**

33. In **State of U.P. vs. Satish, 2005(3) SCC 114,** Court said :-

"The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

34. So far as the argument no.3 of learned Amicus Curiae for appellant is concerned, it is evident from record that accused was taken by Informant and other person to Police Station concerned before registration of case. Case was registered on written report Ex.Ka-1 submitted by Informant, PW-3, under Section 364 IPC. On being interrogated by Police accused-appellant made disclosure statement on which Police recovered dead body of Nanhey Raja from JamuniRiver at the instance of accused-appellant. Non signature of accused on recovery memo may be a slip of the Police Officer. At the most it can be termed as fault by Police in investigation.

35. It is well settled that any infirmity committed by Police Officer or faulty investigation would not help accused. Recovery of dead body is well supported by public witnesses. We are not impressed with the argument of learned Amicus Curiae for appellant and rejected the same.

36. PWs 1 and 3 established the threat extended by accused-appellant to PW-3. Both PWs deposed that accused-appellant has extended threat to Informant to kill any of his son, prior to incident. Immediately thereafter accused took victim Nanhey Raja with him on the pretext of wearing shoe. This fact was established by PW-2 Janki Prasad, who had last seen the victim Nanhey Raja in the company of accused. Accused in his disclosure statement admitted this fact before Police and PW-5. On the basis of disclosure statement recovery of dead body was made by Police from JamuniRiver on the pointing of accused himself. Entire circumstantial evidence leading to guilt of accused has been completely established from the side of prosecution. Prosecution has established

that accused is only and only person who has committed the murder of Nanhey Raja.

37. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance in the argument advanced by learned counsel for appellants.

38. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

39. So far as legal position for non-examination of entire witnesses is concerned, it is well settled principal of law that it is not necessary for the prosecution to produce all the witnesses in support its case. Quality of witnesses is material not the quantity of witnesses. In view of Section 134 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872'), we do not find any substance in the submission of learned counsel for the appellant. Section 134 of Act, 1872, reads as under:-

"134. Number of witnesses.-No particular number of witnesses shall in any case be required for the proof of any fact."

40. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

41. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is material. Quantity of evidence was never considered to be a test for deciding a criminal trial and emphasis of Court is always on quality of evidence. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

42. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing reliance on earlier judgments including **Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.**

43. In **Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,** Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

44. In **State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused in the criminal case. The testimony of a sole witness must be confidence-inspiring, leaving no doubt in the mind of the Court.

45. In the present case, it is fully established from the statement of PW-2 that deceased Nanhey Raja was last seen alive in the company of accused-appellant, who was seen taking victim to Mehrauni Bazar and on being asked by PW-2, accused-appellant told that they were going for wearing shoe. It is further established from the statement of Investigating Officer and Chattrapal that at the pointing of accused dead body of Nanhey Raja was recovered from JamuniRiver on the next day of registration of case. Time gap between the last seen and murder of Nanhey Raja and detection of dead body in the Jamuni River is so short that it cannot be said that crime could have been done by some one else. Accused-appellants in statement under Section 313 Cr.P.C. has failed to offer any explanation, what had happened with the deceased and who murdered. There is sufficient evidence to hold that accused-appellant is only and only person who is responsible for committing murder of Nanhey Raja.

46. In the entirety of the facts and circumstances and legal preposition discussed herein before, we are satisfied that prosecution has successfully proved its case beyond reasonable doubt against accused-appellant and Trial Court has rightly convicted him for having committed an offence under Section 302 read with 201 IPC. Appeal is devoid of merit and liable to be dismissed.

47. So far as sentence of accused-appellants is concerned, it is always a difficult task requiring balancing of variousconsiderations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

48. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law.

Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

49. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence, weapon used in commission of murder and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellants by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no ground appears to interfere in the matter on the point of punishment imposed upon him.

50. We, therefore, find no merit in appeal. Present jail appeal lacks merit and is accordingly, **dismissed** and judgement and order dated 23.01.1998 passed by Additional Sessions Judge/Special Judge E.C. Act, Lalitpur in Session Trial No. 99 of 1997, (State v. Preetam Singh), arising out of Case Crime No. 19 of 1997, Police Station Saujna, under Sections 302 and 201 IPC., is **maintained and confirmed.**

51. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

52. Before parting, we provide that Smt. Rajshree Malviya, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/- for her valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

CRIMINAL APPEAL (CAPITAL CASE) No. 1368 OF 2017

Connected With
Reference No. 3 OF 2017
Connected With
CRIMINAL APPEAL CASES No. 1289 OF 2017, 1296 OF 2017, 1302 OF 2017, 1370 OF 2017, 1371 OF 2017, 1440 OF 2017, 1473 OF 2017 AND CRL. MISC. APPL. U/S 372 Cr.P.C. (LEAVE TO APPEAL) No. 284 OF 2017

Kunwar Pal Singh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ravi Prakash Singh, Sri Ajay Kumar Pandey, Sri Afshan Shafaut, Sri Satish Trivedi.

Counsel for the Opposite Party:
G.A.

A. Non-examination of three witness-effect on conviction – Evidence of P. W. 2 Shanti Devi found not wholly reliable –At least three persons, Rahim Baksh, Narsi and her daughter-Brij Bala were present at the place of incident who had been deliberately withheld by the prosecution.
Prosecution in order to prove the charges framed against the appellants- accused, examined 15 witnesses of fact. P. W. 3, P. W. 4, P. W. 5, P. W. 6 and P. W. 13 Gulab Singh failed to support the prosecution case as spelt out in the F.I.R. and were declared hostile. In their cross-examination conducted with the permission of the Court, they denied having made any statement to the investigating officer. Prosecution failed to examine the investigating officer who had recorded the statements of P. W. 3, P. W. 4, P. W. 5, P. W. 6 and P. W. 13 under Section 161 Cr.P.C.
Therefore, the true genesis of the incident has been suppressed and the prosecution has not come with clean hands and under the facts and circumstances of the case.

The possibility of appellants-Rajendra, Hariom, Anil @ Pappey, Santosh, Shambhoo, Dinesh Darji, Mukesh, Anil @ Bhola, Umashankar havingbeen falsely implicated in the present case cannot be ruled out.
Thus, the prosecution has not been able to prove its case against those accused-appellants beyond all reasonable doubt-entitled to benefit of doubt. (Para-89) (E-7)

(Delivered by Hon'ble Bala Krishna Narayana, J.
Hon'ble Rahul Chaturvedi,J.)

The arguments of this case concluded on 10.04.2019. We then passed the following order :-

Heard Sri Satish Trivedi, Senior Advocate assisted by Sri Ajay Kumar Pandey and Sri Ravi Prakash Singh, learned counsel for the appellants in Capital Case No. 1368 of 2017 along with connected Criminal Appeal No. 1370 of 2017 and 1371 of 2017, Sri Ajay Kumar Pathak learned counsel for the appellant in Criminal Appeal No. 1473 of 2017, Sri A.B.L. Gour, Senior Advocate assisted by Sri Saurabh Gour, learned counsel for the appellant in Criminal Appeal No. 1289 of 2017, Sri Hemendra Pratap Singh, learned counsel for the appellant in Criminal Appeal Nos. 1440 of 2017 and 1296 of 2017, Sri G.S. Hajela, learned counsel for the appellant in Criminal Appeal No. 1302 of 2017 and Sri Ravi Prakash Singh, learned counsel for the appellant in Criminal Misc. Application u/s 372 Cr.P.C. (Leave to Appeal) No. 284 of 2017 and Sri J. K. Upadhyay, learned A.G.A. appearing for the State-respondent assisted by Sri Awadhesh Kumar Shukla, State Law Officer.

We are making the operative order here and now and will give reasons later.

The Capital Case No. 1368 of 2017 along with connected Criminal Appeal Nos. 1289 of 2017, 1296 of 2017, 1302 of 2017, 1370 of 2017, 1371 of 2017, 1440 of 2017, 1473 of 2017 are allowed. The impugned judgment and order dated 15.02.2017 passed by learned Additional Session Judge, Court No. 3, Hathras in S.T. No. 311 of 1999 (State Vs. Rajendra and others) arising out of Case Crime No. 78 of 1990, under Sections 147, 148, 149, 435, 436, 395, 397, 427, 307, 302, 295, 364 I.P.C. and Section 3(2)(5) SC/ST Act, P. S. Sasni, District Hathras are hereby set aside.

The appellants are acquitted of all the charges framed against them. All the appellants are in jail. They shall be released forthwith unless they are wanted

in any other case subject to their complying with the mandatory requirements of provision of Section 437-A Cr.P.C.

However, Reference No. 03 of 2017 and Criminal Misc. Application u/s 372 Cr.P.C. (Leave to Appeal) No. 284 of 2017 are dismissed.

There shall be however no order as to costs.

Here are the reasons :-

(1) Briefly stated the facts of this case are that P. W. 16 Harishankar gave a written report at police station Sasni, sub-district Hathras, district Aligarh on 11.3.1990 at about 18:15 hours in respect of an incident which had allegedly taken place on the same day at about 4 P.M. in village Rudayan, Ward no. 1 alleging therein that he belonged to Jatav community and was a resident of village Rudayan. On the date of occurrence the festival of holi was being celebrated in the village. At about 4 P.M. Udayveer Singh had gone to the house of Sonpal who also belonged to his caste to smear him with colours and when after playing holi with him he was returning to his house he met Kunwar Pal Singh, Rajendra Singh, Jagendra Singh sons of Bhagwan Singh, Shyam Veer Singh son of Bhoori Singh, Prem Singh son of Pop Singh Jat, Banwari son of Sadhu, caste kadere and Insafi Khan son of Fateh Khan who came out from the 'Nouhre' of Kunwar Pal Singh and after catching hold of Udayveer Singh started beating him. Udayveer Singh somehow escaped from their clutches and started running towards his house followed by the aforesaid persons who were joined in their chase by Umesh Kumar son of Shahshi Pal, Vijendra Singh son of Soran Singh, Manoka son of Sadhu, Gulab Singh son of Gulla, Kahar, Nanak Chandra son of Kanhaiya Lal Kahar, Harishchandra son of Chandrapal Khatik, Mahendra Singh son of Radheylal, Raju son of Brahmdutta, Dinesh son of Mathura Prasad, Shambhu son of Shivshankar, Santosh son of Shivshankar Sharma, Rajeev @ Chhotey son of Narayan, Hari, Hariom Pandit, nephew of Lala, Komal Prasad, Mukesh Kumar, Bhola son of Rishi Kumar, Nempal Bhatiya son of Khyaliram, Bijuwa son of Ram Singh Jat, Udayveer Singh son of Pop Singh, Daryav Singh son of Popo Singh Jat, Purshottam son of Ramsahai all residents of village Rudayan, Sahab Singh Pradhan Bikhlaura Khurd, Netrapal son of Udayveer Jat, Brijveer Bikhlaura Khurd, Shyam Singh son of Shiv Singh Bikhlaura Khurd, Pappe son of Mathura Prasad, Pappu son of Mishri Lal, Vashisht, Nannu, Dinesh son of Rajkumar (Pathak), Premchandra son of Gangasharan, Mahesh and Vishnu sons of Gendalal, Nathuram son fo Sunehri Lal, Sunil son of Ramkesh, Dinesh son of Roopkishore, Rajanlal Advocate, Narayannahri Mishra son of Ramgopal, Kamruddin Pradhan village Bheeka Nagla, police station Sasni, district Aligarh and several other persons Narayan Singh village Bilkhaura, Resham Singh Bikhlaura Khurd, Girraj Kishore Bikhlaura Khurd and Mathura Prasad Pradhan Member Leader and Ravendra Pathak Ex-Chief armed with their licenced and unlicenced guns, lathi, ballam, pharsa etc. The aforesaid persons entered into his locality exhorting each other and surrounded therein from the side of boundary wall of the house of Kunwar Pal Singh. The miscreants who were also carrying torches in their hands started setting their houses ablaze. They also desecrated the statue of Indira Gandhi and started hurling stones and firing at the persons belonging to the Jatav caste who became helpless and started running helter skelter shouting for help while shots were being fired at them. They endeavoured to douse the fire but the fire was so fierce that

they had to run towards the fields to save their lives chased by the accused. They saw their sisters and daughters being beaten and within no time not only they had burnt all the houses in the locality belonging to the Harijans but even their harvested crops kept in the farmyards and their tubewells were set on fire. Data Ram (deceased), his wife and his daughter were forcibly dragged out from their house. Such atrocities had been committed by them on the Harijans in the past also and they would continue to indulge in same activities in future also. The accused were openly threatening that they would not let the Harijans live in the village. On account of the atrocities committed on the Harijans by the accused, cries of sorrow could be heard throughout the village. While they hid themselves to save their lives abandoning their houses, the same were looted and plundered by the accused. The extent of damages caused to the houses of Harijans and details of looted property could be ascertained only after the same were assessed by the affected persons on returning to their homes.

(2) In the written report it was also stated that apart from the persons named in the written report there were several other persons who had participated in the incidents of looting and arson who could be identified by face. While the incident was being committed the police had also arrived at the place of occurrence.

(3) On the basis of the written report of the occurrence, case crime no. 78 of 1990, u/s 147, 148, 149, 435, 436, 395, 397, 427, 307, 302, 295, 364 I.P.C. and Section 3(2)(5) S.C./S.T. Act was registered at P. S. Sasni, district-Aligarh against Kunwarpal Singh, Rajendra Singh, Jagendra Singh, Shyamveer Singh, Prem Singh, Banwari, Insafi Khan, Umesh Kumar, Vijendra Singh, Manoka, Gulab Singh @ Gulla, Nanak Chandra all resident of village Rudayan, P. S. Sasni and several other persons. Chek F.I.R. Ext. Ka1 and the relevant G.D. entry vide rapat no. 35 time 17:15 hours date 23.3.1990 and vide rapat no. 43 time 19:00 hours date 14.3.1990.

(4) It appears that after a charred dead body was recovered from the field of Data Ram which was identified as that of Data Ram, section 302 I.P.C. was also added.

(5) The first investigating officer of the case reached the place where the charred dead body of Data Ram was lying and after collecting ash from the places near the tubewell and under the Mango tree he prepared the recovery memo on 12.3.1990. He also collected plain and bloodstained soil from the field of Data Ram and prepared it's recovery memo Ext. Ka13. He then proceeded to collect burnt ash from the 55 burnt houses belonging to the Harijans which were allegedly burnt by the accused during the occurrence and prepared a composite recovery memo. The recovery memo indicates that the ash collected from the houses which were allegedly burnt in the incident was not kept separately but was packed and sealed in a simple piece of cloth on the spot. He also inspected the place from where the dead body of Data Ram was allegedly recovered and prepared it's site plan. He also inspected each of the fifty five houses which were burnt in the occurrence and prepared separate site plan of each house.

(6) The inquest on the body of deceased-Data Ram was conducted on 11.3.1990. The inquest report and other connected documents namely challan

lash, letter addressed to C.M.O., photo nash, letter addressed to R.I., letter for postmortem examination were prepared on the spot. Thereafter, the dead body of Data Ram was sealed by the investigating officer and dispatched to the mortuary for postmortem examination. The postmortem on the body of Data Ram was conducted on 12.3.1990 at about 3:30 P.M. The postmortem report of the deceased was admitted by the defence during the trial and hence it's formal proof was dispensed with. The postmortem report of the deceased indicates following antemortem injuries :

(i) Gunshot wound of entry on his back rt. Side 6 cm below from angle of scapula size 2 x 2 cm x cavity deep.

(ii) Gunshot wound on the front of chest rt. Side in mid auxiliary line, 8 cm below from rt. Nipple .....

(iii) 100% burn injury of 2nd to 3rd degree present all over the body vessels and charred at both hip bone & line of redness & ventricle places also present.

Cause of death was stated to be shock and hemorrhage as a result of ante mortem gunshot and burn injuries.

(7) The investigation of the case was transferred to P. W. 18 Dayaram Dwivedi who at that point of time was posted as S.H.O. police station Sasni, district Aligarh. He started the investigation on 17.3.1990 and during the course of investigation he recorded the statements of Pooran Chandra, Smt. Shanti Devi and on 20.3.1990 Sonpal, Bheekam Singh, Gulab. The investigation of the case was transferred from local police to CBCID by order dated 24.3.1990 passed by S.S.P. Aligarh.

(8) P. W. 14 V. S. Sirohi, the third investigating officer of the case after completing the investigation filed chargesheet on 8.4.1995 against Umashankar, Rajendra, Gulab, Dinesh, Santosh, Mukesh, Daryab Singh, Purshottam, Anil, Mahesh, Nathuram, Dinesh, Rajanlal, Narayan Hari Ravindra and against Umashankar, Vishnu, Mahesh, Hariom, Jitendra and on 18.9.1995 against Mathura Prasad, Mahendra, Kunwarpal, Vijenra, Harichandra, Mahendra, Umendra, Ashok Banwari, Insaf Ali on 21.10.1995.

(9) Since the offences mentioned in the chargesheet were triable exclusively by the Court of Sessions, C.J.M. Aligarh committed the case for the trial of the accused to the Court of Sessions Judge Aligarh where case crime no. 78 of 1990 was registered as S.T. No. 311 of 1999 (State Vs. Rajendra and others) made over for trial from there to the Court of Additional Sessions Judge, Court No. 3, Hathras/Special Judge (S.C./S.T.) Act who on the basis of the material on record and after affording opportunity of hearing to the prosecution as well as the accused framed charge under Sections 147, 148, 149, 435, 436, 395, 397, 427, 307, 302, 295 I.P.C. and Section 3(2)(5) SC/ST Act. The accused abjured the charge and claimed trial.

(10) The prosecution in order to establish the charges framed against the accused examined as many as 18 witnesses out of whom P. W. 1 to P. W. 13 and P. W. 16 were examined as witnesses of various facts while P. W. 14 V. S. Sirohi, the third investigating officer of the case who had completed the investigation and filed chargesheet against the accused, P. W. 18 Dayaram Dwivedi, second investigating officer of the case and P. W. 17 Dr. Gyan S. Sharma who had examined the injuries of the

two injured namely Umesh Chandra and Narsi who had allegedly received injuries in the occurrence and prepared their injury reports which have been brought on record as Ext. Ka 34 to Ext. Ka36 were produced as formal witnesses. The injury reports of the injured (i) Umesh Chandra and (ii) Narsi indicate following injuries on their persons :

(i) Injury report of Umesh Chandra :

चोट नं0 1:– बाई ओर माथे पर भौं से 2 से.मी. ऊपर एक कटा जमा घाव जो कि 3 से0मी0 ग मसल तक गहरा यह सीधा इसके किनारे कटे हुये थे।

चोट नं0–2:– एक कटा हुआ घाव जो कि दाहिनी ओर माथे पर। यह भी सीधा नाक की जड़ से माथे की ओर से 4 से.मी. ग 1 से.मी. मासपेशी तक गहरा। इसके किनारे साफ कटे हुये थे और टेल ऊपर की ओर थी। इसको जेरे निगरानी रखकर एक्सरे की सलाह भी दी थी।

चोट नं0–3:– एक कटा हुआ घाव नाक की हड्डी के ऊपर तिरछा दाहिने से नाक की जड़ के पास 1 से.मी. ग 1से.मी. हड्डी तक गहरा था जो जेरे निगरानी रखी गयी तथा एक्सरे की सलाह दी गई। इसके किनारे साफ कटे हुये थे तथा टेल ऊपर की ओर थी।

चोट नं0–4:– एक लम्बा खुरसट का निशान जो बांये कन्धे पर 7 से0मी0 ग .25 से.मी. यह आडा था।

(ii) Injury report of Narsi :

चोट नं0–1:– एक फआ हुआ घाव माथे पर बांयी तरफ बाई भौं के 4 से0मी0 ऊपर। 3 से.मी. ग 0.5 से0मी0 मांसपेसी तक गहरा तथा खून नहीं था।

चोट नं0–2:– फटा हुआ घाव सिर के सीधी तरफ सीधे कान से 10 से.मी. ऊपर जो कि 5 से.मी. ग 0.5 से.मी. मसल तक गहरा था। इस पर खून जमा हुआ था।

चोट नं0–3:– कटा हुआ घाव बायीं पैर के सामने की ओर घुटने से 6 से.मी. नीचे 1.5 से.मी. ग 0. 5 से.मी. जो कि खाल तक गहरा था।

चोट नं0–4:– फटा हुआ घाव बांये पैर के ऊपर की तरफ ऊपर के 1/3 भाग में जो कि 1से.मी. ग 1से.मी. मसल तक गहरा था।

चोट नं0–5:– खुरसटनुमा नीलगू निशान दायीं अग्र बाहु के पीछे की ओर निचले 1/3 हिस्से मे जो कि 3 से.मी. ग 1.5 से.मी. का था इस का रंग लाल था।

चोट नं0–6:– एक खुरसट का निशान छाती के पिछले भाग पर जो कि सामने की लाइन पर पसली से बिल्कुल नीचे था जो कि 2 से.मी. ग 1.5 से. मी. था।

(11) After the closure of the recording of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. All the accused denied the prosecution case as concocted and alleged false implication due to village party bandi and enmity. Appellant-Anil @ Pappey in criminal appeal no. 1289 of 2017 in addition stated that he was not present at the place of occurrence at the time of the incident as he was employed in Delhi while appellant-Babu Singh @ Vijendra in criminal appeal no. 1370 of 2017 stated that the persons belonging to the informant's side had set the house of his brother Rajendra ablaze and he was busy trying to douze the fire and had not participated in the occurrence. The defence neither adduced any documentary evidence nor examined any witness in defence.

(12) Learned Additional Sessions Judge Court No. 3, Hathras after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record convicted the appellants under the aforesaid offences and awarded above mentioned sentences by the impugned judgment and order. However, co-accused Dinesh, Rajanlal, Insaf Ali, Purshottam, Vishnu, Mahesh, Jeetu @ Jitendra, Harishchandra, Umesh, Mahendra Kumar Vashishth @ Mahesh were acquitted of all the charges.

(13) Reference made by the Additional Sessions Judge Court No. 3, Hathras to this Court for confirmation of death sentence passed by him against Kunwarpal Singh, appellant in capital case no. 1368 of 2017

which was registered as reference no. 3 of 2017 before this Court and connected with these bunch of appeals by order dated 15.2.2017 is also being considered with these appeals.

(14) Hence these appeals.

(15) These appeals as well as the application seeking leave to appeal which have been preferred by the different appellants can be broadly divided into three sets.

(16) The first set comprises of capital case no. 1368 of 2017 (Kunwar Pal Singh Vs. State) and criminal appeal no. 1370 of 2017 (Babu Singh @ Vijendra and another).

(17) In these two appeals, appellants-Kunwar Pal Singh, Babu Singh @ Vijendra and Jogendra @ Jogendra Singh have been convicted under Sections 147, 148, 302/149 I.P.C. read with Section 3(2)(5) SC/ST Act.

(18) The appellants in the aforesaid appeals have not been convicted under Sections 435, 436/149 I.P.C.

(19) The second set comprises of criminal appeal nos. 1371 of 2017, 1473 of 2017, 1289 of 2017, 1440 of 2017, 1296 of 2017 and 1302 of 2017 which have been preferred by appellants-Rajendra, Hariom, Anil @ Pappey, Santosh, Shambhoo, Dinesh Darji, Mukesh, Anil @ Bhola, Umashankar who have been convicted and sentenced under Sections 147, 148, 435, 436/149 I.P.C. read with Section 3(2)(5) SC/ST Act.

(20) The third set comprises Criminal Misc. Application (Leave to Appeal) u/S 372 Cr.P.C. No. 284 of 2017 which has been filed by Rajendra Singh, appellant in criminal appeal no. 1371 of 2017 against the judgment and order dated 14.7.2017 passed by Additional Sessions Judge, Court No. 5, Hathras in S.T. No. 153 of 2010 (State Vs. Niranjan Singh and others) arising out of Case Crime No. 78-B of 1990, under Sections 147, 148, 436, 323/149, 427, 295, 307 I.P.C., P. S. Sasani, District Hathras by which he has acquitted opposite party nos. 2 to 5 from all the charges.

(21) We first proceed to decide capital case no. 1368 of 2017 and criminal appeal no. 1370 of 2017.

(22) Sri Satish Trivedi, learned Senior counsel appearing for the appellants in the aforesaid appeals has submitted that the trial court patently erred in convicting the appellants-Kunwarpal Singh, Jogendra and Babu Singh in the aforesaid appeals under Sections 147, 148, 302/149 I.P.C. read with Section 3(2)(5) SC/ST Act on the basis of the testimony of wholly unreliable, untrustworthy and highly interested witness P. W. 2 Shanti Devi, the wife of the deceased-Datam Ram without seeking corroboration from any other evidence on record.

(23) He next submitted that as far as the two witnesses namely P. W. 1 Chhatrapal Singh and P. W. 16 Harishankar who were also examined by the prosecution during the trial to establish the charge framed against the appellants are concerned, it is indisputed that none of them had witnessed the occurrence. The facts deposed by P. W. 1 Chhatrapal Singh, son of the deceased were as per his own evidence, conveyed

to him by his mother, P. W. 2 Shanti Devi after she had been brought to village Rudayan with the help of police from the house of her brother-in-law (Bahnoi), Raja Ram in village Jasrana on the night of the occurrence. Moreover the statement of P. W. 1 Chhatrapal Singh under Section 161 Cr.P.C. was recorded after more than 22 days of the occurrence without any satisfactory explanation for the inordinate delay. As far as P. W. 16 Harishankar is concerned, he in the F.I.R. qua deceased-Data Ram and P. W. 2 Shanti Devi had stated that the rioters had dragged deceased-Data Ram, his wife, P. W. 2 Shanti Devi and their daughter-Brij Bala from their house and taken them away somewhere but the eye-witness account of P. W. 2 Shanti Devi does not contain any such statement.

(24) He further submitted that the medical evidence on record does not corroborate the manner of assault on deceased-Data Ram as narrated by P. W. 2 Shanti Devi in her statement recorded before the trial court which totally belies her claim of being the eye-witness of the occurrence. He also submitted that the admitted case of the prosecution qua deceased-Data Ram is that he was shot by appellant-Jogendra thrice and all the three shot had hit him and thereafter appellant-Kunwarpal Singh had thrown him into "Laha". The incident was witnessed by P. W. 2 Shanti Devi alone and as per her own evidence after her husband had been thrown into Laha she had fled to village Bilkhaura and from there she had gone to her brother-in-law's house in village Jasrana and she had been brought back to her village Rudayan by the police but there is no link evidence on record proving when and by whom the dead body of Data Ram was recovered and identified and brought to the village and kept under the neem tree. There is further no evidence on record indicating how the police came to know that P. W. 2 Shanti Devi was in Jasrana. From the evidence of P. W. 2 Shanti Devi herself, it is established that P. W. 1 Chhatrapal Singh was neither present at the time and place of occurrence nor she had informed him about her fleeing to Jasrana.

(25) The aforesaid loopholes and lack of link evidence give rise to a very strong suspicious that the entire prosecution story qua deceased-Data Ram is concocted and false.

(26) He next submitted that as far as Babu Singh, appellant in criminal appeal no. 1370 of 2017 is concerned, neither any motive nor any overt act of any kind has been attributed to him and his conviction recorded by the trial court by invoking Section 149 I.P.C., although the evidence on record indicates that only three persons had allegedly participated in committing the murder of Data Ram, is per se illegal.

(27) He lastly submitted that such being the state of evidence, neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set aside.

(28) Rebutting the submissions made by Sri Satish Trivedi, learned counsel for the appellants in capital case no. 1368 of 2017 and criminal appeal no. 1370 of 2017 Sri J.K. Upadhyay, learned A.G.A. appearing for the State submitted that the prosecution case stands fully proved from the consistent and clinching testimony of P. W. 2 Shanti Devi, the sole eye-witness of the occurrence who has given correct and cogent description of

the occurrence which finds full corroboration from the medical evidence on record. The contradictions and the discrepancies in the testimony of P. W. Shanti Devi and the inconsistency in the medical evidence and the ocular version pointed out by the learned counsel for the appellants are of trivial nature which do not go to the core of the prosecution case rendering it unreliable. The discrepancy between her evidence given by her before the trial court and the medical evidence on record with regard to the manner of assault is absolutely natural considering the fact that she is an illiterate lady who had seen her husband being shot and thrown into Laha in her presence.

(29) The factum of deceased-Data Ram being shot by Jogendra, appellant in criminal appeal no. 1370 of 2017 and later thrown by Kunwarpal Singh, appellant in capital case no. 1368 of 2017 into Laha stands fully proved from her evidence.

(30) Both the appeals lacks merit and are liable to be dismissed.

(31) We have heard the learned counsel for the parties and perused the material brought on record.

(32) Record shows that the written report of the occurrence which had allegedly taken place on 11.3.1990 in village Rudayan was lodged by P. W. 16 Harishankar who is admittedly not the eye-witness of the occurrence, at police station Sasni, district Aligarh on the same day at 18:50 hours.

(33) A perusal of the written report of the occurrence indicates that on the date of occurrence holi festival was being celebrated in the village, one Udayveer Jatav by caste while returning from the house of Sonpal who also belonged to his caste after playing holi with him was accosted by Kunwarpal Singh, appellant in capital case no. 1368 of 2017, Rajendra Singh, appellant in criminal appeal no. 1371 of 2017, Jogendra @ Jogendra Singh A2 in criminal appeal no. 1370 of 2017, Shyamveer Singh, Prem Singh, Banwari Lal and Insafi Khan who suddenly came out from the 'Nouhre' of Kunwarpal Singh and they after catching hold of Udayveer Singh started beating him. Udayveer Singh somehow managed to escape and started running towards his village followed by the aforesaid persons who were joined in their chase by Umesh Kumar son of Shahshi Pal, Vijendra Singh son of Soran Singh, Manoka son of Sadhu, Gulab Singh son of Gulla, Kahar, Nanak Chandra son of Kanhaiya Lal Kahar, Harishchandra son of Chandrapal Khatik, Mahendra Singh son of Radheylal, Raju son of Brahmdutta, Dinesh son of Mathura Prasad, Shambhu son of Shivshankar, Santosh son of Shivshankar Sharma, Rajeev @ Chhotey son of Narayan, Hari, Hariom Pandit, nephew of Lala, Komal Prasad, Mukesh Kumar, Bhola son of Rishi Kumar, Nempal Bhatiya son of Khyaliram, Bijuwa son of Ram Singh Jat, Udayveer Singh son of Pop Singh, Daryav Singh son of Popo Singh Jat, Purshottam son of Ramsahai resident of village Rudayan, Sahab Singh Pradhan Bikhlaura Khurd, Netrapal son of Udayveer Jat, Brijveer Bikhlaura Khurd, Shyam Singh son of Shiv Singh Bikhlaura Khurd, Pappe son of Mathura Prasad, Pappu son of Mishri Lal, Vashisht, Nannu, Dinesh son of Rajkumar (Pathak), Premchandra son of Gangasharan, Mahesh and Vishnu sons of Gendalal, Nathuram son fo Sunehri Lal, Sunil son of Ramkesh, Dinesh son of

Roopkishore, Rajanlal Advocate, Narayannahri Mishra son of Ramgopal, Kamruddin Pradhan village Bheeka Nagla, police station Sasni, district Aligarh and other persons Narayan Singh village Bilkhaura, Resham Singh Bikhlaura Khurd, Girraj Kishore Bikhlaura Khurd and Mathura Prasad Pradhan Member Leader and Ravendra Pathak Ex-Chief armed with their licenced and unlicenced guns, lathi, ballam, pharsa etc. The aforesaid persons entered into his locality exhorting each other and surrounded their locality from the side of boundary wall of the house of Kunwar Pal Singh. The miscreants who were also carrying torches in their hands started setting their houses ablaze. They also desecrated the statue of Indira Gandhi and started hurling stones and firing at the persons belonging to the Jatav caste who became helpless and started running helter and skelter shouting for help while shots were being fired at them. They endeavoured to douse the fire but the fire was so fierce that they had to run towards the fields to save their lives followed by the accused. They saw their sisters and daughters being beaten and within no time not only they had burnt all the houses of Harijan locality. Even their harvested crops kept in the farmyards and their tubewells were set on fire. Data Ram (deceased), his wife and his daughter were forcibly dragged from their house. Such atrocities had been committed by them on the Harijans in the past also and they would continue to indulge in such activities in future also. The accused were openly threatening that they would not let the Harijans live in the village. On account of the atrocities committed on the Harijans by the accused, cries of sorrow could be heard throughout the village. As they hid themselves to save their lives abandoning their houses which were looted by the accused. The extent of damages caused to the houses of Harijans and details of looted property could be ascertained only after the same was assessed by the affected persons on returning to their homes.

(34) The prosecution in order to prove the charge framed against Kunwarpal Singh, appellant in capital case no. 1368 of 2017, Babu Singh @ Vijendra and Jogendra @ Jogendra Singh, appellants in criminal appeal no. 1370 of 2017, primarily placed reliance upon the evidence of P. W. 1 Chhatrapal Singh and P. W. 2 Shanti Devi, son and wife of the deceased-Data Ram respectively, P. W. 15 Soorajpal, witness of recoveries, P. W. 16 (informant) Harishankar and P. W. 18 Dayaram Dwivedi, I.O. of the case.

(35) P. W. 1 Chhatrapal Singh, son of the deceased and P. W. 2 Shanti Devi on page 27 of the paper book in his examination-in-chief has categorically deposed that her mother had told him in the evening that at about 5 P.M. accused-Jogendra, Kunwarpal Singh, Babu Singh @ Vijendra, Banwari Lal, Manoka, Komal Prasad, Dinesh Kumar etc. whom his mother knew and of whom Jogendra was armed with katta and rest of the accused were carrying lathi-danda first had beaten his father and thereafter Jogendra Singh had fired at him 2-3 times and then his father was thrown by them into Laha of 35 bighas alive and set ablaze by Kunwarpal Singh. On page 33 of the paper book, he admitted in his cross-examination that his mother had returned to the village after the police had brought the dead body of his father. In his cross-examination on page 29 of the paper book, he admitted that he had not gone to

the place where his father had been murdered on 11.3.1990 and on page 30 of the paper book he further stated that his statement under Section 161 Cr.P.C. was recorded by the investigating officer after 10-12 days of the incident in which he stated that he had neither seen his father being murdered nor he had gone to the place of the incident on 11.3.1990. There is nothing in his evidence which may show that he had provided the address of Raja Ram of Jasrana to the police and his mother had been brought from Jasrana to her village by the police. Thus whatever he deposed before the court qua the incident was hearse.

(36) Nothing turns upon the evidence of P. W. 15 Soorajpal who was produced by the prosecution to prove Ext. Ka32 and Ext. Ka33, the recovery memo of ash, plain and bloodstained earth from the place of occurrence from the field of Data Ram where he was shot dead and burnt. However, he in his cross-examination deposed that he did not remember the day and date on which ash, plain simple earth was recovered, his signatures were obtained.

(37) P. W. 16 Harishankar who is the informant of the case in his evidence tendered before the trial court supported the prosecution case as spelt out by him in the F.I.R. and also deposed that accused-Kunwar Pal Singh, Rajendra, Jogendra, Banwari, Manoj and Mulla @ Gulab had after setting the houses of Harijans in the village on fire had gone to the field of his brother-Data Ram and caused his death by throwing him in burning fire, although the aforesaid fact was conspicuous by its absence in the written report of the incident. He in his cross-examination on page 107 of the paper book admitted that he had not seen the incident which had taken place in the field of Data Ram. On page 110 of the paper book, he further admitted that he had no personal knowledge about the persons who had participated in the occurrence and whatever he had stated in the F.I.R. was communicated to him by other people. On page 109 of the paper book, he stated that he was not aware whether on the date of occurrence, 'Nauhra' of appellants-Rajendra, Jogendra Singh and Kunwar Pal Singh was set on fire or not. However in the same page he admitted that appellant-Rajendra Singh and others had filed a criminal case against Sonpal and others alleging that their 'Nauhar' had been set on fire by Sonpal and others which was pending before the trial Court.

(38) P. W. 18 who at the relevant point of time was posted as S.H.O. P.S. Sasni was entrusted with the investigation of the case on 17.3.1990 stated before the trial court that he started the investigation on 17.3.1990 and recorded the statements of Pooranchand, Smt. Shanti Devi on 19.3.1990 while the statement of witnesses Sonpal, Bheekam Singh, Gulab @ Mulla were recorded on 20.3.1990 and 223.1990 respectively. On 24.3.1990, the investigation of the case was transferred to CBCID under the orders of S.S.P. He also stated that he had not recorded the statement of Smt. Shanti Devi before 19.3.1990 and she in her statement made before him had not disclosed the time at which she had gone to her field. She had also not told to him about the exact place where she was cutting grass at the time of the incident but she had told him that she was cutting grass at a place which was adjacent to the grove of Harishankar. He admitted having not recorded the statements of either Rahim Baksh or

Narsi. He had also stated that although Shanti Devi had told her that gunshot was fired but she had not told him that the accused had fired thrice. He also stated that P. W. 2 Shanti Devi had not stated before him that if she had raised cries for help the accused would have killed her also. She had neither told him that on the date of incident she had remained unconscious for 10-15 minutes nor that she had become unconscious at all. She had also not told him that after she had gone to Jasrana, she had told about the incident to anyone. She had also not told him that she had not gone to the police station Sasni on account of being a lady.

(39) We now proceed to evaluate the evidence of P. W. 2 Shanti Devi, the solitary eye-witness of the murder of Data Ram allegedly committed by appellants, Kunwarpal Singh, Babu Singh @ Vijendra and Jogendra @ Jogendra Singh.

(40) P. W. 2 Shanti Devi in her statement recorded before the trial court deposed that her name was Shanti Devi and she was aged about 50 years and resident of Rudayan, police station Sasna, district Aligarh. About 19-20 years before on the day of holi she, her husband and her daughter-Brij Bala had gone from their house to their tubewell. She had left her son-Chhatrapal Singh in her house. They had left their house and had gone to tubewell because they did not want to participate in holi revelry. Her husband had gone to sleep at the tubewell. Strong breeze was blowing. In order to avoid damage to their standing crops she had not switched on the tubewell. While he and Brijbala were cutting grass Raheem Baksh told her that when he was sleeping he had heard a lot of noise coming from the side of the village. While Raheem Baksh was talking to her she saw about 30-40 persons coming towards her from the side of the village, some of whom went towards the house of Netrapal and Narsi while others came to the tubewell. After beating Narsi, his tubewell and hut were set ablaze by them, Kunwarpar Singh, Jogendra, Babu Ji, Banwari, Manoka, Komal etc who were previously known to her beat her husband. Amongst them Jogendra was carrying a katta with him while others were armed with 'lathi-danda'. Jogendra had shot her husband thrice. P. W. 2 Shanti Devi and her daughter-Brijbala ran away due to fear towards Ganda Nala. The aforesaid persons had set on fire her 'Burjiyan', 'Moonj' and four mango trees. She had seen the entire incident while lying on the ground. Her daughter was also lying on the ground but she had not seen seen anything. She had witnessed the whole occurrence and after the mob had gone she went away from the place of occurrence.

(41) Jogendra had fired at her husband-Kunwarpal Singh had then dragged him upto the Laha and after throwing him into the 'Laha' he had set him ablaze. She and Brijbala fled to Bilkhaura from where they went to the house of Raja Ram in Jasrana and narrated the entire incident to him. Police came to the house of Raja Ram at about 9 P.M. and took her back to her village in the police jeep. On reaching her house she saw the charred dead body of her husband lying under the peepal tree. Thakurs' of village had constructed a temple and Sonpal had built his house near the temple and had opened a door of his house towards the temple which was not appreciated by the Thakurs. Animosity which had developed between the

Harijans and Jatavs was the cause of the incident.

(42) On page 42 of the paper book, P. W. 2 Shanti Devi in her cross-examination stated that she was not present in her village. Much emphasis has been laid by the learned counsel for the appellants on the aforesaid part of her testimony to establish that she was not present in the village on the date of the incident and hence it was not possible for her to have witnessed the occurrence.

(43) On page 44 of the paper book, P. W. 2 Shanti Devi in her cross-examination further deposed that the miscreants had beaten her husband-Data Ram with lathi-danda causing head injury to him. Blood was oozing out from the arms and legs of Data Ram. He was dragged and thrown into Laha after being shot and then set on fire. Data Ram was attacked with lathi and danda at the place which was at a distance of about 4-5 feet from the Laha. After receiving lathi blows, Data Ram had fallen on the ground and thereafter Jogendra had fired three shots at him.

(44) The entire incident which had taken place at about 5 P.M. had lasted for about 10 minutes. Brijbala who was lying on the ground while she was watching the incident after hiding herself. The distance between the place of occurrence and the place from where she had seen the incident was about 100 paces in the west of the Laha near the farmyard. No one else was present at the crime scene from whom she could have asked for help so she kept lying there watching the incident. She had remained unconscious for about 10-15 minutes after the occurrence but Brijbala was conscious throughout and after regaining consciousness she got up and started walking and reached Jasrana. She further admitted that after the miscreants had left the place of occurrence she had not made any effort to go to the place where her husband was lying to find out his condition rather she had gone straight to Bilkhaura from the place where she was hiding.

(45) She on reaching Jasrana had narrated the entire incident but on account of her being a lady she could not go to police station Jasrana. She also stated on page 47 of the paper book that she had told about the occurrence to the darogaji of police station Sasni who had recorded her statement twice. Her first statement was recorded by him at Jasrana. Her second statement was recorded by the investigating officer in her house after two or three days of the occurrence. In her first statement she had told the investigating officer that immediately after the occurrence she and her daughter-Brijbala had gone to the house of Mahipal Jatav in Bilkhaura from the place where they were hiding but he had asked them to leave his house.

(46) P. W. 2 Shanti Devi in her cross-examination on page 48 of the paper book stated that she had no knowledge who had told the police that she was in the house of Raja Ram in Jasrana on the night of the occurrence and who had provided the police with the address of Raja Ram.

(47) Upon being contradicted with her statement recorded under Section 161 Cr.P.C. in which she had stated that the accused were armed with pharsa, ballam and bhala whereas she in her statement recorded during the trial had deposed that the accused were carrying lathi and danda, she expressed her ignorance why

the aforesaid fact had been recorded in her statement by the investigating officer. The statement of fact made by her in her evidence recorded before the trial court that appellant-Kunwarpal Singh had dragged her husband and thrown him into Laha and set him ablaze, was conspicuous by its absence in her statement recorded under Section 161 Cr.P.C. and upon being confronted with the aforesaid statement, P. W. 2 Shanti Devi on page 56 of the paper book reiterated that she had disclosed the aforesaid fact to the investigating officer but she was not aware why the said fact was not recorded by him in her statement.

(48) However, the investigating officer of the case, P. W. 18 Dayaram Dwivedi upon being confronted with the aforesaid portion of the testimony of P. W. 2 Shanti Devi on page 124 of the paper book, deposed that witness P. W. 2 Shanti had not stated before him that Kunwarpal Singh had dragged Data Ram's Body into Laha and after throwing him into Laha he had set him ablaze. She had merely made sweeping allegations against all the accused including Kunwarpal Singh that they had dragged her husband's body into Laha in which harvested crops was stored and after throwing him into Laha they had set him ablaze. P. W. 2 Shanti devi had not disclosed to him the place from where she had witnessed the occurrence. She had also not told him that the place from where she had seen the occurrence was at a distance of about 100 paces from the crime scene.

(49) On page 52 of the paper book P. W. 2 Shanti Devi in her cross-examination reiterated twice that all the three shots fired by Jogendra had hit her husband causing firearm injuries on his chest. She was again confronted by the defence counsel with her statement recorded under Section 161 Cr.P.C. in which she had not stated that she had left her son P. W. 1 Chhatrapal Singh in her house on the date of incident and the aforesaid fact was deposed by her for the first time before the Court on legal advice, she stated that it appears that investigating officer had not questioned her about her son.

(50) On page 56 of the paper book, she deposed that on reaching Jasrana she had narrated the entire occurrence to Raja Ram but the aforesaid fact was not stated by her in her statement recorded under Section 161 Cr.P.C at the house of Raja Ram at 9 P.M.

(51) The fact deposed by her in her examination-in-chief that she had left her house on the date of occurrence at 11 A.M. does not find mention in her statement recorded under Section 161 Cr.P.C. On page 51 of the paper book. A suggestion was given to her that she had gone to Jasrana before the occurrence and she had not seen the incident and that she had given false evidence due to enmity between the two communities but she denied the same. On page 58 of the paper book she again denied the suggestion given to her that no such incident as narrated by her in her evidence had taken place and that she had not seen the incident as she had gone to her sister's house in Jasrana on the date of incident in the morning much before the occurrence had taken place and that she had given false evidence against the accused under the pressure of of her brothers-in-law Hari Shankar and Sonpal.

(52) Another very important circumstance which puts a big question

mark against her claim of being the eye-witness of the occurrence is that no explanation is coming forth from her vis-a-vis if after she had fled from the place of incident and had gone to the house of his brother-in-law Raja Ram in Jasrana via Bilkhaura and had narrated the entire occurrence to her brother-in-law Raja Ram as deposed by her in her evidence before the trial court, although admittedly the aforesaid fact was not disclosed by her to the investigating officer in her statement recorded under Section 161 Cr.P.C. then why no first information report of the incident was lodged by her or by Raja Ram. If she had actually seen the incident and narrated the entire occurrence to her brother-in-law Raja Ram in Jasrana then an F.I.R. of the incident is not only would have certainly been lodged promptly either by P. W. 2 Shanti Devi or by Raja Ram. The aforesaid contradictions, discrepancies and omissions on the part of P. W. 2 Shanti Devi clearly belies her claim of being present in the village and witnessed the occurrence and the defence version that infact she had left the village on the date of incident in the morning and had gone to her sister's house in Jasrana with her daughter-Brij Bala and possibly her son also and after the incident had taken place, she was brought back to her village by the police and the possibility of the version of the incident given by her in her deposition before the trial court being tutored cannot be ruled out.

(53) After having very carefully scanned the statement of P. W. 2 Shanti Devi, we find that there are material contradictions in her statement recorded before the trial court and that recorded during the investigation, to which we have already adverted to and dealt with in detail belie her claim of being the eye-witness of the occurrence. Her failure in not going to the place where her husband had been shot dead and thrown into Laha and set ablaze by the accused after they had gone for the purpose of inquiring about the condition of her husband and instead her fleeing from the place of occurrence with her daughter-Brij Bala on foot to her sister's house in Bilkhaura and not reporting the matter to the police station Jasrana, although Jasrana fell on the way to Bilkhaura or even at police station Bilkhaura, in case she had actually witnessed the occurrence, appears to be totally opposed to normal human conduct under such circumstances. Moreover the medical evidence on record does not corroborate the manner of assault on deceased-Data Ram as narrated by P. W. 2 Shanti Devi. P. W. 2 Shanti Devi has in her evidence tendered during the trial consistently deposed that her husband had been shot by appellant-Jogendra thrice. However the postmortem report of the deceased indicates that he had received only one firearm wound of entry. There are several loose ends and material loopholes in the prosecution story which have been left unexplained. The prosecution case is very specific that apart from P. W. 2 Shanti Devi no other villager had witnessed the occurrence. P. W. 2 Shanti Devi had deposed that although her daughter-Brij Bala was also present with her at the time of the incident but she had not witnessed the occurrence. The prosecution case further is that immediately after the occurrence, P. W. 2 Shanti Devi had fled to the house of her sister in Bilkhaura with her daughter-Brij Bala. Now there is no evidence on record indicating as to how the police came to know about the charred dead body lying in the Laha was that of Data Ram and

who identified the charred dead body as that of Data Ram. Further there is no evidence on record showing how the police came to know about P. W. 2 Shanti Devi being in her sister's house in Jasrana from where the police had brought her to her village on a police jeep.

(54) The above inconsistencies in the prosecution case thus give rise to a very strong inference that the prosecution has not come up with clean hands and the true genesis of the incident has been suppressed. There are too many loose threads in the prosecution case and material contradictions in the evidence of sole eye-witness-P. W. 2 Shanti Devi which go to the core of the prosecution story rendering it unreliable.

(55) It is noteworthy that in the F.I.R. there are no mention that the appellants had committed the murder of Data Ram in his field and thrown his dead body into 'Laha'. The written report of the incident merely contains vague and sweeping allegations against all the persons nominated as accused in the written report that they had caught hold of deceased-Data Ram, his wife, P. W. 2 Shanti Devi and his daughter-Brij Bala and had taken them away somewhere. The aforesaid allegations in the written report run counter to the facts stated by P. W. 2 Shanti Devi in her examination-in-chief.

(56) The F.I.R. does not contain any recital that the appellants after taking away the deceased-Data Ram, his wife and his daughter with them had shot Data Ram and had thereafter thrown him into Laha.

(57) The F.I.R. is also totally silent on the point how, when and by whom the dead body of Data Ram was recovered.

(58) It is not the case of the prosecution that P. W. 2 Shanti Devi had informed either the police or any villager about the murder of her husband.

(59) We have very carefully examined the evidence of the first investigating officer of the case and P. W. 1 Chhatrapal Singh, the son of the deceased but there is nothing in their evidence which may indicate that who told the police that P. W. 2 Shanti devi was in Jasrana, that when and by whom charred dead body of Data Ram was discovered and that who identified the charred dead body as that of Data Ram.

(60) The prosecution has further been unable to come up with any explanation why Data Ram alone was chosen by the appellants for committing his murder. Although if the prosecution story as spelt out in the F.I.R. is accepted to be true then at the time of the incident large number of people were firing with their firearms at the victims who were running helter and skelter and whose houses had been burnt by the accused but none had received any firearm injury. The two persons Umesh Chandra and Narsi who had allegedly received injuries in the incident, their injury reports Ext. Ka34 and Ext. Ka36 do not indicate any firearm wound or gunshot injury on their person.

(61) The prosecution has thus failed to come up with with any motive for the accused-appellants for singling out Data Ram for committing his murder in a brutal manner.

(62) It is true that the law is settled that a conviction can be based upon the evidence of a solitary witness provided that such witnesses appears to be a wholly

reliable witnesses. In case the sole witness produced during the trial appears to be totally dependable, in that case the Court can record a conviction without seeking corroboration from the evidence of any other witness but where the solitary witness is not wholly reliable, then the rule of prudence demands that the Court should look for corroboration from other evidence. In the instant case, we have already found that P. W. 2 Shanti Devi is not at all a reliable witness and in our opinion it would not be safe at all to maintain the recorded conviction of the appellants on the basis of the testimony of P. W. 2 Shanti Devi which does not find corroboration from any other evidence including medical evidence on record.

(63) There is yet another very interesting aspect of the matter. No explanation is coming forth from the side of the prosecution for its omission to examine Brij Bala, the daughter of the deceased who as per the evidence of P. W. 2 Shanti Devi was present with her at the place where she was hiding and from where she had witnessed the incident. She would have been the best witness at least to corroborate the testimony of P. W. 2 Shanti Devi or at least to prove the presence of P. W. 2 Shanti devi at the place of incident. Similarly the prosecution has failed to come up with any plausible reason for not examining Rahim Baksh who was present at the tubewell of the deceased as deposed by P. W. 2 Shanti Devi in her examination-in-chief when P. W. 2 Shanti Devi had seen 30-40 persons coming from the side of the village towards her. Even Narsi who had his house near the tubewell of Data Ram and as deposed by P. W. 2 Shanti Devi before the Court he was beaten up by the mob and his house burnt by the appellants and the other co accused and whose injury reports had been brought on record by the prosecution during the trial as Ext. Ka34 was not produced as witnesses. It is not the case of the prosecution that Brij Bala, Narsi and Rahim Baksh had been won over by the accused and they would not have supported the prosecution story if they were produced during the trial.

(64) Thus, under the circumstances of the case, the failure of the prosecution to examine Brij Bala, Narsi and Rahim Baksh who very material witnesses of the case compels us to draw an adverse inference against the prosecution that in case Brij Bala and Rahim Baksh had been produced during the trial, they would not have supported the prosecution case. The aforesaid three persons would have been the best witness who would have corroborated the claim of P. W. 2 Shanti Devi of her being the eye-witness of the occurrence.

(65) Thus, in view of the foregoing discussion, we do not find it safe to confirm the recorded conviction of the appellants-Kunwarpal Singh, Babu Singh @ Vijendra, Jogendra @ Jogendra Singh recorded by the trial court on the basis of the evidence of all the three witnesses, P. W. 2 Shanti Devi in our opinion is not a wholly reliable witness. Although it evinces from her evidence recorded during the trial that at the time of the occurrence at least three persons, Rahim Baksh, Narsi and her daughter-Brij Bala were present at the place of incident who had been deliberately withheld by the prosecution.

(66) Now coming to the second set of appeals preferred by Rajendra, appellant in criminal appeal no. 1371 of 2017, Hariom, appellant in criminal appeal no. 1473 of 2017, Anil @ Pappey, appellant in criminal appeal no. 1289 of

2017, Santosh, appellant in criminal appeal no. 1440 of 2017, Shambhoo and Dinesh, appellants in criminal appeal no. 1296 of 2017 and Mukesh, Anil Kumar and Umashankar, appellants in criminal appeal no. 1302 of 2017. We find that the prosecution in order to establish the charges framed against the aforesaid appellants had examined, P. W. 1 Chhatrapal Singh, P. W. 2 Shanti Devi, P. W. 3 Chokhe Lal, P. W. 4 Zalim Singh, P. W. 5 Mahesh, P. W. 6 Son Pal, P. W. 7 Ashok Kumar, P. W. 8 Ram Kumari, P. W. 9 Suresh Chandra, P. W. 10 Shankar Lal, P. W. 11 Veerpal, P. W. 12 Saudan Singh, P. W. 13 Gulab Singh, P. W. 15 Soorajpal and P. W. 16 Harishankar, the informant of the case were examined as witnesses of fact while P. W. 14 V. S. Sirohi, the second investigating officer of the case who had competed the investigation and filed charge sheets, P. W. 17 Dr. Gyan S. Sharma, who had examined the injuries of Umesh Chandra son of Shishu Pal Singh and Narsi son of Bhagwan Singh and prepared their injury reports and proved the same as Ext. Ka34 to Ext. Ka36, P. W. 18 Dayaram Dwivedi, second investigating officer of the case were produced as formal witnesses.

(67) Learned counsel for the appellants have submitted that considering the glaring contradictions, material improvements and irreconcilable discrepancies in the statements of the witnesses of fact produced by the prosecution during the trial who had supported the prosecution case and also in view of admitted enmity between the prosecution witnesses and the appellants, the conviction of the appellants recorded by the trial court on the basis of the testimonies of such witnesses cannot be sustained. The inconsistencies in their statements with regard to the identity and number of the accused who had allegedly participated in committing the offences, belie their claim of being the eye-witnesses of the occurrence.

(68) He next submitted that the failure of the prosecution to furnish any explanation for the burning of the house of Rajendra, appellant in criminal appeal no. 1371 of 2017 clearly indicates that the true genesis of the occurrence had been suppressed and the prosecution had not approached with clean hands. Although there is cross version of the occurrence indicating that the true prosecution side had also burnt the houses of some of the accused-appellants. Such being the state of evidence, neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and is liable to be set aside.

(69) Per contra Sri J.K. Upadhyay, learned A.G.A. appearing for the State-respondent has made his submissions in support of the impugned judgment and order and submitted that neither the recorded conviction of the appellants nor the sentences awarded to them suffer from any illegality or infirmity requiring any interference by this Court. This appeal lacks merit and is liable to be dismissed.

(70) Having heard the learned counsel for the parties present and perused the entire lower court record, we find that the prosecution in order to prove the charges framed against appellants-Rajendra, Hariom, Anil @ Pappey, Santosh, Shankar Lal, Dinesh, Mukesh, Anil Kumar and Umashankar and the other accused had examined as many as 15 witnesses of fact namely P. W. 1 Chhatrapal Singh, P. W. 2 Shanti Devi, P. W. 3 Chokhe Lal, P. W. 4 Zalim Singh, P. W. 5 Mahesh, P. W. 6 Son Pal, P. W. 7

Ashok Kumar, P. W. 8 Ram Kumari, P. W. 9 Suresh Chandra, P. W. 10 Shankar Lal, P. W. 11 Veerpal, P. W. 12 Saudan Singh, P. W. 13 Gulab Singh, P. W. 15 Soorajpal and P. W. 16 Harishankar. Out of the aforesaid fact witnesses, P. W. 3 Chokhe Lal, P. W. 4 Zalim Singh, P. W. 5 Mahesh, P. W. 6 Sonpal and P. W. 13 Gulab Singh had failed to support the prosecution case as spelt out in the F.I.R. and were declared hostile. Upon being contradicted with their statements recorded under Section 161 Cr.P.C. by the DGC (Criminal) in which they had allegedly supported the prosecution case, they in their cross-examination conducted by him with the permission of the Court denied having made any such statement to the investigating officer. It is noteworthy that the prosecution had failed to examine the investigating officer who had recorded the statements of P. W. 3 Chokhe Lal, P. W. 4 Zalim Singh, P. W. 5 Mahesh, P. W. 6 Sonpal and P. W. 13 Gulab Singh under Section 161 Cr.P.C. as he would have been the best witness to prove that the aforesaid hostile witnesses had supported the prosecution case during investigation and they had not deposed true and correct facts before the Court.

(71) As far as P. W. 15 Soorajpal and P. W. 16 Harishankar, the informant of the case are concerned, nothing turns on their evidence as admittedly they were not the eye-witnesses of the occurrence.

(72) We have already dealt with the evidence of P. W. 15 Soorajpal and P. W. 16 Harishankar hereinabove.

(73) P. W. 14 V. S. Sirohi, the third investigating officer of the case in his evidence tendered before the trial court has merely narrated the steps taken by him during the investigation and prepared and proved the charge-sheets filed by him against all the appellants after completing the investigation as Ext. Ka31 and Ext. Ka32.

(74) We are now left with the evidence of P. W. 1 Chhatrapal Singh, P. W. 7 Ashok Kumar, P. W. 8 Ram Kumari, P. W. 10 Shankar Lal, P. W. 11 Veerpal and P. W. 12 Saudan Singh against the appellants.

(75) P. W. 1 Chhatrapal Singh in his examination-in-chief nominated Gulab Singh @ Mulla alone as the accused who had set his house ablaze. He did not take the name of any other appellant. Gulab Singh died during the trial and the trial stood abated qua Gulab Singh.

(76) P. W. 7 Ashok Kumar in his statement recorded before the trial Court stated that appellants-Jogendra, Rajendra, Kunwar Pal Singh and non-appellants-Banwari, Mulla @ Gulab Singh and Raju etc. had come to his house on the date of incident on 11.3.1990 at about 4 P.M. He was in his house with his wife, Kamlesh, mother-Ram Kumari, sister-in-law-Vidya Devi, brother-Umashankar and children while they were taking their lunch, he heard sounds of voices exhorting to kill and burn and when he came out of his house he saw a mob which included appellants-Jogendra, Rajendra and Kunwar Pal Singh and non-appellants-Banwari, Mulla @ Gulab and Raja etc. Appellants-Rajendra and Jogendra had abused his mother and had beaten her and his other family members and after locking them inside their house, they had sprinkled kerosene oil and set his house ablaze, although his mother had requested them with folded hands to let them go but they did not show any mercy to her. He managed to save his family by

demolishing the rear wall of his house. On page 117 of the paper book he in his cross-examination stated that he was facing trial in a case on the charge of having set on fire 'Nauhra' of Rajendra and others on the date of occurrence in which his father was also an accused. On the same page, he further admitted that on the date of incident, the police had arrived in the village at about 4:30 P.M. On page 117 of the paper book, he stated that he had not got any member of his family or himself medically examined. He further stated that he did not appreciate the act of Rajendra lodging a cross F.I.R. against him.

(77) P. W. 8 Ram Kumari corroborated the evidence of her son P. W. 7 Ashok Kumar but she did not name non-appellants-Banwari, Mulla @ Gulab Singh and Raju also as accused, although P. W. 7 Ashok Kumar had nominated them also as accused who had set his house ablaze. She had stated that she could recognize Kunwarpal Singh, Jogendra and Rajendra only as most of the assailants had their faces smeared with colours. P. W. 8 Ram Kumari also admitted in her cross-examination that on the date of incident, 'Nauhra' of appellants-Rajendra, Kunwar Pal Singh and Jogendra had been burnt.

(78) Thus, from the perusal of the evidence of P. W. 7 Ashok Kumar and P. W. 8 Ram Kumari, it transpires that appellant-Rajendra had lodged a cross F.I.R. of the occurrence alleging therein that his house had been set ablaze by P. W. 7 Ashok Kumar, his father-P. W. 6 Sonpal and others and hence the possibility of P. W. 7 Ashok Kumar and P. W. 8 Ram Kumari falsely implicating Rajendra, Kunwar Pal Singh and Jogendra in this case due to enmity cannot be ruled out.

(79) P. W. 9 Suresh Chandra stated before the trial court that on the date of incident Dinesh, Premchand, Karuwa, Nahna, Umashankar, Ram Dev, Anil Kumar, Mukesh and Pappu came to his house and after threatening to kill them they with the help of other persons had set his house ablaze after P. W. 9 Suresh Chandra and his family members had come out of the same. In his cross-examination on page 78 of the paper book, he admitted that Dinesh, Hariom, Prem Chandra had set the 'Nauhra' of Rajendra, Jogendra and Kunwar Pal Singh on fire. He further admitted in his cross-examination that the miscreants were carrying torches, cans filled with kerosene oil and cow dung cakes and they were setting the houses ablaze by dipping cow dungs into the kerosene oil and they throwing the same on the roofs of the houses. **The aforesaid fact was conspicuous by its absence in his statement recorded under Section 161 Cr.P.C. and when he was contradicted with the same he stated that he had told the aforesaid fact to the investigating officer but he had no explanation why he had not recorded the same in his statement.** He also admitted in his cross-examination that although the accused had threatened to kill him and his family members but when they came out of their house they had not stopped them and after he had come out of his house, the above named accused had entered into his house and set it ablaze. When he was contradicted with his statement recorded under Section 161 Cr.P.C. in which the aforesaid fact was conspicuous by its absence, he deposed that he had told the said fact to the investigating officer. He

had no explanation why the aforesaid fact did not find mention in his statement recorded under Section 161 Cr.P.C.

(80) From the perusal of the statement of P. W. 9 Suresh Chandra, it transpires that he had not nominated appellants-Rajendra, Hariom, Jogendra Singh as accused, although P. W. 7 Ashok Kumar and P. W. 8 Ram Kumari had named them as accused. It further follows from the facts stated by him in his statement recorded before the trial court that he made material improvements in his evidence tendered during the trial by stating the facts which were not mentioned in his statements recorded under Section 161 Cr.P.C. to suit the prosecution. Thus, P. W. 9 Suresh Chandra does not appears to be a reliable witness at all.

(81) P. W. 10 Shankar Lal stated before the trial court that accused-appellants-Rajendra, Kunwar Pal Singh and Jogendra etc had constructed a temple on the land belonging to the Jatavs in his village. Sonpal Singh had opened the door of his house towards the temple. However due to pressure exerted on him by the Thakurs of the village, he had closed the door of his house due to which relations between Thakurs and Jatavs had become inimical. On the date of incident while holi festival was being celebrated at about 3-4 P.M., the appellants-Kunwar Pal Singh, Rajendra, Jogendra, Santosh, Hariom, non-appellants-Devesh, Kaluwa, Nahna came with about 50-60 other persons and after dividing themselves into several groups, appellants-Hariom, Santosh, Dinesh, non-appellants, Kaluwa and Devesh had set his house on fire. They were armed with lathi and danda. Apart from beating them they had also fired shots. There is no evidence on record showing that he or his family members had got their injuries examined. He further stated that he had fled from his house with his children and on returning to his house he had found his house had been plundered and his household articles burnt. He also stated that a report of the incident was lodged by him at the police station after 10-16 days of the occurrence. He in his cross-examination denied that 'Nauhra' of the appellants-Kunwar Pal Singh, Rajendera and Jogendra had also been set on fire on the date of the incident. He also stated that he had no knowledge whether appellant-Rajendra had lodged a first information report against his uncles-Sonpal, Chokhe Lal and Khachermal with regard to the burning of his 'Nauhra'.

(82) P. W. 11 Veerpal stated before the trial court that on the date of incident at about 3 P.M., appellants-Dinesh Darji, Hariom, Shambhoo and non-appellant Premchandra along with 8-10 other persons whom he could not recognize as their faces were smeared with colour had thrown brickbats at his house on which he got scared and ran away. Upon returning, he found thatched roof of several houses of the locality had been burnt. Some household articles were missing. In his cross-examination, he stated that he was not aware about the identity of the persons who had burnt the houses. He further stated in his evidence that some persons had set 'Nauhra' of appellants-Rajendra and Kunwarpal Singh ablaze. Thus, it is evident from the statement of P .W. 11 Veerpal that he had not seen the persons who had burnt his house. Thus, nothing turns upon his evidence against the appellants.

(83) P. W. 12 Saudan Singh stated before the trial court that on the date of incident at about 3:30 P.M., appellants-Dinesh Darji, Hariom and non-appellants-

Premchandra and Sunil came to his house with 10-15 persons whom he could not recognize as their faces were smeared with colour. They had burnt the thatched roof of his house as well as the thatched roofs of the house of his son. In his cross-examination, he admitted that apart from Dinesh Darji, 10-15 other persons whose faces were smeared with colour had burnt his house. Upon seeing the mob, he had not run away when the thatched roof of his house was ablaze. The police was also present in the village. He had requested the S.O. with folded hands. He also admitted that on the date of incident, 'Nauhra' of appellants-Rajendra and Kunwar Pal Singh had been set on fire. He also stated that the investigating officer had not recorded his statement during the investigation. Thus, it is proved from the evidence of P. W. 12 Saudan Singh that the facts deposed by him before the trial court were stated by him for the first time as he had admitted that the investigating officer had not recorded his statement during the investigation and considering the fact that he has named only appellants-Dinesh Darji and Hariom as the perpetrators of the crime and has failed to depose against the other appellants, we do not find him a reliable witness.

(84) A persual of the statement of P. W. 7 to P. W. 12, it evinces that none of them have stated that all the appellants namely Rajendra, Hariom, Anil @ Pappey, Santosh, Raja, Dinesh, Mukesh, Anil @ Bhola and Umashankar had participated in the occurrence. It has also come in their evidence that at the time when the houses of Harijans were being allegedly burnt, the miscreants had smeared their faces with colour and the witnesses could not recognize them. It also follows from their statements that the relations between the Jatavs and the Thakurs of the villages were inimical on account of the fact that the Thakurs had constructed a temple on the land of P. W. 6 Sonpal who had opened the door of his house facing the temple but he had closed the same on account of the pressure exerted on him by the Thakurs of the village. It is also established from the evidence on record that on the date of incident, 'Nauhra' of appellants-Rajendra, Jogendra and Kunwar Pal Singh was also burnt with regard to which a cross F.I.R. was lodged by appellant-Rajendra against P. W. 6 Sonpal, uncle of P. W. 1 Chhatrapal Singh and his father-P. W. 7 Ashok Kumar.

(85) Upon a further careful scrutiny of the statements of P. W. 7 Ashok Kumar, P. W. 8 Ram Kumari, P. W. 9 Suresh Chandra, P. W. 10 Shankar Lal, P. W. 11 Veerpal and P. W. 12 Saudan Singh, we find that there is a glaring discrepancy in their statements with regard to the number of accused-appellants who had set their houses ablaze while P. W. 1 Chhatrapal Singh nominated P. W. 13 Gulab Singh alone. P. W. 7 Ashok Kumar nominated appellants-Jogendra, Rajendra and Kunwarpal Singh and non-appellants, Banwari, Mulla @ Gulab, Raja and other unknown persons as accused, his mother-P. W. 8 Ram Kumari did not name non-appellants Banwari, Mulla @ Gulab and Raja also as accused. P. W. 9 Suresh Chandra while nominating Dinesh, Premchand, Karuwa, Nahna, Umashankar, Ramdev, Anil Kumar, Mukesh as the persons who had torched his house failed to name appellants-Rajendra, Hariom and Jogendra Singh as accused. P. W. 10 Shankar Lal again nominated appellants-

Rajendra, Kunwarpal Singh, Jogendra, Santosh and Hariom and non-appellants Devesh, Karuwa who according to him had beaten him with lathi and danda and fired shots in the air and had plundered his household articles in his absence. P. W. 11 Veerpal nominated appellants-Dinesh Darji, Hariom, Shambhoo and non-appellants Premchand along with 8-10 other persons who could not be recognized by the witness but did not attribute any overt act to them. P. W. 12 Saudan Singh named Dinesh Darji, Premchand, Hariom and Sunil as the persons who had burnt his house as well as the house of his son. It has also come in their evidence as already noted by us hereinabove that the members of the mob which was torching the houses belonging to the Jatavs in the locality and plundering their houses had their faces smeared with colour. It is highly improbable that if the incident had taken place while the festival of holi was being celebrated why the appellants alone decided not to put colour on their faces and expose themselves to the danger of being recognized and identified as the persons who had committed the offences with a large number of other unknown persons. It is proved to the hilt from the statements of the prosecution witnesses that there was enmity between the Jatavs and the Thakurs of the village due to the fact that the Thakurs had not appreciated the act of P. W. 6 Sonpal of opening the door of his house towards the temple which they had allegedly constructed on the land of P. W. 6 Sonpal but on account of the threat and pressure of the Thakurs, he had closed the same. It is also established from the evidence of the prosecution witnesses that on the date of incident 'Nauhar' of appellants-Rajendra, Jogendra and Kunwarpal Singh had also been burnt with regard to which a cross F.I.R. was lodged by appellant-Rajendra against P. W. 6 Sonpal, uncle of P. W. 1 Chhatrapal Singh, his father and P. W. 7 Ashok Kumar. The prosecution has failed to come up with any explanation for the burning of 'Nauhra' of appellants-Rajendra, Jogendra and Kunwarpal Singh in the same occurrence. There is no mention in the F.I.R. of the occurrence which was lodged by P. W. 16 Harishankar about the 'Nauhra' of appellants-Rajendra, Jogendra and Kunwarpal Singh also having been burnt in the same incident. It is also proved from the evidence of P. W. 16 Harishankar and P. W. 12 Saudan Singh that even before the lodging of the F.I.R. while the occurrence was taking place the police had arrived at the crime scene and hence the possibility of the written report being prepared and scribed after the due deliberations and consultations between the police and P. W. 16 Harishankar containing a false and concocted prosecution story falsely implicating the appellants cannot be ruled out.

(86) Another very startling aspect of the matter is that although none of the prosecution witnesses have deposed about the complicity of Anil @ Pappey, appellant in criminal appeal no. 1289 of 2017 but it appears that he has been convicted by the learned trial judge illegally by placing reliance on the evidence of P. W. 9 Suresh Chandra who on page 78 of the paper book had deposed about the participation Anil Kumar, A2 in criminal appeal no. 1302 of 2017.

(87) Since it has come in the evidence of two prosecution witnesses that the police was present in the village at the time when the accused-appellants

were allegedly indulging in act of violence and arson. No explanation is coming forth from the side of the prosecution as to how the accused-appellants could set ablaze the houses of the members of the Jatavs community in the village in the presence of the police. It is difficult for us to believe that devastation of such magnitude could be caused by the accused-appellants in the presence of the police in the village including the S.H.O. of the police.

(88) The cumulative effect of the aforesaid omission, inconsistencies and loopholes in the prosecution case compels us to hold that the true genesis of the incident has been suppressed and the prosecution has not come with clean hands and under the facts and circumstances of the case, the possibility of appellants-Rajendra, Hariom, Anil @ Pappey, Santosh, Shambhoo, Dinesh Darji, Mukesh, Anil @ Bhola, Umashankar having been falsely implicated in the present case cannot be ruled out. Although the offence had been committed by the persons who had camoflash themselves by smearing their faces with colour whom the witnesses were unable to recognize and the appellants were falsely implicated in the present case after due deliberations and consultations with the police. It has come in the evidence of P. W. 12 Saudan Singh that when the houses of the Jatav were being burnt, the S.H.O. were present in the village and he had requested to him with folded hands to stop the genocide.

(89) Thus, upon a wholesome consideration of the facts of the case, attending circumstances and the nature of the evidence on record, we do not find that the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubt and they are entitled to benefit of doubt. Hence neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set aside.

(90) Now coming to the third set namely Criminal Misc. Application u/S 372 Cr.P.C. (Leave to Appeal) No. 284 of 2017 which has been filed by appellant-Rajendra Singh seeking leave to file an appeal against the judgment and order dated 14.7.2017 passed by Additional Sessions Judge, Court No. 5, Hathras in cross case namely S.T. No. 153 of 2010 (State Vs. Niranjan Singh and others) arising out of Case Crime No. 78-B of 1990, under Sections 147, 148, 436, 323/149, 427, 295, 307 I.P.C., P. S. Sasani, District Hathras by which he has acquitted opposite party nos. 2 to 5 from all the charges.

(91) Briefly stated the facts of this case are that the informant-Rajendra Singh gave a written report at P.S. Sasani, District Hathras on 7.3.1990 stating therein that the accused-Sonpal resident of village Rudayan in connivance with several other villagers had demolished the temple constructed on public land. Upon the information of the incident given by the Chief of the village to the police station, the police force arrived at the crime scene on which Sonpal fled. A written compromise was arrived at between the parties in which it was agreed that the temple shall be re-constructed and Sonpal shall not open his door towards it. The compromise was signed by Village Chief and Sub Village Chief, Surajpal etc. The police inspector returned to the police station with the written compromise.

Thereafter, the temple was reconstructed on 9.3.1990 Sonpal and several members belonging to the Jatav caste damaged the wall of the temple at two places with the object of removing the doors of the temple. The villagers including those belonging to the Jatav caste tried to remonstrate with Sonpal but he along with Niranjan, ramesh, Chandrapal, Indrapal, Bhagwandas, Satish, Sonpal, Bhajanlal, Laxmi etc. refused to relent. On noticing that the situation was getting out of control, Village Chief and Sub Village Chief Sri Ravendra Pathak somehow succeeded in persuading the parties to enter into compromise and it was again agreed that one door of the temple shall be removed.

(92) On 11.3.1990 at about 4 P.M., when they went to the temple to celebrate holi, singing holi songs, they saw Sonpal, Bhawan Singh, Chokhey, Ashok, Netrapal, Zalim, Jagdish, Man Singh, Shishupal, Durga, Gulab, Chandrapal, Khajani, Pappu, Phool Singh, Babu etc. coming towards the temple hurling abuses at them and started throwing stones at them. In order to save themselves, they started running helter and skelter. Phool Singh, Babu, Chokhey, Sonpal and several other persons set their houses on fire and fired shots in the air. Some members of the Jatav community set their own houses also on fire. Someone gave information of the occurrence to the police on which police force arrived at 5:30 P.M.. Informant's Nauhra and all the items kept by him in his agricultural field were burnt. The informant had suffered a loss of Rs. 3000/-

(93) On the basis of the written complaint lodged by the informant, case crime no. 78-B of 1990 was registered on 12.03.1990 against all the accused.

(94) The investigating officer after completing the investigation filed charge-sheet against Sonpal, Mitthu, Khacche, Chokhey, Ashok, Netrapal, Zalim, Jagdish, Kehri Singh, Khajan, Vimlesh, Man Singh, Shishu Pal, Durga, Chandrapal, Gulab, Khajani Pappu, Phool Singh, Lalu, Ramesh, Radheyshyam, Niranjan, Satish, Gramsingh and Indrapal.

(95) Since the offences mentioned in the charge-sheet were triable exclusively by the Court of Sessions Judge, C.J.M. Hathras committed the accused for trial to the Court of Sessions Judge, Hathras where case crime no. 78-B of 1990 was registered as S.T. No. 153 of 2010 (State Vs. Niranjan Singh and others) and made over for trial from there to the Court of Additional Sessions Judge, Court No. 5, Hathras who on the basis of the material on record framed charge under Sections 147, 148, 436, 323/149, 307, 427 and 295 I.P.C. The accused abjured the charge and claimed trial.

(96) The prosecution in order to prove its case against the accused examined P. W. 1 Insaf Ali, P. W. 2 V. S. Sirohi, P. W. 3 Rajendra Singh (informant) and P. W. 4 Dayaram Dwivedi as witnesses.

(97) The prosecution also adduced documentary evidence consisting of photo copy of the chek F.I.R. , photo copy of the written report of the incident, charge-sheet Ext. Ka1, site plans of the place of occurrence Ext. Ka2, Ext. Ka3 and Ext Ka5, recovery memo of the ash recovered from the place of incident Ext. Ka4.

(98) The accused in their statements recorded under Section 313 Cr.P.C. denied the prosecution case as false and alleged false implication.

(99) Learned Additional Sessions Judge, Court No. 5, Hathras after

considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, acquitted the opposite party nos. 2 to 5 by the impugned judgment and order.

(100) Hence this application.

(101) It is contended by the learned counsel for the applicant that the finding of the acquittal recorded by the learned trial judge is vitiated by non consideration of the material evidence on record. The impugned judgment and order which is per se illegal and is liable to be set aside.

(102) Having heard the learned counsel for the applicant and perused the entire lower court record very carefully, we find that the two witnesses of fact examined during the trial were declared hostile after they failed to support the prosecution case regarding the complicity of the opposite parties.

(103) The learned trial judge after considering the evidence on record, came to the conclusion that the prosecution has miserably failed to establish the charges framed against the opposite party nos. 2 to 5 and proceeded to acquit them after giving benefit of doubt to them.

(104) We have very carefully perused the impugned judgment and order as well as the entire lower court record including the statements of the witnesses recorded during the trial and we do not find that the learned trial judge committed any illegality or legal infirmity in acquitting the opposite party nos. 2 to 5. Both the eye-witnesses of the occurrence had failed to support the prosecution case during the trial and were declared hostile. The finding of acquittal recorded by the learned trial court is supported by cogent reasons and relevant considerations. Learned counsel for the appellants has failed to demonstrate that the finding of acquittal recorded by the trial court is vitiated by non-consideration of any relevant material or is perverse. The application for leave to appeal is liable to be rejected.

(105) We accordingly refuse to grant leave to the applicant-Rajendra Singh to file appeal against the impugned judgment and order.

(106) These are the reasons upon which we had allowed Capital Case No. 1368 of 2017 along with connected Criminal Appeal Nos. 1289 of 2017, 1296 of 2017, 1302 of 2017, 1370 of 2017, 1371 of 2017, 1440 of 2017, 1473 of 2017 and dismissed Reference No. 3 of 2017 and Criminal Misc. Application u/s 372 Cr.P.C. (Leave to Appeal) No. 284 of 2017.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

JAIL APPEAL No. 6590 OF 2016

Gyanendra Singh@Raja Singh ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Sameer Jain (A.C.).

Counsel for the Opposite Party:
A.G.A., Sri Ratan Singh

A. Section 376 (2) (f), 2 (i) I.P.C. and Section 3/4 of POCSO Act, 2012. Jail Appeal against conviction. - minor variations in statements, effect of – The principle of law that minor variations or contradictions in the statements of witnesses are inevitable and natural because every person states and narrates facts in his own way. (Para 39)

B. Principle of sentencing and penology- undue sympathy in awarding sentence with accused is not required. The object of sentencing in criminal law should be to protect society and also to deter criminals by awarding appropriate sentence.(Para 45)

C. Section 42 POCSO Act, 2012 , Section 71 I.P.C. Normally where any criminal act is punishable in two or more Statute or in different provision of same statutes sentence, punishment has to be provided in accordance with statute providing lesser punishment. However, that general principle does not apply in view of section 42 of POCSO Act, to offenders under that Act. Greater punishment under POCSO Act to be awarded.(Para 51)

Jail Appeal is partly allowed.

Chronological list of Cases Cited: -

1. Karnel Singh vs. State of M.P. 1995 (5) SCC 518

2. State of Punjab vs. Gurmeet Singh and others 1996 (2) SCC 384

3. Vahid Khan vs. State of M.P. (2010) 2 SCC 9

4. Bharwada Bhogin Bhai Hirji Bhai vs. State of Gujarat AIR 1983 SC 753

5. State of Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996

6. Independent Thought vs. Union of Indian and Others (2017) 10 SCC 800, paras 79 and 80. (E-2)

(Delivered by Hon'ble Virendra Kumar Srivastava, J.)

1. The present jail appeal under Section 383 Cr.P.C. has been filed by accused-appellant Gyanendra Singh @ Raja Singh *(hereinafter referred to as 'appellant')* through Superintendent of Jail, Fatehpur against the judgment and order dated 16.9.2016 passed by Additional Session in S.T. No. 06 of 2016 *(State vs. Gyanendra Singh @ Raja Singh)* arising out of Case Crime No. 236/2015, Police Station (hereinafter referred to as "P.S.') Chandpur, District Fatehpur, whereby he has been convicted U/s 376 (2) (f), 2 (i) I.P.C. and U/s 3/4 of Protection of Children from Sexual Offences Act, 2012 *(hereinafter referred to as 'POCSO Act, 2012')* and has been sentenced to undergo life imprisonment along with a fine of Rs. 25,000/- for offence u/s 376 (2) (f), 2 (i) I.P.C. and also has been sentenced for offence 3 / 4 of POCSO Act, 2012 for life imprisonment and fine of Rs. 25,000/-. In default of payment of above fine, he has to undergo two months of additional imprisonment for each fine.

2. The brief facts of prosecution case are that the accused-appellant Gyanendra Singh @ Raja Singh is father of victim (PW-2) (name of the victim is not being disclosed in this judgment) aged about 9 years. PW-1, Smt. Rajani @ Deepa is real mother of PW-2, victim whereas PW-3, Ram Naresh Singh @ Thakur Deen is grand-father of the victim. On 28.10.2015, at about 14:15 p.m., PW-1, Smt. Rajani lodged First Information Report *(hereinafter referred to as "F.I.R.')* (Ex.Ka.1) at P.S. Chandpur, District Fatehpur alleging that she had gone to her parental house about two months ago with her youngest son Krishna, aged about 2 years, leaving her minor daughter, victim aged about 9 years and a son named

Vishnu, aged about 4 years at her matrimonial house in the custody of her husband-appellant. On 22.10.2015 at about 8:00 p.m., her daughter victim was sleeping in her house. At that very time her husband Gyanendra Singh @ Raja Singh came to victim, enticed and took her away at the roof of the house where he committed rape with the victim, and detained her on roof by threatening her. In the morning when victim came down from the roof, narrated whole occurrence to her grand-father PW-3 Ram Naresh Singh. It has further been alleged that the whole occurrence was informed by PW-3 Ram Naresh to Informant on phone. After the occurrence, since appellant was absconding, PW-1, informant could not dare to go to her matrimonial house due to terror of the appellant. On 28.10.2015, she, by taking courageous steps, went to P.S. Chandpur, District Fatehpur with her father Ranjeet Singh, PW-3 father-in-law Ram Naresh Singh along with her daughter (victim) and filed a F.I.R. against appellant with prayer for medical examination of the victim. It has further been mentioned in the F.I.R. that a day before, Informant had gone to District Headquarter, Fatehpur where she was directed to approach P.S. Chandpur to lodge F.I.R. Upon such information, Chick F.I.R. (Ex.Ka.4) was prepared and the said information was entered in General Diary (Ex.Ka.5) at 14:15 p.m. and Case Crime No. 236/15, U/s 376 (2) (f), 2 (i) I.P.C. and 3/4 of POCSO Act, 2012 was registered against appellant Gyanendra Singh @ Raja Singh.

3. Investigation was undertaken by PW-7, Rajesh Kumar Singh, Investigation Officer (I.O). Victim was sent for medical examinationn and examined by PW-4, Dr. Manisha Shukla. According to her, no external injury was found on the body of the victim. On internal examination, there was a redness present over the labia minora in the vagina of the victim; Hymen was intact; Victim was then referred for x-ray examination in order to determine her age. She (PW-4) had prepared medical examination report (Ex.Ka.3). Oral, vaginal, vulval and anal swab were taken, slide was prepared and sent for pathological examination for D.N.A. test as well as for examination of spermatozoa.

4. During investigation, PW-7, S.I., Rajesh Kumar Singh recorded statement of witnesses and inspected place of occurrence, prepared site plan Ex.Ka.6, and arrested appellant. The certificate of date of birth from the victim's school was taken. Victim was produced before Judicial Magistrate for recording her statement under Section 164 of Code of Criminal Procedure, 1973 (Code) where her statement (Ex.Ka.2) was recorded to the following effect:-

"The victim (.....) has been presented by the I.O. Rajesh Kumar Singh under the Order of Chief Judicial Magistrate dated 3.11.2015 for recording the statement in relation to C.C. No. 236/15, U/s 376 (2 cha) (2 jha) I.P.C. and Sectio ¾ POCSO Act, P.S. Chandpur, District Fatehpur. The Victim (.....) stated that her father's name Raja @ Gyanendra Singh R/o Chandpur, Fatehpur aged 9 years, occupation student. I in the night of 22.10.2015 around 9:00 pm was sleeping. Just then my father took me up to the roof. Then my father brought mustard oil; then he opened my underwear and then he committed a bad act with me. He inserted his private part into my private part and

kept on rubbing. I was crying but he clasped my mouth. My mother was not there at home. There was only me, grand-father, grand-mother and my 4 year old brother was there at home. I got faint around 3:00 a.m. My father continued this bad act with me upto 3:00 a.m. My father kissed also my private part. I gained my conscious at 8:00 a.m. and I felt excruciating pain in my private part. The statement dictated by the witness have been recorded verbatim by me."

5. Thereafter, investigation was taken over by PW-6, S.I. Ranvijay Singh due to the transfer of PW-7, S.I. Rajesh Kumar Singh, who copied medical examination report of victim in case diary. The investigation was further taken over by PW-8, S.I. Shubh Narain due to the transfer of PW-6, S.I. Ranvijay Singh. The undergarment of victim was taken into custody by him and he prepared recovery memo (Ex.Ka.7) perused and verified statement of witnesses available in case diary, concluded investigation and filed charge-sheet (Ex.Ka.8) against appellant U/s 376 (2) (f), 2 (i) I.P.C. and 3/4 of POCSO Act, 2012.

6. Cognizance of the offence was taken by Trial Court. Copies of relevant papers were served on the appellant. After hearing appellant, Trial Court framed charges against appellant as follows:-

मैं ऋचा जोशी विशेष न्यायाधीश (लैंगिक अपराधों से बालकों का संरक्षण अधिनियम)/अपर सत्र न्यायाधीश/फास्ट ट्रेक कोर्ट नम्बर–2 फतेहपुर एतद् द्वारा आप अभियुक्त ज्ञानेन्द्र सिंह उर्फ राजा सिंह पर निम्नलिखित आरोप लगाती हूँ–

यह कि दिनॉक 22–10–2015 को समय करीब 08.00 बजे वहद स्थान चॉदपुर थाना चॉदपुर जिला फतेहपुर में आपने वादिनी मुकदमा रजनी की अवयस्क पुत्री □□□□□□ उम्र 9 वर्ष उसके पिता होते हुये लैंगिक हमला/बलात्कार किया। इस प्रकार आपने भा0दं0सं0 की धारा–376 (2च)(2झ) के तहत दण्डनीय अपराध कारित किया, जो इस न्यायालय के प्रसंज्ञान में है।

यह कि उक्त दिनॉक समय व स्थान पर आपने वादिनी मुकदमा की अवयस्क पुत्री पीडिता उम्र 9 वर्ष के साथ प्रवेशन लैंगिक हमला किया। इस प्रकार आपने धारा 3/4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 के अन्तर्गत दण्डनीय अपराध कारित किया है, जो इस न्यायालय के प्रसंज्ञान में है।

अतएत मैं आदेशित करती हूँ कि उक्त आरोप का विचारण इस न्यायालय द्वारा किया जावे।

अभियुक्त को आरोप पढ़कर सुनाया गया। अभियुक्त ने उक्त आरोप से इंकार किया एवं विचारण किये जाने की मॉग की।

I Richa Joshi, Special Judge (POCSO) / Additional Sessions Judge Fast Track Court No. 2, Fatehpur hereby charge you the accused Gyanendra Singh @ Raja Singh as follows:-

That you the accused, on 22.10.2015 around 8.00 "O' clock at the place Chandpur P.S. Chandpur, District Fatehpur raped minor daughter of the complainant of this Case Rajni viz. (victim), aged 9 years even after being her father. This way you committed a cognizable offence U/s 376 (2 cha) (2 jha) I.P.C. which is in the cognizance of this Court.

That on the said date, time and place you the accused committed penetrative sexual assault on the minor daughter of the complainant of this case, namely, (victim) aged 9 years. This way you committed a cognizable offence U/s 3 /4 POCSO Act, 2012 which is in the cognizance of this Court.

I hereby direct that your trial for the above charges be heard by this Court.

The accused was read aloud the charges which he denied and claimed to be tried. (English translation by Court)

7. Charges were read over and explained to accused-appellant who pleaded not guilty and claimed to be tried.

8. In support of prosecution case, it examined nine witnesses out of whom PW-1, Smt. Rajani (wife of appellant), PW-2, victim (daughter of appellant) and PW-3, Ram Naresh (father of appellant) are witnesses of fact and rest are formal witnesses. PW-4, Dr. Manisha Shukla has examined victim and prepared Medico Legal Examination Report (Ex.Ka.3); PW-5, Const. Sukhdeo Prasad is a witness who registered the F.I.R. (Ex.Ka.4) and made entry of information in General Diary (Ex.Ka.5); PW-6, S.I. Ranvijay Singh, PW-7, S.I. Rajesh Kumar Singh and PW-8, S.I. Shubh Narain are the Investigating Officers of the case who have investigated the case, prepared site plan (Ex.Ka.6), seizure memo of undergarment of victim (Ex.Ka.7) and filed charge-sheet (Ex.Ka.8) and PW-9, Deepika Singh, Ex-Principal of school where victim was studying at the time of occurrence who has proved her age certificate (Ex.Ka.9).

9. After closure of prosecution evidence, appellant was examined under Section 313 of Code wherein he denied prosecution version and stated that he is innocent and has been falsely implicated. Admitting date of birth of deceased as 20.10.2006, he has further stated that earlier he had lodged F.I.R. against his wife and his father, hence she had lodged a false report against him. He has further stated that at the time of occurrence, victim was residing with his sisters *(didi)* and charge-sheet has wrongly been submitted upon a false investigation conducted by I.O. against him.

10. The appellant was offered to lead evidence in his defence but he refused to produce the same.

11. On hearing learned counsels for both the parties, Trial Judge found appellant guilty of the charges framed against him and accordingly convicted and sentenced as above. Aggrieved by the impugned judgment and order, appellant has preferred this appeal.

12. We have heard Sri Sameer Jain, learned Amicus Curiae for appellant and Sri Ratan Singh, learned A.G.A. for State.

13. Learned Amicus Curiae has submitted that the appellant is innocent and has been falsely implicated. In this case F.I.R. has been lodged after six days from the occurrence without any justification; medical examination was conducted after seven days of the occurrence; medical evidence is contradictory to ocular evidence as neither any injury was found on the body of the victim nor any proof of rape has been found in medical examination; statement of victim is contradictory to the statement of PW-3 (appellant's father); He has been falsely roped in this case as there was disputes between him and his father along with his wife; and impugned judgment and order is against the provision of law, hence is liable to be set aside.

14. Per-contra, learned A.G.A. vehemently opposed the submission made by learned Amicus Curiae and submitted that this is a case of rape committed on victim by his own father and in support of offence, the evidence has been produced by victim (daughter), wife and father of appellant; delay in lodging F.I.R. and getting medical examination of victim conducted, is justified; there is no contradiction between medical and ocular evidence as even after seven days, a symptom of rape has been found in medical examination; statements of witnesses are corroborated by each other;

offence against accused has been proved beyond all reasonable doubt; the judgment and order passed by lower Court is liable to be affirmed and appeal be dismissed.

15. We have considered rival submission of the learned counsel for the parties and have gone through the entire record.

16. PW-1, Rajani, mother of victim and wife of appellant, is not an eye witness. On the fateful date of occurrence, she was at her parental home. She has stated that before two months of the occurrence she had gone to her parental house with her two kids, Krishna and Vishnu, by leaving her daughter (victim) aged about 9 years with her husband as she was studying in class 4th at Chandpur. She has further stated on 22.10.2015 when victim was sleeping in her house at about 8:00 p.m., appellant (father of victim) came and enticed her away on roof of the house. He shut her mouth, committed rape with her and by threatening, detained her whole night. On next morning when victim came down from roof, she narrated the occurrence to her grandfather. She has further stated that her father-in-law, Ram Naresh (PW-3), informed her regarding the incident and also told that appellant had fled away. She further stated that due to fear she had no courage to return her matrimonial house. After 5-6 days, by taking courageous steps, she went with her father Ranjit Singh, father-in-law Ram Naresh (PW-3) and her brothers at Police Station Chandpur, District Fatehpur and submitted F.I.R. (Ex.Ka.1) which was written on her dictation by one Rakesh Singh.

17. PW-2 (Victim) aged about 9 years was examined by Trial Court after ascertaining, whether she was able to give rational answers to the questions put to her during examination. She has stated that on 22.10.2015 at about 8:00 p.m., she was sleeping with her grand mother on a cot. At that time, her mother Rajani (PW-1) had gone to her grand father-in-law *(nana)* . Only her grandmother (PW-3), grandfather, her younger brother Harsh and Vishnu were at home. At the time of occurrence, her father (appellant) came and taken her away and her brother on the roof of the house. She has further stated that her father made her brother sleep and thereafter came down in the house and returned with a bowl containing mustard oil. He slapped her 2-4 times and applied mustard oil in her vagina, placed his penis on her vagina and penetrated into it. As she tried to raise alarm to her grandmother, he threatened to throw her into well, and shut her mouth whereby she became unconcious. She has further stated that she had narrated whole story to her grandmother in the next morning and also told to her mother (PW-1) when she met her. She has further stated that she was medically examined and her statement was also recorded by Police as well as by a Judge in the Court. During examination, her statement under Section 164 of Code (Ex.Ka.2) was narrated to her whereupon she affirmed it and stated that the statement was given by her to Judge.

18. PW-3 Ram Naresh Singh, grandfather of victim (PW-2) as well as father of appellant, has stated that on 22.10.2015, victim was sleeping on a cot near to him at about 8:00 p.m. His son, appellant Gyanendra Singh, enticed away her on the roof of the house. The victim had stated to him, in the next morning, that her father had sexually assaulted her by shutting her mouth and detained her on the roof by threatening. He has further stated that he had narrated the occurrence

on phone to her daughter-in-law (PW-1) who was at that time at her parental house and after 2 or 3 days he had gone to the parental house of her daughter-in-law. On 27.10.2015, he had gone to Fatehpur to file an application. On 28.10.2015, her daughter in law had returned at her house and thereafter she lodged F.I.R.

19. PW-4 Dr. Manisha Shukla, has stated that on 29.10.2015, she was posted at DistrictWomenHospital, Fatehpur. On that day, she had examined victim at 10:50 a.m. She aged about 9 years, had been brought by a lady Const. Ramendri. She (PW-4) prepared a medico legal examination report (Ex.Ka.3). She has further stated that upon query, made by her, victim had stated that she was sexually assaulted and beaten by her own father. According to her, victim had also stated that after the occurrence she had changed her clothes and also gone to natural call. At the time of examination, victim's pulse rate was 76 and blood pressure was 110/80. There was no external injury on the body of victim, whereas, on internal examination, redness was present on labia minora. According to her, for the age determination of victim, x-rays of corpal bone, right wrist joint, right elbow joint and right knee joint were advised; slides of vaginal smear, oral swab, vaginal swab, vulval swab, anal swab were prepared and for DNA examination and examination for spermatozoa. According to her, force was used on victim and possibility of sexual assault cannot be ruled out. In cross-examination, she has specifically stated that the injury present on the labia minora of victim could not be caused by falling of the victim.

20. PW-5 Const. Sukhdeo Prasad was posted on 28.10.2015 at P.S. Chandpur, District Fatehpur, who has stated that he had prepared Chick F.I.R. (Ex.Ka.4) on the basis of written information given by Informant Rajani @ Deepa (PW-1) and registered case crime no. 236/2015, U/s 376 (2) (f), 2 (i) I.P.C. and U/s 3/4 of POCSO Act against appellant Gyanendra Singh @ Raja Singh. He has further stated that the said information was also entered in General Diary Report (Ex.Ka.5) on that very day at 14:15 p.m.

21. PW-7, Rajesh Kumar Singh, I.O. of the case has stated that on 28.10.2015, he was posted as Station House Officer, P.S. Chandpur, District Fatehpur; a case crime no. 236/2015, registered during his posting, was investigated by him. He had recorded the statement of victim (PW-2), Rajani (PW-1), Ram Naresh (PW-3), Smt. Champa Devi and police officials. He has further stated that he had inspected the place of occurrence and prepared site plan (Ex.Ka.6). He has further stated that he has taken the certificate of date of birth of victim from her school where she had studied; he had produced the victim before the Court for getting her statement recorded under Section 164 Cr.P.C; appellant was arrested during investigation, and his statement was also recorded by him.

22. PW-6, Ranvijay Singh, is second I.O. after the transfer of PW-7, S.I. Rajesh Kumar. He had only perused the copied of the medical examination report of victim.

23. PW-8, Shubh Narain, is third I.O. who had taken over the investigation after transfer of PW-6 S.I. Ranvijay Singh, has stated that he had perused the statement under Section 164 Cr.P.C. given by the victim before the Court and copied it in case diary. During

investigation, he had verified the statement of witnesses and also recorded statement of PW-4, Dr. Manisha and upon conclusion of investigation, submitted a charge-sheet (Ex.Ka.8) against appellant u/s 376 (2) (f), 2 (i) I.P.C. and U/s 3/4 of POCSO Act, 2012. This witness has also proved recovery memo (Ex.Ka.7) of victim's panty, prepared by him.

24. PW-9, Dipika Singh, Ex-Principal of Sadna Public School, Chandpur has stated that on 25.7.2014, she was posted as a principal of the school. In Scholar Admission Register (छात्र प्रवेश पंजिका), the age of victim has been shown as 20.10.2006. She has further stated that victim was admitted in class III on 25.7.2014. This witness has filed (Ex.Ka.9) certified photocopy of relevant portion of the register wherein details of victim has been mentioned.

25. So far as the submission of learned Amicus Curiae that there is delay of seven days in lodging the F.I.R., hence, prosecution case is not reliable is concerned, in this case, father of the victim is accused for committing offence of rape with his own daughter and F.I.R. has been lodged by mother of the victim who is wife of the appellant. In F.I.R., it has been specifically mentioned that she (PW-1) was not at the place of occurrence at the time of incident; she had gone to her parental house and incident was informed to her by her father in law (PW-3), Ram Naresh. PW-1 in her examination in chief has specifically stated that her father in law told her that after causing occurrence, appellant had fled away to unknown place. Upon such information, she could not dare to go to her matrimonial house, but after 5-6 days, she dared to go to police station on 28.10.2015 with her father Ranjeet Singh, her father-in-law Ram Naresh (PW-3) along with her brother and lodged the F.I.R. This witness has been cross-examined by the defence counsel. In her cross-examination, she has specifically stated that she was informed by her father-in-law regarding the incident occurred on 22nd (month not known) and she came to her matrimonial house at 9th-10th O'clock on 28th day of the month.

26. PW-3, Ram Naresh Singh, who is father of the appellant has also stated that he had informed his daughter-in-law (PW-1) regarding the occurrence who was at that time at her parental house. He has further stated that after 2-3 days of the occurrence, he had gone to parental house of her daughter-in-law PW-1, village Pathreda, District Banda with victim (PW-2) and on 28.10.2015, she came back. This witness has stated that on 27.10.2015, he had also gone to Fatehpur to lodge F.I.R. and thereafter her daughter-in-law had the F.I.R. at Police Station. This witness has also been cross-examined by the defence counsel. In his cross-examination, he has specifically stated that he was present with her daughter-in-law at the time of filing F.I.R. He has denied the suggestion put by the defence counsel to him that the appellant has been falsely implicated.

27. It is settled principle of law that there is no fixed time to lodge F.I.R. Some times F.I.R. is lodged very promptly and sometimes some delay may be caused in lodging the same. Only on the ground that prompt F.I.R. has been lodged, prosecution story cannot be presumed as true and similarly on the ground that the delay has been caused in lodging F.I.R., prosecution case cannot be thrown out. If the delay caused in lodging

F.I.R. is natural and justifiable, in the facts and circumstances of the case, it cannot affect the veracity of prosecution case. It depends upon the facts and circumstances of each case. In this case, appellant has been charged for committing rape with her own daughter aged about 9 years and Informant is neither outsider nor inimical to appellant. She is wife of the appellant. Normally where the accused is the family member of the victim and also the guardian of the victim and Informant, the family members firstly tried to avoid to disclose offence in society and also avoid to lodge F.I.R in order to protect future life and carrier of victim, which may be affected by social stigma. In this case, it has been specifically alleged that from the date of occurrence, appellant was absconding and Informant could not dare to lodge F.I.R. against her husband. We know very well that our society is male dominated, and male member of family usually is head of the family. PW-1 Rajani in her cross-examination has stated that appellant was the only son of her father-in-law. It might be that the family members of Informant firstly decided not to lodge F.I.R. because they knew very well that if a criminal case is lodged, they might loose the company of appellant but afterwards they decided to go for justice and lodge F.I.R. In such a situation, it appears that in peculiar facts and circumstances, the said delay was caused in lodging F.I.R.

28. At this very juncture observations made by Supreme Court in **Karnel Singh vs. State of M.P. 1995 (5) SCC 518**, on the point of delay in lodging F.I.R. in case of sexual assault, are very relevant and read as under:-

".....The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false....."

29. Similarly in State of **Punjab vs. Gurmeet Singh and others 1996 (2) SCC 384,** Court held as under:-

".....The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged....."

30. Thus in view of peculiar facts and circumstances of this case and also the law laid down by Apex Court, we are of the view that delay caused in lodging F.I.R. is reasonable and justified. There is no substance in the submission made by learned Amicus Curiae.

31. So far as the submission of learned counsel regarding medical evidence, that no external injury was found; a delay has been caused in medical examination; the ocular evidence is not supported by the medical evidence,

hymen was found intact and no injury was found on the vagina of the victim, and the redness has been found in medical examination in labia minora may be due to the infection, hence no symptom of rape was found is concerned, we find that offence of rape has been committed by the appellant who is father of victim aged about 9 years. Offence of rape has been defined in Section 375 I.P.C, as follows:-

Section 375 *- A man is said to commit "**rape**" if he:*

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any party of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions: First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person whom she is interested, in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under eighteen years of age.

Seventhly - When she is unable to communicate consent.

32. Thus the aforesaid definition shows that the penetration of penis by a man to any extent into vagina, mouth, urethra or anus of a women or making her to do so with him or any other person amounts to rape, if it has been committed against her will or without her consent.

33. In **Vahid Khan vs. State of M.P. (2010) 2 SCC 9,** Court reiterating the consistent view, held that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.

34. In this case, victim was aged about 9 years. Her medical examination was conducted on 29.10.2015 whereas the offence was committed on 22.10.2015. PW-4, Dr. Manisha Shukla has clearly stated that victim has stated to her that her father carried her on the roof top and committed sexual assault by force. Redness was found on the labia minora of victim's vagina. In cross-examination, she has specifically stated that the injuries found on the labia minora in victim's vagina could not be caused by fall of the victim. It is notable point at this stage that though this witness has stated that hymen of victim was intact and there was no

swelling on the vagina of victim but we cannot overlook the fact that the medical examination was conducted after seven days and according to victim, appellant had applied mustard oil (lubricant) before committing rape with her. The victim had also specifically stated that due to pain, she had become unconscious. It might be possible that after seven days, swelling, tenderness of the injury of vagina might have subsidised and minimised. Neither complete penetration nor complete intercourse is required for offence of rape as provided in Section 375 I.P.C. Penetration to any extent is sufficient. Presence of redness even after 7 days on the labia minora in the vagina of the victim clearly shows that sexual assault was committed with victim.

35. At the time of occurrence, PW-1, Rajani, mohter of victim was not with her. She had gone to her parental house and when she came, she dared to lodge F.I.R. against appellant. Looking into the gravity of offence as there was no female adult in the house of victim at the time of occurrence, who might carry the victim to hospital for medical examination, after lodging F.I.R., victim was carried by Police for medical examination, hence, delay, in getting medical examination conducted, is justified.

36. In **Bharwada Bhogin Bhai Hirji Bhai vs. State of Gujarat AIR 1983 SC 753,** Court while dealing with the uncorroborated testimony of victim of sexual assault, has held as under:-

"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social mileu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:

(1) The female may be a 'gold digger' and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengence on the male for real or imaginary wrongs. She may have a

grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarassing position, on account of personal or political vendatta. (5) She may do so to gain notorietyor publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy. (7) She may do so to win sympathy of others. (8) She may do so upon being repulsed.

By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave thewhole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (S) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured

witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the Western World. Obseisance to which has perhaps become a habit presumably on account of the colonial hangover. We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune."

37. Statement of PW-1 Rajani, PW-2 Victim and PW-3 Ram Naresh clearly show that the offence of sexual assault was committed on 22.10.2015 at about 8:00 p.m. by appellant. Statement of PW-4 Dr. Manisha Shukla and medical examination report (Ex.Ka.3) also shows that symptom of sexual assault was present on the private part of victim at the time of her medical examination. It is settled principle of law that in rape cases, only the statement of victim, if trustworthy, is sufficient to prove prosecution case. No further corroboration is required in such matter. In this case, medical evidence fully corroborate ocular version of prosecution. The submission raised by defence counsel regarding deficiency of medical evidence has no force.

38. So far as submission of learned Amicus Curiae that the statements of witnesses are self-contradictory is concerned, we have perused the statements of PW-1 Rajani Devi, PW-2 victim and PW-3 Ram Naresh and find that there is no material contradiction. Though there are some minor variations in the statement of PW-2 victim and PW-3 Ram Naresh as PW-2 victim has stated that at the time of occurrence, she was sleeping at cot with her grandmother outside her house, whereas, PW-3 has stated that her grand-daughter / victim was sleeping on a cot beside him but statements of these witnesses cannot be treated as contradictory because PW-3 has no where stated that the victim was not sleeping at the time of occurrence with her grand-mother.

39. It is settled principle of law that minor variations or contradictions in the statements of witnesses are inevitable and natural because every person states and narrates facts in his own way. Method or manner of expression of any fact of two persons cannot be exactly same. Thus, we are of the view that there is no

contradiction between the statements of witnesses and the submission advanced by learned Amicus Curiae, in this regard, has no force.

40. It is also pertinent to mention that the victim was produced by I.O. during investigation before Judicial Magistrate on 3.11.2015, where her statement was recorded under Section 164 Cr.P.C. She has narrated in her statement before the Magistrate (statement under Section 164 Cr.P.C. has been transcribed in para no. 4 of this judgment) whole occurrence. The victim has in her examination in chief has also stated that she had been produced before Court where her statement was recorded. She was not cross-examined by the defence on this point before Trial Court, thus, the statement under Section 164 of the Code further corroborates prosecution story.

41. As we have stated that victim was aged about only 9 years at the time of occurrence, PW-1 Rajani, PW-2 victim and PW-3 Ram Naresh are very close relatives i.e. wife , daughter and father of victim, Appellant is the only son of PW-3 Ram Naresh; They (witnesses) very well knew the fact that they are deposing for such type of serious offence, wherein, they may loose their social respect in society as well as also loose company of the appellant. They were also aware about the consequences of making charge against appellant for such offence that whole life of the victim may be spoiled by society particularly in rural areas. No one can be expected to lodge false criminal case for offence of rape against her own husband by leaving aside the real culprit. In this backdrop, it is alleged by accused-appellant that he has falsely been implicated, onus shifts upon him to prove such fact. Section 29 of the POCSO Act, 2012 is also relevant at this stage which is as under:-

"Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the ***Special Court shall presume,*** *that* ***such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.****" (emphasis added)*

42. In this case, although appellant has taken plea in his statement under Section 313 of the Code that he had lodged F.I.R. against his father Ram Naresh PW-3 and his wife Rajani PW-1 and also had stated that at the time of occurrence, the victim was at his sisters house, but he has not produced any evidence in his defence to support his version. Thus the aforesaid presumption gets further strengthened and support prosecution case.

43. PW-1, Rajani, PW-2 Victim and PW-3 Ram Naresh Singh are neither enemy nor stranger to appellant. PW-2 is innocent child. Every teen daughter treats her father as a best guard, well wisher and faithful person in her life, in the world. Appellant has not only committed rape to her but also damaged and destroyed faithful and pious relation between daughter and father. The witnesses produced by prosecution were put to lengthy cross-examination by learned defence counsel before Trial Court, but nothing could be extracted by way of cross-examination so as to create any doubts in their testimony. Delay caused in lodging F.I.R. and medical examination is natural and justified. According to the

statement and examination of all the witnesses, each and every fact of circumstances of the case proved by prosecution leads to one conclusion that such a hateful offence of rape has been committed by the appellant. There is nothing on record to show that prosecution witness had any animus with the appellant so as to implicate him falsely by leaving aside the real culprit. Trial Court had elaborately discussed prosecution evidence in the light of arguments advanced by learned counsel of prosecution as well as defence. In our view, impugned judgment and order requires no interference and is liable to be affirmed.

44. Now the question arises, whether sentence awarded to the appellant by trial Court is just and proper or not?

45. It is settled principle of sentencing and penology that undue sympathy in awarding sentence with accused is not required. The object of sentencing in criminal law should be to protect society and also to deter criminals by awarding appropriate sentence. In this regard, Court in State of **Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996**, has said as under:-

"10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

46. In this case, the offence of rape has been committed by appellant who is father of victim aged about 9 years. He has been convicted by Trial Court in an offence under Section 376 (2) (f), 2 (i) I.P.C. and has been sentenced to under go life imprisonment along with fine of Rs. 25,000/- and has also been committed for an offence under Section 3 / 4 of POCSO Act and has been further sentenced for the same sentence. Both the sentences have been directed to run concurrently.

47. Section 376(2) (f), 2 (i) I.P.C. (as it was at the time of occurrence), deals with offence of rape committed with victim by a relative, guardian or teacher, or a person in a position of trust or authority towards a women or an offence committed with victim who is aged under 16 years of age. Similarly, the offence punishable under Section 3 /4 POCSO Act, 2012 is an offence of penetrative sexual assault committed by any person with victim aged under 18 years.

48. Section 376 (2) (f), 2 (i) of I.P.C. and Section 4 of POCSO Act, 2012 which provides the punishment for sexual assault / rape are as under:-

Section 376:-

1. .....

2. Whoever,-

f. being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

i. commits rape on a woman when she is under sixteen years of age; or

.....

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 4 of POCSO Act:-

"Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

49. Thus a person who commits penetrative sexual assault punishable under Section 4 of POCSO Act, 2012 shall be punished with imprisonment of either description for a term which shall not be less than 7 years but it may extend to imprisonment for life and shall also be liable to fine, whereas, a person who has been found guilty for offence under Section 376 (2) I.P.C. is liable to be punished with rigorous imprisonment for a term which shall not be less than 10 years but it may extend to imprisonment for life which shall mean imprisonment for the remainder of that persons natural life and shall also be liable to the fine.

50. Thus it appears that a single / same act of sexual offence / rape has been declared as offence under Section 375 read with Section 376 I.P.C. and under also Section 4 of POCSO Act, if victim is aged about below 16 years.

51. It is settled principle of law that no person can be punished twice for one offence. Normally a criminal court, by virtue of Section 71 I.P.C., in such cases, where any criminal act is punishable in two or more Statute or in different provision of same statutes sentence, convicts and sentence in such provision of such statutes where lesser punishment has been provided. Parliament was aware to this situation. Looking into the gravity of nature of offence of rape offences, particularly, rape with victim below age of 18 years, Section 42 and 42 A of POCSO Act, 2012 were incorporated to deal with such peculiar situation, which read as under:-

Section:42: *Alternative Punishment:- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.*

Section42(A):*Act Not In Derogation Of Any Other Law:- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.*

52. Thus it is clear that if offence of sexual assault is punishable in relevant provision of POCSO Act and also in relevant provision of I.P.C., like 376 I.P.C., Trial Court is bound to punish the

accused either in the relevant provision of POCSO Act, or under I.P.C. which is greater in degree.

53. Supreme Court while dealing with Section 42 and Section 42A and relevant provisions of POCSO Act, 2012 in **Independent Thought vs. Union of Indian and Others (2017) 10 SCC 800,** paras 79 and 80 has held :-

79. "Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove."

80. "Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, ***the provisions of POCSO are in addition to and not above any other law.*** *However, the second part of Section 42A provides that* ***in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency.*** *POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO.*

*Therefore, t**his is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail**. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO **will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO."***

54. In view of the provision contained in Section 42 of POCSO Act, Trial Judge ought to have punished appellant only in Section 376 (2) (f) (i) I.P.C., not in Section 4 of POCSO Act, 2012. In addition to it, he ought not to have punished appellant both in Sections 376 (2) I.P.C. and in Section 3 /4 of POCSO Act, 2012.

55. In the light of above discussion, judgment and order dated 16.9.2016; passed by Additional Session Judge / Fast Track Court No. 2 Special Act (POCSO), Fatehpur in S.T. No. 6 of 2016 (State vs. Gyanendra Singh @ Raja Singh) so far as it relates to conviction of appellant is maintained and affirmed but the sentenced is modified. His conviction and sentence under section 376 (2) (f) (i) I.P.C. is maintained. He has to undergo for life imprisonment for remaining natural life as provided in this Section and to pay fine of Rs. 25,000/-. No separate sentence is required for the offence under Section 3/ 4 of POCSO Act, 2012.

56. In the light of above discussion, the appeal is **partly allowed** to that extent, as said above.

57. Sri Sameer Jain, learned Amicus Curiae has assisted the Court very diligently. We provide that he shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad, to Sri Sameer Jain, Amicus Curiae, without any delay and, in any case, within 15 days from the date of receipt of a copy of this judgment.

58. Let a copy of this judgment along with lower court record be sent to the concerned Trial Court, Fatehpur for necessary information and compliance.

59. A compliance report be sent to this Court within two months. Copy of his judgment be also supplied to the accused through Superintendent of Jail, concerned.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

CRIMINAL APPEAL No. 5708 OF 2017
With
CASES CRIMINAL APPEAL No. 5947 OF 2017, 5752 OF 2017, 5950 OF 2017, 5986 OF 2017, 6068 OF 2017, 6116 OF 2017 AND 7192 OF 2017

Ram Narayan... Appellant (In Jail Since 31.05.2011)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Kameshwar Singh, Sri Phool Singh Yadav, Sri V.P. Srivastava.

Counsel for the Opposite Party:
A.G.A., Sri Sudhir Bharti.

A. Section 302/149 IPC- Appellant-accused Rameshwar, Jagmohan and Sukhpal were arrested by the Police and

firearm was also recovered from them. No other evidence. Cannot be sufficient to convict them.

In the absence of any other evidence, aforesaid three accused-appellants cannot be said to be involved in the case in hand and, in our view, they have been convicted without any evidence against them. Trial Court has committed error in not looking into this aspect of the matter particularly when on this aspect no explanation has come forward on the part of prosecution, either before Court below or even before this Court.(Para64)

B. Expert evidence and ocular evidence. As to other accussed-appellant - Ballistic reports do not corroborate that the weapons recovered from accused-appellants were used in the crime in question. Credible ocular evidence available. Non-availability of such ballistic report by itself will not help. It is well settled legal position that it is quality and not the quantity of witnesses, which is important. Time honoured principle is that the evidence has to be weighed and not to be counted. The test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise. (Para63)

Hence, conviction and sentence of accused-appellants namely Rameshwar, Sukhpal, Dalpat Kewat, Ram Sewak, Badri Vishal Pal and Ram Narayan under Section 25 of Act, 1959 warrants no interference and deserves to be sustained. Similarly, conviction and sentence of appellant Munna @ Surendra Pal under Section 30 of Act, 1959 also deserves to be sustained.(Para65)

Appeal partly allowed.

CHRONOLOGICAL LIST OF CASES CITED:-

(2007) 14 SCC 150, Namdev Vs. State of Maharashtra (E-2)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. All these eight criminal appeals have been preferred against a common judgment dated 29.8.2017 and order dated 5.9.2017 passed by Richa Joshi, Additional Sessions Judge, F.T.C., (Court no. 2), Fatehpur. By the impugned judgment and order, accused appellants Ram Narayan @ Lala (Crl. Appeal No. 5708 of 2017), Dalpat (Crl. Appeal no. 5752 of 2017), Ashish and Ramsewak (Crl. Appeal No. 5950 of 2017), Jagmohan @ Munna and Sukhpal (Crl. Appeal No. 5986 of 2017), Rameshwar Kewat (Crl. Appeal No. 6068 of 2017), Badri Vishal Pal (Crl. Appeal No. 6116 of 2017) and Munna @ Surendra Pal (Crl. Appeal No. 7192 of 2017) have been convicted under Section 302/149 IPC and sentenced to undergo Rigorous Imprisonment (hereinafter referred to as 'R.I.') for life along with fine of Rs. 20,000/- each. It is also provided that in case of default in payment of fine, each of the accused appellants shall further undergo 6 months additional simple imprisonment. All the aforesaid accused appellants have also been convicted and sentenced under Section 147 IPC to undergo 2 years R.I. and a fine of Rs. 5000/- each. In the event of default in payment of fine they have to suffer 3 months additional simple imprisonment. All the accused appellants have further been convicted and sentenced under Section 148 IPC to serve out 3 years R.I. and a fine of Rs. 5000/- each. In case of default in payment of fine, provision of 3 months additional simple imprisonment was made. Accused appellant Munna @ Surendra Pal has further been convicted and sentenced under Section 30 Arms Act 1959 (hereinafter referred to as "Act, 1959") to undergo 6 months imprisonment with a fine of Rs. 1000/-. In case of default in payment of fine, he is required to undergo one month additional simple imprisonment. Accused appellants Rameshwar, Sukhpal Kewat, Dalpat Kewat,

Ram Sewak, Badri Vishal Pal and Ram Narayan have been convicted and sentenced under Section 25 of Act, 1959 to undergo one year Simple Imprisonment and fine of Rs. 1000/- each. In the event of default in payment of fine, each has to undergo additional Simple Imprisonment for one month. All the sentences imposed on appellants are directed to run concurrently.

2. Crl. Appeal No. 5947 of 2017 has been filed separately by Ram Sewak against the conviction and sentence u/s 25 of Act, 1959.

3. Factual matrix of the case, surfacing from the First Information Report (hereinafter referred to as 'F.I.R.'), as also the evidence available on record, may be stated as under.

4. A written report, Ex.Ka-1 was presented by PW-1 Rajesh Kumar at P.S. Gazipur, District Fatehpur, on 21.5.2011 at 6:30 a.m. stating that he is the son of deceased Jagannath Nishad, resident of Village Nidhwapur Majre Parsetha, P.S. Gazipur, District Fatehpur. In the preceding night of 20.5.2011, Informant, PW-1, along with his father, deceased Jagannath, aged about 50 years, and Babu, aged about 40 years, after taking meals, had gone to field, situated near Government Tubewell, in order to look after and protect the crops of *moong* and ladyfinger. Informant was sleeping on the roof of Tubewell whereas his father and Babu were sleeping on the ground over a *katheri* (cushion made of old sarees/dhoti). In the night, at about 11 p.m., accused appellants Jagmohan @ Munna s/o Shiv Balak, Munna s/o Seeta Ram, both armed with their licensed DBBL gun, Rameshwar s/o Shiv Balak, Sukhpal s/o Ram Kripal, Ashish s/o Ram Sewak, Dalpat s/o Ram Ratan, Ram Narayan @ Lala s/o Ram Pal and Ram Sewak s/o Shri Pal armed with illegal weapons, all residents of village of Informant, and Badri Vishal Pal s/o Hardayal Pal, resident of Village Parsetha, armed with illegal weapon came over there and tried to awake father of Informant as well as Babu, sleeping by his side, on account of election enmity and scuffle taken place at the time of Holi. Seeing accused appellants, aforesaid two persons being scared, tried to flee away but accused appellants caught hold both of them and felled them down. They resorted to indiscriminate firing by their respective weapons and murdered both of them. Informant on account of fear remained lying silently on the roof of Tubewell and witnessed entire incident in the moon light. In the meantime, from the side of village, Ram Bihari s/o Kedar Nath, Jai Karan s/o Ram Swaroop, Lal ji s/o Sandala, Ram Sajivan s/o Ram Khelawan and several others, armed with *lathis*, holding torches reached the road passing near Tubewell and therefrom they witnessed the incident. When they exhorted accused appellants, they were threatened by accused who shouted and warned villagers to go back otherwise they would also meet the same treatment. Accused appellants also opened several fires in air towards left side of the road as a result whereof villagers on the road, being frightened, went back to village and concealed themselves in their houses after closing doOrs. Accused appellants had surrounded the village throughout night and at about 4:00 a.m. in the morning, went towards jungle, hurling threats that whosoever would inform police, of the incident or appear as witness, he too would be met with similar consequence. All accused appellants, F.I.R. states, have

formed an organized gang for their own benefit, committing offences and incidents. Prior to this incident they have also murdered one Shamsher s/o Chandrapal Nishad and in that case, sentence of life imprisonment has been inflicted. These accused have created an atmosphere of terror and for that reason, nobody dares to make complaint or lodge a case or appear as witness against them. After accused appellants had gone away, Informant, PW-1, came down from the roof. In the meantime, family members and several villagers had also reached the place of occurrence. It is stated in F.I.R. that Informant had gone secretly, concealing him, to the Police Station for lodging report.

5. On the basis of written report, Ex.Ka-1, PW- 5 Abdul Aziz, the then Head Moharrir at Police Station registered a case under Section 147, 148, 149, 302 IPC at Case Crime No. 92 of 2011. He also prepared a *Chik* report, Ex.Ka-23. Simultaneously, he made an entry of the incident in general diary at Report No. 12, a copy of which has been filed in court as Ex.24. He also registered a case under Section 30 of Act, 1959 against accused appellant Munna @ Surendra Pal Kewat and under Section 25 of Act, 1959 against accused appellants Rameshwar, Dalpat, Ram Narayan, Sukhpal at Case Crime No. 98 of 2011, 99 of 2011, 100 of 2011, 101 of 2011 and 102 of 2011 and also prepared *Chik* F.I.R., Ex.Ka-25. Corresponding entries were made by him at Report no. 2 at 1:45 p.m. in General Diary on 31.5.2011. A copy of general diary, Ex.Ka-26 is on record.

6. Immediately after registration of F.I.R., investigation was undertaken by PW-4, S.I. Rakesh Kumar Saroj, who rushed to the place of occurrence and took in possession three empty cartridges, one bullet of 315 bore and prepared recovery memo in respect thereof. He also took sample of simple and blood stained soil from near the dead bodies of Babu and Jagannath, sealed them in separate phials and prepared recovery memos, Ex.Ka-5 and Ex.Ka-6, respectively. Investigating Officer *(hereinafter referred to as 'I.O.')* PW-4, Rakesh Kumar Saroj got prepared inquest report, Ex.Ka-7, in respect of deceased Babu and Ex.Ka-12, in respect of deceased Jagannath by S.I. R.C. Yadav. S.I. R.C. Yadav, also prepared necessary documents, Ex.Ka-8 to Ka-11 i.e. letter to C.M.O., specimen seal, Challan Nash, Photo Nash in respect of deceased Babu and Ex.Ka-13 to Ka-16 in respect of deceased Jagannath. Thereafter, he sent both dead bodies to DistrictHospital for *post mortem*. On pointing of the Informant, PW-1, he had prepared site plan, Ex.Ka-17.

7. On 21.5.2011 PW-3, Dr. K.V. Chaudhary of DistrictWomenHospital, Fatehpur conducted *post mortem* over dead body of Babu at 5:40 p.m. According to him, about half day had passed since his death. The deceased was of average body built, his eyes and mouth were partially open. PW-3 found following ante mortem injuries on the person of deceased:-

1. ***firearm entry wound on left side face temporal region skull*** *size (2 cm x 2 cm) 4 cm anterior to left ear; blackening and tattooing present around the wound.*

2. ***firearm entry wound on left side face*** *one cm. lateral to left angle of mouth, size (1cm x 1cm); blackening and*

tattooing present around the wound; size (7 cm x 6 cm) on left side of face.

3. ***firearm entry wound on right side of chest*** *3 cm above right nipple, X cavity deep; blackening and tattooing present; size of wound (2 cm x 1cm).*

4. ***firearm entry wound on left side below mid*** *clavicle; size (2 cm x 2 cm); blackening and tattooing present around wound.*

5. ***firearm exit wound on back side*** *left posterior part of axilla size (1cm x 1cm).*

6. ***firearm entry wound on left side abdomen*** *size (2 cm x 2 cm); cavity deep, 15 cm below the left nipple; blackening and tattooing present around the wound; size (4 cm x 4 cm).*

7. ***firearm exit wound on right side back of thoracic*** *region 3 cm lateral on 12 (thoracic vertebrae) region.*

(emphasis added)

8. On internal examination fracture of III rib left side was found; pleura left lacerated; left lung pale; right lung lacerated; heart was empty; about one and half litre blood clot present in thoracic cavity; peritoneum lacerated; one litre blood clot present in cavity; teeth 16/16, stomach contained about 300 ml pasty like food material; small intestine half filled with gases; large intestine half filled with faecal matter; liver- pale; gallbladder half filled; spleen- pale; both kidneys were pale and urinary bladder half filled. In the opinion of Doctor death had occurred due to shock and haemorrhage, as a result of ante mortem firearm injuries. Three metallic cylindrical type bullets recovered from body. The doctor prepared *post mortem* report, Ex.Ka-3.

9. On the same day at 4:40 p.m. the same Doctor i.e. PW-3 conducted autopsy on the dead body of Jagannath. He was 50 years old and of average body built. *Rigor mortis* present in upper and lower extremities. Eyes and mouth were closed. Following ante mortem injuries on the person of the deceased were found:-

1. ***firearm entry wound on left side tempo parietal region of scull;*** *size (2 cm x 2 cm); 5 cm above left area; brain deep underlying bone fractured, blackening and tattooing present around the wound (4 cm x 4 cm).*

2. ***firearm wound on left eyebrow,*** *size (2 cm x 2 cm), muscle deep; blackening and tattooing present size (10 cm x 9 cm) on the face left side.*

3. ***firearm wound on the abdomen*** *wound of entry present size (1cm x 1cm),* ***blackening and tattooing present around the wound,*** *size (15 cm x 3 cm) just above the umbilicus,* ***wound of entry*** *3 cm above the umbilicus .*

4. ***firearm wound on abdomen right side*** *above iliac crest area, 12 cm lateral to umbilicus;* ***blackening and tattooing present*** *around the wound; size (20 cm x 12 cm).*

5. ***firearm entry wound on the back side of right shoulder*** *above right scapula; blackening and tattooing present around the wound; size (4 cmx4 cm) underlying bone fracture.*

10. The Doctor, PW-3 found three metallic cylindrical type of bullets from body and sent the same to S.P., Fatehpur. On internal examination the membrane of head and neck was found lacerated. Brain was lacerated and about 200 ml blood and clot present. Pleura- pale; right and left lungs- pale; heart was empty; wall of abdomen- lacerated; peritoneum- lacerated; abdominal cavity contained about 2 litre blood and clot; teeth 16/15; stomach contained about 200 ml pasty like food material; small intestine half

filled with gases; large intestine half filled with faecal matter; liver lacerated; gallbladder half filled; both kidneys half pale and urinary bladder half filled. According to doctor cause of death was shock and haemorrhage as a result of ante mortem injuries. The doctor has prepared *post mortem* report, Ex.Ka-2.

11. On 24.5.2011 I.O., PW-4, after receiving information from an Informer, arrested accused appellant Badri Vishal Pal of village Parsetha and accused appellant Ram Sewak of village Parsetha. On search, one country made pistol of 315 bore in working condition was recovered from the right phent of Badri Vishal Pal. A live cartridge of 315 bore was loaded into barrel of pistol. On search of the accused Ram Sewak, one country made pistol of 315 bore in working condition was recovered from his right phent with a live cartridge of 315 bore loaded inside. On query, both the aforesaid accused admitted their involvement in the crime of committing murder of Babu and Jagannath using aforesaid weapons. I.O. sealed country made pistols and cartridges in separate packets and got prepared recovery memo Ex.Ka-18 by S.I. Daya Shanker Tiwari. Thereafter, on 25.5.2011 a case under Section 25 of Act, 1959 was registered. On 30.5.2011, PW-4 arrested five accused appellants namely Munna @ Surendra Pal Kewat, Rameshwar Kewat, Dalapat, Ram Narayan and Sukhpal.

12. One DBBL gun, two live cartridges and one licence No. 888 issued by District Magistrate, Fatehpur had been recovered from the possession of Munna @ Surendra. One country made SBBL gun of 12 bore with 4 live cartridges of 12 bore kept in the cartridge belt had been recovered from the person of Rameshwar Kewat. One country made pistol of 315 bore, one live cartridge and one empty cartridge were recovered from the possession of Dalpat. One country made pistol of 315 bore and one live cartridge of 315 bore had been recovered from the possession of Ram Narayan @ Lala. One country made pistol of 315 bore, one live cartridge and one empty cartridge were recovered from the possession of accused appellant Sukhpal Kewat. All the five accused appellants admitted their involvement and use of respective weapons in the murder of Babu and Jagannath. He got prepared recovery memos Paper Nos. 3A/5 to 3A/7 through S.I. Ramesh Chandra. Later, accused appellant Ashish was arrested and in respect of accused Jagmohan @ Munna non-bailable warrant and orders for proceeding under Section 82, 83 Cr.P.C. were obtained from the Court on 25.7.2011.

13. After collecting evidence and concluding investigation, PW- 4 submitted charge sheet, Ex.Ka-19 against accused appellants Munna, Rameshwar Kewat, Sukhpal (wrongly mentioned as Shiv Pal in the statement of PW-3), Ashish, Dalpat, Ram Narayan @ Lala, Ram Sewak and Badri Vishal Pal under Section 147, 148, 149, 302 IPC.

14. Consequent upon Court's order dated 25.7.2011 directing for proceeding under Section 82 and 83 Cr.P.C. accused appellant Jagmohan surrendered in the Court on 2.8.2011. On investigation, he told that his licensed gun was in the shop of Ajay Arms Store, Fatehpur. After obtaining permission from District Magistrate, I.O. took in possession DBBL gun no. 6555 as per Rules and prepared recovery memo, Ex.Ka-20 in respect

thereof. A separate charge sheet, Ex.Ka-22 was submitted before the Court by the investigating officer on 17.8.2011.

15. PW-8, S.I. Dayashankar Tiwari had conducted investigation with regard to offences under Sections 25 and 30 of Act, 1959 against the accused appellants. He prepared site plan, Ex.Ka-34 in respect of place wherefrom five accused namely Munna, Rameshwar Kewat, Dalpat Kewat, Ram Narayan and Sukhpal were arrested by police. Charge sheets Ex.Ka-35 and Ex.Ka-36 were filed against accused appellants Munna @ Surendra Pal under Section 30 of Act, 1959 and against Rameshwar Kewat under under Section 25 of Act, 1959, respectively. Requisite sanction for prosecution against accused appellant Rameshwar Kewat as Ex.Ka-37 is on record. Ex.Ka-38 is charge sheet and Ex.Ka-39 is sanction against Dalpat. Ex.Ka-40 is charge sheet under Section 25 of Act, 1959 and Ex.Ka-41 is sanction for prosecution against Ram Narayan. Similarly, Ex.Ka-42 and Ex.Ka-43 are charge sheet and sanction in respect of accused Sukhpal Kewat.

16. After filing charge sheet, Ex.Ka-19 under Section 147, 148, 149, 302 IPC by the police, C.J.M. Fatehpur took cognizance of the offence on 8.8.2011 against accused appellants Munna, Rameshwar, Sukhpal, Ashish, Dalpat, Ram Sewak, Ram Narayan and Badri Vishal Pal. Cognizance of the offence against accused appellant Jagmohan on the charge sheet, Ex.Ka-22 was also taken by C.J.M., Fatehpur on 1.10.2011. On charge sheets Ex.Ka-28, Ka-30, Ka-36, Ka-38, Ka-40 and Ka-42 cognizance of the offence under Section 25 of Act, 1959 was taken by C.J.M. on 8.7.2011, 25.7.2011, 23.8.2011, 23.8.2011, 23.8.2011 and 23.8.2011, against accused appellants Badri Vishal Pal, Ram Sewak, Rameshwar Kewat, Dalpat, Ram Narayan and Sukhpal Kewat, respectively. Against accused appellant Munna @ Surendra Pal cognizance of the offence under Section 30 of Act, 1959 was taken by C.J.M. Fatehpur on 14.7.2011 on charge sheet Ex.Ka-35. All the charge sheets under Section 25 of Act, 1959 were filed after obtaining requisite sanction from District Magistrate.

17. Offences under Section 147, 148, 149, 302/34 IPC (Crime No. 92/11) being exclusively triable by Court of Sessions Judge, cases were committed to the Court of Sessions Judge by C.J.M. Fatehpur on 15.10.2011 which was registered as Session Trial No. 440 of 2011. Likewise cases under Section 25 and 30 of Act, 1959 against accused appellants were also sent to Sessions Court which were registered as S.T. No. 447 of 2011 against Badri Vishal Pal under Section 25 of Act, 1959; S.T. No. 448 of 2011 against Ram Sewak under Section 25 of Act, 1959; S.T. No. 449 of 2011 against Munna @ Surendra under Section 30 of Act, 1959; S.T. No. 451 of 2011 against Dalpat; S.T. No. 452 of 2011 against Ram Narayan under Section 25 of Act, 1959 and S.T. No. 453 of 2011 against Sukhpal under Section 25 of Act, 1959. Session Trial was ultimately transferred to Ist Addl. District and Sessions judge (Ex Cadre -I, Fatehpur) who framed charges against accused appellants on 13.7.2012 under Section 302 read with 149, 147, 148 IPC the charge reads as under:-

"मै रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप अभियुक्तगण

1– मुन्ना पुत्र सीताराम केवट
2– रामेश्वर पुत्र शिवबालक केवट
3– सुखपाल पुत्र रामकृपाल केवट
4– आशीष पुत्र राम सेवक
5– दलपत पुत्र रामरतन
6– रामनरायन उर्फ लाल पुत्र रामपाल
7– रामसेवक पुत्र श्रीपाल
8– बद्री विशाल पुत्र हरदयाल पाल
9– जगमोहन उर्फ मुन्ना निषाद, को निम्न आरोप से आरोपित करता हूँ :–

1– यह कि दिनांक 20.05.2011 को करीब 11:00 बजे रात्रि स्थान सरकारी टयूबवेल पास स्थित ग्राम निधवापुर मजरे परसेठा थाना गाजीपुर जनपद फतेहपुर में आप लोगों ने एक राय होकर सामान्य उद्देश्य की पूर्ति में मुकदमा वादी राजेश कुमार के पिता जगन्नाथ एवं बाबू की ताबड़तोड़ फायरिंग कर हत्या कर दी। इस प्रकार आप लोगो ने धारा–302/149 भा0दं0सं0 के अधीन दण्डनीय अपराध कारित किया जो इस न्यायायल के प्रसंज्ञान में है।

2– यहकि उपरोक्त दिनांक, समय व स्थान पर आप अभियुक्तगण ने एक नाजायज मजमा कायम कर बलवा किया। इस प्रकार आप लोगो ने ऐसा कृत्य किया जो धारा–147 भा0दं0सं0 के अधीन दण्डनीय अपराध है जो इस न्यायालय के प्रसंज्ञान में है।

3– यहकि उपरोक्त दिनांक, समय व स्थान पर आप अभियुक्तगण ने एक नाजायज मजमा कायम कर घातक आयुधों से सज्जित होकर बलवा किया। इस प्रकार आप लोगो ने ऐसा कृत्य किया जो धारा–148 भा0दं0सं0 के अधीन दण्डनीय अपराध है, जो इस न्यायालय के प्रसंज्ञान में है।

मै एतद्द्वारा निर्देशित करता हूं कि उक्त आरोप के लिए आप लोगो का विचारण इस न्यायालय द्वारा किया जायेगा।"

(i) that on 20.5.2011 at about 11:00 pm in village- Nidhwapur Majre Parsetha, near Government Tubewell under police circle Gazipur District Fatehpur, in furtherance of your common intention you killed informant's father Jagannath by resorting to indiscriminate firing. Thus you have committed an offence punishable under Section 302/149 IPC which is within cognizance of this Court.

(ii) that on aforesaid date, time and place you accused formed an unlawful assembly and committed rioting. Thus you have committed such an act which is punishable under Section 147 IPC and is within the cognizance of this Court.

(iii) That on the aforesaid date, time and place you all the accused forming an unlawful assembly committed rioting armed with deadly weapons. Thus you have committed such an act which is punishable under Section 148 IPC and within the cognizance of this Court.

18. Likewise charges under Section 25 of Act, 1959 were framed by learned Additional Sessions Judge-I Fatehpur, on 13.7.2012 against accused appellants Badri Vishal Pal, Ram Sewak, Rameshwar, Dalpat, Ram Narayan, Sukhpal, which reads as under:

Charge against Badri Vishal Pal:

''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप ***अभियुक्त बद्रीविशाल पाल,*** *को निम्न आरोप से आरोपित करता हूं।*

यह कि दिनांक 24.5.2011 समय 11:30 पी0एम0 स्थान परसेठा रोड पर बनी पुलिया वहद ग्राम परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद तमंचा देसी 315 बोर व एक जिंदा कारतूस थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया जिसको रखने का आपके पास कोई लाइसेन्स नहीं था। इस प्रकार आपने धारा–25 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।''

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you accused, Badri Vishal Pal, as under with the following charge:

That on 24.5.2011 at 11:30 p.m., Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one country made pistol 315

bore & one live cartridge from your possession at the culvert on Parsetha Road within Village-Parsetha, P.S.- Ghazipur, District- Fateh MoongmoongMoongmoong pur, regarding possession of which you had no licence. Accordingly, you have committed offence punishable u/s.25 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

Charge against Ram Sewak:

''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप अभियुक्त रामसेवक, को निम्न आरोप से आरोपित करता हूं।

यह कि दिनांक 24.5.2011 समय 11:30 पी0एम0 स्थान परसेठा रोड पर बनी पुलिया वहद ग्राम परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद देशी तमंचा एकनली 315 बोर व एक जिंदा कारतूस 315 बोर का थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया जिसको रखने का आपके पास कोई लाइसेन्स नहीं था। इस प्रकार आपने धारा–25 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।''

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you accused, Ram Sewak, as under with the following charge:

That on 24.5.2011 at 11:30 p.m., Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one country made pistol single barrel 315 bore & one live cartridge 315 bore from your possession at the culvert on Parsetha Road within Village-Parsetha, P.S.- Ghazipur, District-Fatehpur, regarding possession of which you had no licence. Accordingly, you have committed offence punishable u/s.25 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

Charge against Rameshwar:

''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप ***अभियुक्त रामेश्वर केवट,*** *को निम्न आरोप से आरोपित करता हूं।*

यह कि दिनांक 30.5.2011 समय 22:20 बजे रात्रि स्थान बगीचा रामशंकर व रामसेवक केवट वहद ग्राम निधवापुर मजरे परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद एस0बी0बी0एल0 गन देसी 12 बोर व चार अदद जिंदा कारतूस 12 बोर का थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया जिसको रखने का आपके पास कोई लाइसेन्स नहीं था। इस प्रकार आपने धारा–25 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।''

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you accused, Rameshwar Kewat, as under with the following charge:

That on 30.5.2011 at 22:20 p.m., Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one country made S.B.B.L. Gun 12 bore & four live cartridges 12 bore from your possession in the grove of Ram Shankar & Ram Sewak Kewat within Village-Nidhwapur Majre Parsetha, P.S.- Ghazipur, District-Fatehpur, regarding possession of which you had no licence. Accordingly, you have committed offence punishable u/s.25 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

Charge against Dalpat:

*''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप **अभियुक्त दलपत केवट,** को निम्न आरोप से आरोपित करता हूं।*

यह कि दिनांक 30.5.2011 समय 22:20 बजे रात्रि स्थान बगीचा रामशंकर व रामसेवक केवट वहद ग्राम निधवापुर मजरे परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद तमंचा देसी 315, एक अदद जिंदा कारतूस 315 बोर एवं एक अदद खोखा कारतूस 315 बोर के थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया जिसको रखने का आपके पास कोई लाइसेन्स नहीं था। इस प्रकार आपने

धारा–25 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you accused, Dalpat Kewat, as under with the following charge:

That on 30.5.2011 at 22:20 p.m., Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one country made pistol 315, one live cartridge 315 bore & one cartridge shell 315 bore from your possession in the grove of Ram Shankar & Ram Sewak Kewat within Village-Nidhwapur Majre Parsetha, P.S.-Ghazipur, District-Fatehpur, regarding possession of which you had no licence. Accordingly, you have committed offence punishable u/s.25 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

Charge against Ram Narain:

*''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप **अभियुक्त रामनरायन केवट,** को निम्न आरोप से आरोपित करता हूं।*

यह कि दिनांक 30.5.2011 समय 22:20 बजे रात्रि स्थान बगीचा रामशंकर व रामसेवक केवट वहद ग्राम निधवापुर मजरे परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद तमंचा देसी 315 बोर, व एक अदद जिंदा कारतूस 315 बोर का थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया जिसको रखने का आपके पास कोई लाइसेन्स नहीं था। इस प्रकार आपने धारा–25 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।''

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you accused, Ram Narain Kewat, as under with the following charge:

That on 30.5.2011 at 22:20 p.m., Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one country made pistol 315 bore & one live cartridge 315 bore from your possession in the grove of Ram Shankar & Ram Sewak Kewat within Village-Nidhwapur Majre Parsetha, P.S.-Ghazipur, District- Fatehpur, regarding possession of which you had no licence. Accordingly, you have committed offence punishable u/s.25 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

Charge against Sukh Pal:

*''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप **अभियुक्त सुखपाल केवट,** को निम्न आरोप से आरोपित करता हूं।*

यह कि दिनांक 30.5.2011 समय 22:20 बजे रात्रि स्थान बगीचा रामशंकर व रामसेवक केवट वहद ग्राम निधवापुर मजरे परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद तमंचा देसी 315 बोर, एक अदद जिंदा कारतूस 315 बोर व एक अदद खोखा कारतूस 315 बोर का थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया जिसको रखने का आपके पास कोई लाइसेन्स नहीं था। इस प्रकार आपने धारा–25 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।''

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you accused, Sukh Pal Kewat, as under with the following charge:

That on 30.5.2011 at 22:20 p.m., Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one country made pistol 315 bore, one live cartridge 315 bore & one cartridge shell 315 bore from your possession in the grove of Ram Shankar & Ram Sewak Kewat within Village-Nidhwapur Majre Parsetha, P.S.-Ghazipur, District-Fatehpur, regarding possession of which you had no licence. Accordingly, you have committed offence punishable u/s.25 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

19. Similarly, against accused appellant Munna @ Surendra Pal charge under Section 30 of Act, 1959 was framed, which reads as under:

''मैं रमेश सिंह, अपर जिला एवं सत्र न्यायाधीश (एक्स कैडर) प्रथम, फतेहपुर आप ***अभियुक्त मुन्ना उर्फ सुरेन्द्रपाल केवट,*** *को निम्न आरोप से आरोपित करता हूं।*

यह कि दिनांक 30.5.2011 समय 22:20 बजे रात्रि स्थान बगीचा रामशंकर व रामसेवक केवट वहद ग्राम निधवापुर मजरे परसेठा थाना गाजीपुर जनपद फतेहपुर में आपके कब्जे से एक अदद डी0बी0बी0एल0 गन नम्बर–15292 सी/4 व दो अदद जिंदा कारतूस 12 बोर तथा पहने हुए पैंट की बायीं जेब से लाइसेन्स नम्बर–888/डी.एम. (एफ) तथा दो अदद जिंदा कारतूस 12 बोर नम्बर एक के थानाध्यक्ष राकेश कुमार सरोज व अन्य पुलिस कर्मियों ने बरामद किया। इस प्रकार आपने धारा–30 आयुध अधिनियम के अधीन दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा निर्देशित करता हूँ कि उक्त आरोप के लिए आप लोगों का विचारण इस न्यायालय द्वारा किया जायेगा।''

"I, Ramesh Singh, Additional District and Sessions Judge (Ex. Cadre) First, Fatehpur, charge you ac MoongmoongMoongmoong cused, Munna @ Surendra Pal Kewat, as under with the following charge:

That on 30.5.2011 at 22:20 p.m. and in the grove of Ram Shankar & Ram Sewak Kewat within Village-Nidhwapur Majre Parsetha, P.S.-Ghazipur, District-Fatehpur, Rakesh Kumar Saroj, Station House Officer & other police personnel recovered one D.B.B.L. Gun No.15292 C/4 & two live cartridges 12 bore from your possession and Licence no.888/D.M.(F.) & two original live cartridges 12 bore from the left pocket of the trousers worn. Accordingly, you have committed offence punishable u/s.30 Arms Act, which is in the cognizance of this Court.

I, hereby, direct that you all will be tried by this Court for the above charge."

20. All the accused pleaded not guilty and claimed to be tried.

21. In the meantime, reports of Ballistic Expert from Forensic Science Laboratory, Lucknow were received which have been marked as Ex.Ka-45, ka-46, ka-47, ka-48, ka-49, ka-50 and ka-51. From the aforesaid ballistic reports it appear that both the deceased had been done to death by use of firearms. According to ballistic and forensic reports, bullets, cartridges and pellets contained human blood found on the clothes of both the deceased as well as sample of blood stained soil contained human blood.

22. Here it would be relevant to give a chart mentioning weapons possessed and used by individual accused appellant.

S. No.	Cri. Appeal No.	Appellants' Name	Sentence imposed	Weapons
1	5708 of 2017	Ram Narayan @ Lal	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 25 Arms Act- 1 year R.I. + 1000/-	One country made pistol 315 bore, 1 live cartridge
2	5947 of 2017	Ram Sewak	25 Arms Act	One country made pistol 315 bore, one live cartridge
3	5752 of 2017	Dalpat	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 25 Arms Act- 1 year R.I. + 1000/-	One country made pistol 315 bore, one live cartridge and one empty cartridge
4	5950 of 2017	1. Ashish	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/-	
		2. Ram Sewak	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 25 Arms Act- 1 year R.I. + 1000/-	One country made pistol with one live cartridge of 315 bore
5	5986 of 201	1. Jagmohan @ Munna	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/-	
		2. Sukhpal	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 25 Arms Act- 1 year R.I. + 1000/-	Country made pistol 315 bore, 1 live cartridge,1 empty cartridge
6	6068 of 2017	Rameshwar Kewat	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 25 Arms Act- 1 year R.I. + 1000/-	SBBL gun 12 bore, 4 live cartridges 12 bore
7	6116 of 2017	Badri Vishal Pal	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 25 Arms Act- 1 year R.I. + 1000/-	Country made pistol 315 bore, 1 live cartridge.
8	7192 of 2017	Munna @ Surendra Pal Kewat	302 Life imprisonment R.I. + 20,000/- 147- 2 years R.I. + 5000/- 148- 3 years R.I. + 5000/- 30 Arms Act - 6 months + 1000/-	DBBL gun No. 15292 C/4 + 2 live cartridges + Licence No. 888/DM(F)

23. In order to substantiate and prove the guilt of accused appellants, prosecution examined as many as 8 witnesses, out of whom PW-1, Rajesh Kumar and PW-2, Sohan are witnesses of fact; PW-3, Dr. K.V. Chaudhary had conducted *post mortem* on the dead bodies of deceased Babu and Jagannath

and has proved *post mortem* report of deceased as Ex.Ka-3 and Ka-4 respectively; PW-4, S.I. Rakesh Kumar is the first I.O. who had rushed to the spot after registration of case and had taken in possession country made pistol and bullets and has also proved recovery memos Ex.Ka-4, in respect of weapons and cartridges, Ex.Ka-5 and Ex.Ka-6 in respect of sample of blood stained soil and simple soil. Besides, inquest report Ex.Ka-7 and Ka-12, in respect of Babu and Jagannath respectively have been proved by this witness. PW-4 has proved relevant papers Ex.Ka-7 to Ka-11 and Ka-13 to Ka-16 relating to sending the dead bodies along with constables to DistrictHospital for autopsy. Site plan, Ex.Ka-17 has also been proved by him. Recovery memo, Ex.Ka-18 in respect of arms and bullets recovered from Badri Vishal Pal and Ram Sewak has been proved by him. PW-4 has also proved charge sheet, Ex.Ka-19 against accused appellants, recovery memo, Ex.Ka-20 with respect to DBBL gun and licence of Jagmohan; application Ex.Ka-21 for taking into possession of DBBL gun from Ajay Gun House and charge sheet Ex.Ka-22 against Jagmohan @ Munna. Material Exhibits 4 to 68 pertaining to blood stained and simple soil, various arms and ammunitions recovered from the possession of appellants have been proved by this witness.

24. PW-5, Head *Moharrir* Abdul Aziz has proved the *Chik* FIR Ex.Ka-23 and copy of G.D. Entry, Ex.Ka-24. He has also proved the *Chik* FIR, Ex.Ka-25 in respect of offences under Section 30 and 25 of Act, 1959.

25. PW-6, S.I. Doodhnath Nishad, I.O. of the cases under Section 25 of Act, 1959 had proved site plan, Ex.Ka-27, charge sheet against the accused appellant Ex.Ka-28 to Ex.Ka-31.

26. PW-7, Constable Moharrir Kunj Bihari scribe of *Chik* FIR in respect of case under Section 25 and 30 of Act, 1959 has proved *chik* FIR, Ex.Ka-32 and copy of G.D., Ex.Ka-33.

27. PW-8, S.I. Daya Shanker Tiwari, I.O. of the offence under Section 25 of Act, 1959 has proved the site plan of place of occurrence, Ex.Ka-34 as also the sanction of District Magistrate for launching prosecution marked as Ex.Ka-37, Ka-39, Ka-41 and Ka-43.

28. After closure of prosecution evidence, accused appellants were examined by Court under Section 313 Cr.P.C.

29. Accused appellant Munna @ Surendra Pal pleaded ignorance about the incident and stated that he has been arrested from his house on 22.5.2011. He denied recovery of any country made pistol or live or empty cartridge. He has stated that he was prosecuted because of enmity.

30. Accused appellant Rameshwar in his statement under Section 313 Cr.P.C. has admitted existence of enmity due to Gram Pradhan election. Initially, he stated that Rajesh was present on the roof of Tubewell but later on, he pleaded ignorance saying that he was sleeping in his house. According to him, he was not arrested nor anything was recovered from him and he was called by Inspector Sanjay. He has denied any recovery from him. He stated that at the time of occurrence he was present inside his house and did not see anyone. He has denied of any enmity with Sohan. He

stated that he is not aware whether he had been implicated on account of long drawn enmity or for any other reason.

31. Accused appellant Dalpat Kewat has also stated that he was unaware of any incident and at that time, he was present in his house. According to him, police had arrested him from his house and challaned in the case. About recovery, he has stated that allegations are wrong and no recovery was made from him. He has admitted that there existed enmity of Pradhan's election and that he has been falsely implicated. He claims to have been implicated on account of party factionalism.

32. Accused appellant Jagmohan has stated that he was not at his house at the time of incident. He has admitted election enmity. He was Gram Pradhan since 2005 to 2010 and enmity existed on that account. Regarding quarrel at the time of Holi and election, this accused has stated that no quarrel had taken place with him, rather it had taken place amongst Munna and others on account of enmity of Pradhan's election.

33. Accused appellant Sukhpal has stated that at the time of incident he was inside his house and is not aware of incident that has taken place at Tubewell. He has denied of any recovery from his possession and claimed to have been arrested from his house. Alleged recovery is fabricated. According to him, he bore no enmity with nephew Rajesh Kumar on account of quarrel taken place at the time of election and Holi. He stated that he is innocent and has been implicated on account of election enmity and factionalism.

34. Accused appellant Ashish has also stated that he was at his house at the time of incident and is not aware of the incident. He bore no enmity with Rajesh. Enmity between PW-2 Sohan and Surendra and others existed on account of Pradhan's election. He stated to have been implicated falsely on account of election of Pradhan and parti bandi.

35. Accused Ram Sewak has stated that he was not aware of the incident taken place at the Government Tubewell since on 19.5.2011 he had gone in barat of his son Ashish and on 20.5.2011 at 9 p.m. they returned and were in their houses. He stated that there was no enmity with his nephew and quarrel had taken place with Surendra and others wherein he was a surety. He has denied of any recovery having been made from him and said that alleged recovery is concocted. He has denied enmity with nephew Rajesh Kumar and has admitted that enmity of PW-1 was with Surendera and others. He has stated that due to jealousy Informant had falsely implicated in this case as they could not bear the progress of this accused. One tractor had been given by Government along with a cheque of Rs. 10,000/-. He has stated that he is innocent and chronic patient of Asthma.

36. Accused appellant Ram Narayan has also stated ignorance about the incident and stated that on that night he had come back from the marriage of his nephew and was at his house at the time of occurrence. Police has shown forged recovery against him and that he has been arrested from his house. He has admitted about quarrel at the time of Holi. Enmity was on account of party bandi. He claims to have been implicated on account of enmity.

37. Accused appellant Badri Vishal Pal has stated that at the time of

occurrence he was at his house and no recovery was made from him. Alleged recovery is forged. Rajesh had eve teased his wife regarding which a Panchayat took place and on that account there has been an enmity between them. The recovery is stated to have been forged one. He claims that he is implicated on account of aforesaid enmity.

38. On appraisal of prosecution evidence as well as material available on record and after hearing learned counsel for parties, learned Trial Court recorded verdict of conviction and sentenced accused appellants as detailed in paragraph 1 of this judgement.

39. In order to record finding of guilt against accused-appellants, Trial Court has given following reasons:

(1) PW-1, Rajesh Kumar, is the eye witness of the incident. Accused-appellants were well known to him since all of them except Badri Vishal, were residents of the same village wherein PW-1 was residing and Badri Vishal was resident of Village Parsetha, a nearby village, and also known to PW-1.

(2) The death of two deceased Jagannath and Babu has taken place near Tubewell in the night of 20 May, 2011 and body was recovered and *Panchayatnama* was prepared verifying recovery of body near Tubewell. Therefore, date, time and place of the death of two deceased is duly proved.

(3) The motive was enmity caused due to election of Gram Pradhan in respect whereto there was a scuffle between some of the accused-appellants with the family members of deceased at the time of Holi.

(4) In the night of incident, there was moonlight which helped PW-1 in identifying accused-appellants. Besides, when accused-appellants exhorted Jagannath and Babu who were sleeping, from their voice also PW-1 recognized accused-appellants who were already known to him.

(5) The narration of incident tallied with the manner in which bodies of deceased were recovered from the field near Tubewell.

(6) PW-1 is not a chance witness since his father and neighbour had come to sleep at Tubewell to take care of their crop standing in the field which were near Tubewell and PW-1, being son of Jagannath, could have accompanied his father and this is a natural conduct.

(7) Multiple firearm injuries on the bodies of deceased fortify statement of PW-1 that accused-appellants collectively opened indiscriminate fire upon the two deceased and murdered them.

(8) Statement of PW-1 is corroborated by PW-2 Sohan who arrived at the place of incident, hearing sound of gunshot fires and along with him some other villagers also arrived at the place along with *Lathi, Danda* and torch and in the light of torch and moonlight PW-2 saw accused-appellants carrying firearms who threatened PW-2 and other villagers to run away else they will also be done to death. Accused-appellants also opened fires in air. PW-2 and other villagers saved themselves by coming back to their house.

(9) There is no delay in lodging of F.I.R. by PW-1 whose close relative, i.e., father and one neighbour were murdered by nine accused-appellants carrying firearms with them and on account of the incident and apprehension of life, Informant PW-1 remained in hide till morning and thereafter came to police station for lodging report and this satisfactorily explained delay, if any.

(10) Recovery of firearms when accused-appellants were arrested was proved by PW-4, i.e., I.O. and he also proved other relevant documents. Minor errors in investigation pointed out by defence were not material to dislodge otherwise trustworthy ocular version of witnesses corroborated by medical report showing the manner of death.

(11) Five firearm injuries were found on the body of Jagannath and three bullets were recovered from his body and seven firearm injuries were found on the body of Babu and three bullets were recovered from his body which show that before their death, indiscriminate firing took place in which they sustained multiple firearm injuries mostly on the vital parts, causing immediate death. Therefore, involvement of a large number of persons who opened rapid firing causing multiple firearm injuries to these two deceased is duly proved from the post-mortem report which has been proved by PW-3.

(12) The defence that deceased were Police Informers and therefore notorious dacoits in the area committed murder was not proved by defence by adducing any evidence.

(13) All the accused-appellants, except Ashish, were carrying firearms. Firearm of Jagmohan @ Munna was his licensed DBBL Gun.

(14) The mere fact that with regard to recovery of firearms from accused-appellants, only Police witnesses have given evidence and there is no independent witness, it cannot be said that the evidence of police officials cannot be relied or is untrustworthy.

(15) In the statement of Section 313, accused-appellants have broadly admitted enmity on account of Party-Bandi and election dispute.

(16) Ashish is the son of Ram Sewak and their defence that they were not present since marriage of Ashish was solemnized on 19.05.2011 has been disbelieved on the ground that incident took place on 20.05.2011 at 11:00 p.m. and by that time they had returned to their village after solemnizing marriage and no evidence was adduced that they were present elsewhere and not at their house in the night of incident and at place of incident at 11:00 p.m.

(17) In fact Ram Sewak admitted that on 20.5.2011 at 9:00 p.m. he returned and was at his house. Similarly Ashish also stated that he was at his house therefore the factum tham country made pistol recovered from Sukhpal; bullet mark E19 was fired from the recovered country made pistol marked as 5/11.

(19) The entire evidence show and prove the offence of accused-appellants under the sections as noticed above and prosecution has proved its case beyond reasonable doubt.

t a day earlier marriage took place was of no consequence.

(18) Ex.A.15 Forensic Report, Ballistic Experts Report shows that the bullet EC1, EC2 were fired from country made pistol recovered from Badri Vishal; bullet mark EC4 was fired from country made pistol recovered from Sukhpal; bullet mark E19 was fired from the recovered country made pistol marked as 5/11.

(19) The entire evidence show and prove the offence of accused-appellants under the sections as noticed above and prosecution has proved its case beyond reasonable doubt.

40. It is the above judgment of conviction and sentence, which has been

challenged by accused-appellants in the aforementioned appeals before this Court.

41. We have heard Sri V.P. Srivastava, Senior Advocate assisted by Sri Phool Singh Yadav for accused appellant Jagmohan in Crl. Appeal No. 5986 of 2017 and Ram Narayan @ Lala in Crl. Appeal No. 5708 of 2017; Sri Mangla Prasad Rai, Senior Advocate assisted by Sri Ashok Kumar Rai for Ram Sewak in Crl. Appeal No. 5947 of 2017 and Ashish in Crl. Appeal No. 5950 of 2017; Sri Purshottam Dixit, Advocate for Dalpat in Crl. Appeal No. 5752 of 2017 and Munna @ Surendra Pal Kewat in Crl. Appeal No. 7192 of 2017; Sri Phool Singh Yadav, Advocate for Remeshwar in Crl. Appeal No. 6068 of 2017 and Sukhpal in Crl. Appeal No. 5986 of 2017; Sri Akhilesh Kumar, Advocate for Badri Vishal Pal in Crl. Appeal No. 6116 of 2017; Sri Sudhir Bharti, Advocate for complainant and Sri Syed Ali Murtaza, learned A.G.A. on behalf of State.

42. Broadly the arguments advanced by learned counsel for appellants are:

(1) The presence of PW-1, who is the star witness of the entire case, itself is doubtful, inasmuch as there are serious contradictions in his statement showing that the statement has been procured and he is not actually an eye-witness of the incident.

(2) The bullets recovered from the body of deceased have not been found to have been fired from the firearms allegedly recovered from accused-appellants and forensic report in this regard has failed to prove this fact.

(3) Informant PW-1 himself admits that he was sleeping on the roof of tubewell and there was sufficient distance between him and the place where Jagannath and Babu are said to have been sleeping, hence it was not possible for accused-appellants to identify the persons who committed murder hence accused-appellants have been implicated only on the basis of suspicion and alleged enmity.

(4) PW-2 is not an eye-witness of the incident as admittedly as per his own version he reached the place of incident subsequently and his statement contains several contradictions.

(5) Site-plan has not shown as to where deceased and Informant were sleeping.

(6) There was no stairs or otherwise arrangement to climb the roof of Tubewell Kothari, hence PW-1's statement that he was sleeping on the roof of Tubewell cannot be believed.

(7) It is a case where virtually there is no credible evidence to prove the guilt of appellants and only on conjunctures they have been convicted though prosecution miserably failed to prove its case beyond reasonable doubt.

43. It may be noticed at this stage that learned counsel for parties have not addressed this Court on the question of conviction and sentence of accused appellants Rameshwar, Dalpat, Ram Sewak, Badri Vishal Pal, Ram Narayan and Sukhpal, under Section 25 of Act, 1959 and their arguments are confined in respect of conviction of all accused appellants under Sections 302/149; 147 and 148 IPC. One of the appellants, Munna @ Surendra Pal has been convicted and sentenced under Section 30 of Act, 1959 and on this aspect also we have not been addressed at all.

44. Learned A.G.A., on the contrary, submitted that it is a straight case where

accused-appellants collected with an intention to kill Jagannath and Babu, carrying firearms with them at around 11:00 p.m., they attacked both of them, opened rapid and indiscriminate fires causing their death on the spot. PW-1 son of one of the deceased who was present on the site, sleeping on the roof of Tubewell is eye witness to the entire incident. All the accused-appellants were very well known to him, there was no difficulty in identification of accused-appellants by Informant, in the night when there was sufficient moon light and nothing has been extracted in cross-examination to discredit ocular version of Informant, PW-1. The factum that accused-appellants were present at the place of incident on the date and time as stated by PW-1 is fortified by the statement of PW-2 who reached the place of incident, hearing firing sound, and saw accused-appellants present at the place of incident with firearms, who also threatened PW-2 and other villagers who have reached the place of incident on hearing firing, that they should go back else they will also face the same consequence and afraid of such threats, PW-2 and other villagers returned. Thus the presence of accused-appellants along with firearms at the place, on the date and time, stated by Informant to commit murder of Jagannath and Babu, is duly fortified by the statement of PW-2. The post-mortem report also fortify that the two deceased sustained multiple firearm injuries and three bullets each, from the bodies of two deceased were recovered which also fortify the prosecution story as narrated by eye-witness PW-1. The enmity between deceased and accused-appellants is also writ large hence it is a straight case of hit and run and Trial Court has rightly convicted accused-appellants holding that prosecution has successfully proved its case beyond reasonable doubt and the judgment warrants no interference.

45. We have heard the counsel for the parties and peruse the record.

46. First of all we may notice the facts which are evident from record and in respect whereof virtually learned counsel for the appellants could not advance any substantive argument.

(1) The first is that Jagannath and Babu were found murdered, sustaining multiple fire injuries, in the night of 20/21st May, 2011 and their bodies were found in the field, near Tubewell. The body of Babu was found around 25 paces, on west from Tubewell, in a field of one Devraj while body of Jagannath was found near Tubewell in his own field.

(2) The body of both deceased had multiple firearm injuries and as per post-mortem report, proved by PW-3, three bullets from body of each of the deceased were recovered at the time of post-mortem.

(3) The murder was committed at the place where bodies were found.

(4) Firearms were recovered from seven accused-appellants at the time of arrest and the licensed DBBL Gun of accused-appellant Jagmohan @ Munna on his information was recovered from a Firearm Licensee where he had deposited.

(5) F.I.R. was lodged by PW-1 Rajesh Kumar who is the son of deceased Jagannath and neighbour of another deceased Babu, at 6:30 a.m. on 21st May, 2011 at Police Station Ghazipur, District Fatehpur.

(6) The distance of the place of incident and police station is about eight kilometer.

(7) As per PW-3, Doctor, who conducted autopsy, both the deceased may have died after 2-3 hours of taking meals.

(8) Both the bodies were recovered at a distance of 10-20 paces to each other.

(9) The night of 20-21.5.2011 (being the Tithi Tritiya/Chaturthi of Krishna Paksha) had moon light.

(10) All the accused-appellants are residents of village Nidhwapur except Badri Vishal who is resident of Majre Parsetha.

47. Now in this backdrop, we have to examine, (i) whether the two deceased have been murdered by accused-appellants as claimed by prosecution; (ii) is there sufficient evidence to sustain their conviction and (iii) can it be said that the prosecution has proved its case beyond reasonable doubt and Trial Court has rightly convicted accused-appellants or there is any possibility that the offence may have been committed by somebody else and the complicity of all the accused-appellants or one or more of them is doubtful.

48. The prosecution case is broadly founded on the ocular testimony of PW-1 who claims to be present at the time and place of incident and is eye-witness of the entire incident. PW-2 who is another witness of fact has supported some part of the statement of PW-1 and these are the two principal witnesses whose evidence has to be examined threadbare to find out whether their deposition is trustworthy so as to sustain conviction of accused-appellants or not.

49. PW-1 has stated that in the night of 20.05.2011, at around 11:00 p.m., he was present on the roof of Tubewell. His father Jagannath and Babu were sleeping near Tubewell on *katheri*. There was enmity between accused-appellants and family of PW-1 on account of election of Gram Pradhan and at the time of Holi there was an incident of *maar-peet* between family members of Informant and accused-appellants. At around 11:00 a.m., when Informant was lying on the roof of Tubewell, Jagmohan @ Munna came with his licensed DBBL gun and Rameshwar and others were carrying illegal firearms. They woke up Informant's father and Babu, who under fear, tried to run away to save them but caught by accused-appellants and they fired rapidly from the firearms carrying with them causing immediate death of Jagannath, father of Informant and Babu. PW-1 silently saw incident in the moon light from the roof of Tubewell and recognized every accused appellant very well. Hearing the firing, some villagers namely Ram Bihari, Ram Sajivan and Jai Karan and others arrived there and saw accused-appellants with firearms. They challenged accused-appellants whereupon accused-appellants opened fire in air and threatened villagers to run away else they will also face the same consequences. Accused-appellants continued to roam and surround village in the night. At around 4:00 a.m. they left administering warning that if anyone lodge F.I.R. or give evidence against them, would meet the same fate. They ran away towards jungle. Thereafter Informant came down of the roof, went to his village and explained the incident to family members who reached the place of incident immediately. Thereafter Informant and Sohan, PW-2, in a secret manner, reached Police Station by Cycle and lodge report. PW-1 stated that the crop of *Moong*

(pulse) and *Bhindi* (Lady Finger) was standing in the field of his father Jagannath and Babu near Tubewell. They had gone in the night to stay there for protection of the said crop. One of the accused-appellant, Rameshwar also had a criminal history of having murdered Shamsher son of Chandrapal wherein he was convicted and sentenced to life imprisonment. The place of incident is not at much distance from the house of Informant. In cross-examination he has said that his residence is about 200 meters from the place of incident. Besides Informant and his father, who were present at the Tubewell for protection of their crop, other family members who were at residence were three ladies, four minor girls, and a younger brother of Informant, aged about 14 years. Three other brothers of Informant were at Mumbai and two nephews were at their grand maternal parents house. Informant's field is only about 50 meters from Tubewell. In fact Tubewell itself was installed in the field of Informant which is Government Tubewell and not a private Tubewell. The field in which Tubewell was installed, at the time of incident, there was no crop. Informant's another field was around 20 meters from Tubewell and third field was around 50 meters from the Tubewell. In both these fields crop of *moong* and *bhindi* was standing. It was sown about two months prior to the date of incident. The area of field of Informant which is around 20 meters from Tubewell is about 7 or 8 Biswa and in the vicinity there is a field of Sikandar son of Ghanshyam who is in relation, grand-father of Informant. Therein also Informant has share of about 7-8 Biswa. Another field which is about 50 meters from Tubewell, had the area of 1½ bigha and Informant has half share therein while remaining half is of Sikandar. Babu was residing around 20-25 meters from the residence of Informant. He (Informant) and his father took food around 10:00 and then came at Tubewell for protection of their crop where Babu also arrived. Informant's father was sleeping about 2 meters from Tubewell on a *katheri* and Babu was lying on the right side of Informant's father. He also said that at the time of Holi, his father, Babu, Ratandev, Jagatpal, Ram Swaroop and Ram Sanehi collectively assaulted accused-appellant Jagmohan and his wife Raju as also Shiv Balak, father of Jagmohan with *lathi* and danda. Height of roof of Tubewell would be around 11 feet and there was no staircase to reach the roof. At the time of incident, Informant was not sleeping but only lying on the roof and his father and Babu were clearly visible from that place. He came down from the roof at around 4:00 am in the morning and saw dead bodies of his father and Babu. After sometime, others also reached the place.

50. However, in cross-examination, at one stage, he has also said that at the time of incident he was lying on the roof and had not seen accused-appellants Rameshwar, Jagmohan and Sukhlal. In cross-examination, he has further explained that his father had some dispute with Munna Dalpat, Ashish and Ram Sewak. Babu also had dispute with the said persons. He reiterated this fact when denying suggestion that his father and Babu had no dispute/quarrel with Munna, Dalpat, Ashish and Ram Sewak. Jagannath, Informant's father, contested election of Gram Pradhan in which Ram Sewak was also one of the contestants. It is also said in the cross-examination that near the place of incident, there situated fields of Raja Ram, Devram, Ram

Sajivan, Jagannath, Ram Bali, Ram Sagar, Braj Bhushan etc. and they had also grown crops of *Moong* and *Bhindi* and used to go to their fields for protection of their crop. Informant and deceased had gone to protect crop from animals. For the fear of insects etc. Informant went on the roof of Tubewell while Babu and his father went to sleep about 10 paces from Tubewell on North Western side, on a *Katheri*. The presence of Informant on the roof of Tubewell has been seriously contested by appellants on the ground that nothing has been brought on record to show that there was no means to reach on roof of Tubewell hence it could not have been probable to think that Informant was lying on the roof of Tubewell. This fact that there was no staircase for reaching the Tubewell roof was admitted by Informant in his cross-examination where he has said as under:-

''ट्यूबवेल पर कोई सीड़ी नहीं थी और न गांव से कोई सीड़ी मगाई गई।''

51. It is also seriously argued that there was a big iron cover over Tubewell roof and hence there could not have been sufficient space on the roof allowing anyone to sleep, therefore basic contention of Informant that he had gone to sleep on the roof of Tubewell is wholly untrustworthy.

52. Regarding information that Informant and his father used to go to the field for protection of crop, Informant categorically said that this fact was known to everybody that they daily go to the field for protection of crop. This fact stated by Informant reads as under:

''घटना से पहले से हम लोग फसल की रखवाली के लिए इसी प्रकार जाते रहते थे। घटना के डेढ़ माह पूर्व से हम लोग फसल की रखवाली के लिए जाया करते थे। गांव घर के लोगों को यह बात मालूम थी कि हम लोग रोज फसल की रखवाले करने रात में जाते है। हमें व हमारे पिता जी वगैरह को इस बात की जानकारी थी कि हमारी मुन्ना वगैरह से रंजिश है। फसल की रखवाली के लिये हम लोग लाठियां लेकर गये थे कोई असलहा आदि लेकर नहीं गये। भिण्डी और मूंग की फसल घटना से दो माह पहले बोई गई थी। जो मूंग हमने खेत में बोई थी वह आमतौर से ढाई तीन महीना में तैयार हो जाती है।''
(emphasis added)

53. The statement of PW-1 is broadly consistent with F.I.R. version. The manner in which incident has taken place, has been stated by him very consistently without any material variation. It shows that there is no imagination or articulation of facts to fabricate a story. Statement does not narrate an incident which has not actually occurred. PW-1 very categorically has said that the accused-appellants came up with firearms, caught his father and Babu, wake up and when they tried to run to save them, accused-appellants caught them, felled on the ground and opened indiscriminate firing. He has also said that his father tried to run towards North of the Tubewell Tunki but he was caught and murdered while Babu tried to run towards West of Tubewell but around 15 paces from the Tubewell he was caught and murdered. The Informant's father was caught by four persons and Babu was caught by five persons and they fired one or two rounds from their arms.

54. Learned counsel for the appellants stated that it is unbelievable that Informant's father was sought to be attacked by accused-appellants but he took no steps to protect him and kept silence. It is argued that it is unbelievable that a son would silently witness murder of his father and would take no step to protect.

55. We find ourselves unable to agree with this contention for the reason that manner in which a person would

react in a given situation differs from person to person. Informant a young man of 27 years, saw nine persons collectively coming with firearms to commit offence of murder of two persons. In such circumstances, appellant getting frightened and apprehensive for his own life, if remained in concealment, silent and simply watched the incident, it cannot be said that his conduct was unnatural or improbable. It is also conceivable that the incident made such a serious impact upon Informant that even when accused-appellants, after sometime went away from Tubewell, he could not dare to come down or to raise noise. He came down in the morning at around 4:00 a.m. when some villagers and family members of Informant also arrived at the place of incident. Accused-appellants remained surrounding the village and left early in the morning at around 4:00 a.m. after giving a threat that if anybody give evidence he would meet the same fate.

56. PW-2, Sohan, who is also resident of the same village, claimed that he reached the place of incident, hearing sound of fires, from the side of Tubewell around 11:00 p.m. On 20.5.2011, and was accompanied by some other villagers carrying *lathi*-danda and torch. He saw Jagannath @ Munna with double barrel licensed gun and other accused-appellants with unauthorized firearms. Accused-appellants threaten villagers and PW-2 asking them to run away or they will also face the same consequences. They also fired in air. So they went back. The PW-2 accompanied Informant to Police Station for lodging Report. This witness is not an eye witness to the incident of killing of Jagannath and Babu by accused-appellants but his version is relied to support that part of evidence of PW-1 that accused-appellants along with firearms were present at the place of incident around 11:00 p.m. on 20.5.2011 near Tubewell. PW-2 also proved the fact that they (accused-appellants) threatened villagers and PW-2 to run away or they will face the same consequences. It is argued that this fortify the statement of PW-1 about presence of accused-appellants at the place of incident along with the firearms and that they committed crime for which reason they also threatened villagers, who came near Tubewell, after hearing firing.

57. Admittedly PW-2 is not a witness even to have seen dead bodies of Jagannath and Babu in the night itself when he claims had gone to the place of incident at around 11:00 p.m. on 20.5.2011 but he saw dead bodies only in the morning when he reached place of incident. In cross-examination, however, we find that PW-2 stated, referring to his earlier statement that at 4:00 or 4:30 in the morning when he was going from his house to the place of incident, he met Rajesh coming from the place who explained the entire incident and then he came to know of what has happened. He has also stated in cross-examination that for the first time he reached the place of incident at 5:00 a.m. in the morning and reached near the dead bodies. He has also said that Rajesh explained him that the incident took place around 11:00 p.m. in the night. This part of the cross-examination of PW-2 contradicts his earlier statement that firstly he reached near the place of incident in the night itself and saw accused-appellants with firearms who threatened them and thereafter they ran away. If he had gone near the place of incident in the night itself, to claim that he for the first time

reached the place of incident in the morning at 5:00 a.m. and came to know of entire incident cannot reconcile with his first statement.

58. Learned A.G.A. sought to explain that in the night PW-2 came to the place of incident but remain at a distance, due to fear of accused-appellants, who threatened villagers and PW-2. They did not reach the place of incident and what he has said further in cross-examination is regarding actual reaching the place of incident i.e. for the first time in the morning at 5:00 a.m. on 20.05.2011.

59. After going through the entire statement of PW-2, we find that in examination-in-chief he is very categorical that after hearing firing, he and other villagers, went towards Tubewell and saw accused-appellants with firearms. Therefore he reached, at least, up to the stage where from in the moon light or in the light of torch, as he claimed that he had taken, accused-appellants were visible and could threat villagers to run away and being afraid thereof PW-2 and others came back. There may be a difference of 10, 20 or 30 paces but fact remains that for the first time PW-2 reached near the place of incident in the night itself. He also knew that something wrong has happened otherwise when accused-appellants allegedly threatened that if villagers do not run away they will face the same consequences, what it would have meant to the PW-2. In cross-examination, on the contrary, his statement show as if he was not at all aware of any incident which had taken place in the night and only in the morning when PW-1 narrated the entire incident, for the first time he came to know about it and then reached the place of incident at 5:00 a.m. Therefore to rely on the statement of PW-2 to support testimony of PW-1 that accused-appellants with firearms were present at 11:00 p.m. near Tubewell and had opened fire and threatened villagers is not very safe. In our view statement of PW-2 on these aspects cannot be said to be a clear and trustworthy version to support some part of statement of PW-1 regarding what transpired in the night of 20/21.05.2011. The only supportive statement of PW-2 is that in the morning, he and other villagers reached the place of incident and found Jagannath and Babu, dead, and their bodies were lying in the fields. Therefore for answering the question, whether accused-appellants have committed the crime of murder of Babu and Jagannath, statement of PW-2, in our view, is of no help.

60. Now there remains only the statement of PW-1 which is in our view consistent in respect to all other accused-appellants except three of them. His examination-in-chief is in corroboration with F.I.R. version but then we find that in the cross-examination PW-1 himself has said that he did not saw Rameshwar, Jagmohan and Sukhpal from the place where he was lying. The relevant statement reads as under:

''घटना के समय मैं लेटा हुआ था। मैंने उठकर मुल्जिमान रामेश्वर, जगमोहन व सुख पाल को नहीं देखा। घटना घटित होने के बाद मैं छत पर ही था।''

61. In order to implicate Rameshwar, Jagmohan and Sukhpal for committing crime under Section 302 read with Section 147, 148, 149 IPC we find no other evidence whatsoever on record except that they were arrested by the Police and firearm was also

recovered therefrom but this fact by itself cannot be relied to implicate the aforesaid three persons for taking a view that they committed crime of murder of Jagannath and Babu.

62. In respect of other accused-appellants, as we have already discussed, statement of PW-1 is very categorical. The accused-appellants being well known to Informant, there is no reason to doubt any error in recognition of accused-appellants by PW-1. With respect to recovery of firearms from accused-appellants, in fact, none of the counsel has advanced any submission whatsoever except that there is no Ballistic Report to show that bullets found in the body of deceased were actually fired from the weapons recovered from accused-appellants, therefore, Ballistic reports do not corroborate that the weapons recovered from accused-appellants were used in the crime in question. In our view, when there is an otherwise credible ocular evidence to implicate accused-appellants except above three, non-availability of such Ballistic Report by itself will not help accused-appellants and the mere fact that there is a solitary witness in the case in hand would make no difference for the reason that even a single witness, if otherwise trustworthy and credible, and Court finds no reason to disbelieve him, his statement is clear and shows truthfulness, a conviction can be sustained on the statement of such a solitary witness. It is well settled legal position that it is quality and not the quantity of witnesses, which is important. Time honoured principle is that the evidence has to be weighed and not to be counted. The test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

63. In **Namdev Vs. State of Maharashtra (2007) 14 SCC 150,** Court has said :

"Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence."

64. The aforesaid observations, however, are with respect to others except accused-appellants Rameshwar, Jagmohan and Sukhpal in respect whereto PW-1 himself has said that he had not seen them at the time of incident. If that be so, in the absence of any other evidence, aforesaid three accused-appellants cannot be said to be involved in the case in hand and, in our view, they have been convicted without any evidence against them. Trial Court has committed error in not looking into this aspect of the matter particularly when on this aspect no explanation has come forward on the part of prosecution, either before Court below or even before this Court.

65. With respect to conviction of accused-appellants under Section 25 of Act, 1959 i.e. Rameshwar, Dalpat, Ram Narayan and Sukhpal, we find that PW-8, who prepared site plan, Ex.ka-34, wherefrom the aforesaid accused were arrested and firearms were recovered he has proved the said document. PW-4 arrested Badri Vishal Pal and recovered one country made pistol of 315 bore in working condition and one live cartridge.

He also arrested Ram Sewak and recovered one country made pistol of 315 bore in working condition and one live cartridge of 315 bore, loaded inside the weapon. PW-4 sealed country made pistols and cartridges and prepared recovery memo, Ex.ka-18. PW-4 proved recovery memo Ex.ka-18 in respect of above recovery. Thereafter, PW-4 arrested five accused-appellants namely Munna@ Surendra Pal, Rameshwar Kewat, Dalpat Kewat, Ram Narayan Kewat and Sukhpal Kewat. One DBBL gun, two live cartridges and one Licence No. 888 issued by District Magistrate, Fatehpur was recovered from possession of Munna @ Surendra Pal; one country made SBBL gun of 12 bore with four live cartridges kept in the cartridge belt was recovered from the person of Rameshwar; one country made pistol of 315 bore, one live cartridge and one empty cartridge was recovered from possession of Dalpat; one country made pistol of 315 bore and one live cartridge of 315 bore were recovered from the possession of Ram Narayan @ Lala; one country made pistol of 315 bore, one live cartridge and one empty cartridge were recovered from the possession of accused-appellant Sukhpal and recovery memos paper no. 3A/5 and 3A/7 were prepared. These documents were also proved by PW-4 in his oral deposition. Gun No. 6555 and licence no. 911 were recovered from the arms shop of Smt. Beena Singh and ferd paper no. 26 A/2 i.e. Ex.A-20 was proved by PW-4. The fire arms and ammunition recovered from accused-appellants, named above, were exhibited as 7 to 11 and 13 to 67 and all have been proved by PW-4. Neither in the cross-examination we find anything substantive to discredit evidence of PW-4 in respect of the aforesaid recovery of firearms and ammunitions nor anything has been brought to our notice to disbelieve the said evidence. The mere fact that in regard to recovery, witness is a Police Personnel, does not mean that for this reason alone if otherwise creditworthy and reliable, such evidence can be rejected. Hence, conviction and sentence of accused-appellants namely Rameshwar, Sukhpal, Dalpat Kewat, Ram Sewak, Badri Vishal Pal and Ram Narayan under Section 25 of Act, 1959 warrants no interference and deserves to be sustained. Similarly conviction and sentence of appellant Munna @ Surendra Pal under Section 30 of Act, 1959 also deserves to be sustained.

66. In view of above discussion, Criminal Appeal Nos. 5986 of 2017 and 6068 of 2017 are partly allowed. Impugned judgment dated 29.8.2017 and order dated 5.9.2017, insofar as the same relate to accused-appellants Sukhpal and Rameshwar, are set aside to the extent, they have been convicted under Section 302/149; 147 and 148 IPC. Their conviction and sentence under Section 25 of Act, 1959 by impugned judgement and order is however, confirmed. In respect of appellant Jagmohan @ Munna Nishad, impugned judgment dated 29.8.2017 and order dated 5.9.2017 are hereby also set aside in respect of his conviction under Section 302/149; 147 and 148 IPC.

67. These appellants are in jail. Accused-appellants Sukhpal and Rameshwar, if already served out sentence awarded under Section 25 of Act, 1959 and not wanted in any other case, shall be set at liberty forthwith. Accused-appellant Jagmohan @ Munna, if not wanted in any other case shall be released forthwith.

68. Criminal Appeals No. 5708 of 2017, 5947 of 2017, 5752 of 2017, 5950 of 2017, 6116 of 2017 and 7192 of 2017 are hereby dismissed. Accused-appellants Ram Narayan @ Lala, Ram Sewak,

Dalpat, Ashish, Badri Vishal Pal and Munna @ Surendra Pal Kewat are in jail, shall serve out respective sentences awarded to them by Trial Court by impugned judgment and order as affirmed by this Court.

69. Keeping in view provisions of Section 437-A Cr.P.C., appellants Rameshwar, Jagmohan @ Munna Nishad and Sukhpal are hereby directed to forthwith furnish a personal bond of the sum of Rs. 10,000/- each and two reliable sureties, each of the like amount, before Trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against this judgment or for grant of leave, appellants on receipt of notice thereof, shall appear before Supreme Court.

70. A copy of this judgment be sent to Trial Court by FAX for immediate compliance. Lower Court's record be also sent back along with a copy of this judgment.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Income Tax Appeal No.107 of 2015

Commissioner of Income Tax, Meerut
..Appellant
Versus
Vam Resorts &Hotels Pvt. Ltd.
.....Respondent

Counsel for the Appellant:
S.S.C., Sri Shubham Agarwal.

Counsel for the Respondent:
Sri Suyash Agarwal, Sri Krishna Agarwal.

A. Section 263 Clause (c) to Explanation 1 of Income Tax Act, 1963 – Assessee filed appeal against assessment order u/s 143(3). CIT issued notice u/s 263 during pendency of appeal. Appeal partly allowed by CIT(A). Thereafter, CIT passed order under section 263 to set aside the assessment order and remand the assessment to the assessing authority. Action under Section 263 was barred by Clause (c) to Explanation 1 of Section 263 of the Act.

B. Section 263 cannot be invoked on mere suspicion.

Tribunal rightly set-aside order of CIT. The appeal is devoid of merit. Dismissed.

The question of law answered against the revenue and in favour of the assessee.

CHRONOLOGICAL LIST OF CASES CITED: -

1: - 243 ITR 83 (SC), Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax,

2: - (2018)409 ITR 567 (Mad), Smt. Renuka Philip vs. ITO

3: - (2015) 372 ITR 310 CIT vs.Krishna Capbox Ltd, (2015) 372 ITR 310

4: - [2015] 372 ITR 303/230 Taxman 641/55 taxmann.xom 514 (Bom.) CIT v. Fine Jewellery (India) Ltd

5: - 323 ITR 83(SC), Commissioner of Income Tax vs. Development Credit Bank Ltd.,

6: - 259 ITR 502 (Gujrat) CIT vs. Arvind Jewellers

7: - 203 ITR 108 (Bombay) CIT vs. Gabriel India Ltd.

8: - 111 ITR 326 (Alld), J.P.Srivastava & Sons vs. CIT

9: - 224 ITR 180 (P & H), CIT vs. Ram Narain Goel

10: - 262 ITR 295 (P & H), CIT vs.Faqir Chaman Lal (E-7)

(Delivered by Hon'ble Rohit Ranjan Agarwal J.)

1. This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as the Act) has been filed assailing the judgment and order dated 14.11.2014 passed by the Income Tax Appellate Tribunal, Delhi Bench "H", New Delhi. This appeal was admitted on 16.2.2017 on the following questions of law:

(1) Whether the ITAT passed a perverse order in setting aside the order U/s 263 on grounds that A.O. had already conducted inquiry on issues on which order U/s 263 was passed when no such embargo has been put in the language of the Section, the intention of the legislature was never such so as to render the revenue remediless against erroneous orders of the A.O. nor make the revenue suffer a continuous wrong.

(2) Whether the ITAT erred in law in interpreting the provisions of Section 263 which says "Commissioner may call for and examine the records of the proceedings if he considers any order passed therein, by the A.O. is erroneous in so far as prejudicial to the interest of revenue" hence the view of the ITAT in the present case that A.O. had already conducted inquiry is unsustainable.

(3) Whether the ITAT erred in law in curbing the power of the CIT granted by the legislature to examine and correct the orders of the A.O. especially when this is the only remedy available with the department to correct the wrong of the A.O.

(4) Whether the ITAT erred in law in deleting the order U/s 263 on the issue of development expenses when it was clear that only a small portion of such development expenses was actually related to land development receipts.

(5) Whether the ITAT erred in law in deleting the order U/s 263 on the issue of agricultural income when it was clear that assessee had only purchased a land on which crops were shown and sale proceeds of such crops does not constitute agriculture income.

(6) Whether the ITAT erred in law in allowing the appeal of the assessee ignoring the fact that there was a difference between the Gross Receipts as per 26AS and Gross Receipts declared by the assessee when the assessee did not furnish any reconciliation statement to explain the difference.

2. The case relates to the assessment year 2008-09. The assessee which is a Company, filed return of income on 27.9.2008 declaring income at Rs.14,71,900/-. The said return was processed under Section 143(1) of the Act. The case of the Company was selected for scrutiny and notices under Section 143(2) and 142(1) were issued. The assessee produced the books of account and replied the various queries raised by the Assessing Officer. As the assessee had shown development expenses of Rs.7,16,62,142/- in the profit and loss account, the A.O. found Rs.1,20,000/- as excessive and disallowed the same, and added to the income of the assessee. The Order under Section 143(3)

of the Act was passed by the assessing officer on 18.11.2010.

3. The assessee challenged the assessment order passed under Section143(3) of the Act by filing Appeal No.192/10-11 before the CIT(A) under Section 250 of the Act. On 5.6.2013, the CIT(A) allowed the appeal of the assessee on the ground that addition made by A.O. was without any basis, as the word "appear" to be excessive was stated in the order of the A.O. and such addition made in a cavalier and casual manner cannot be sustained.

4. During the pendency of the appeal the Commissioner of Income Tax, Meerut exercising power under Section 263 of the Act, issued notice to the assessee. The notice was replied by the assessee, and on 25.3.2013 Commissioner of Income Tax directed the A.O. to look into applicability of Section 40-A(3) and Section 40(a)(ia) of the Act.

5. After the remand A.O. again issued notice under Section 142(3)/263 of the Act to the assessee. It appears that the assessee did not appear before the assessing authority and the assessing officer passed assessment order on 7.3.2014 under Section 263/143(3) of the Act on total income of Rs.17,47,323,650/-.

6. While the remand proceedings were pending before the assessing authority the assessee approached the Income Tax Appellate Tribunal, (Delhi Bench "H"), New Delhi (hereinafter called as "ITAT") challenging the order under Section 263 of the Act passed by the Commissioner of Income Tax, Meerut. The ITAT allowed the appeal of the assessee setting aside the order passed by the CIT, Meerut under Section 263 of the Act.

7. Sri Subham Agarwal defending the order passed by the Commissioner of Income Tax, Meerut under Section 263 of the Act submitted that the assessing officer has disallowed the expenses of Rs.1,20,000/- only, without any inquiry and has accepted the restb of the amount as land development expenses in the profit and loss account, as such, the CIT had rightly remanded the matter to the assessing authority exercising revisional power as the order of A.O. was erroneous and pre-judicial to the interest of revenue. He further submitted that after the remand order, A.O. again has passed assessment order on 7.3.2014 and now the addition of Rs.7,16,62,142/- on account of land development expenses had been made as the assessee did not avail the opportunity despite repeated reminders and failed to produce the books of account and comply the order of the assessing authority. He contended that Tribunal has passed the order impugned after assessment order has been passed by the assessing authority after remand, and Tribunal should not have set aside the same, but should have relegated the matter to assessing authority directing the assessee to appear before the same and produce books of account to verify the queries so raised.

8. Per contra, counsel for the assessee submitted that the assessment order dated 18.11.2010 was passed after notice under Sections 143(2) and 142(1) of the Act was issued to assessee raising various queries and the assessee had appeared before the Assessing Officer number of times and furnished books of account and replied. Further, the CIT in its show cause notice dated 6.2.2013 has

accepted the fact that on examination of record, assessment order was passed after inquiry which according to him was not proper. Thus, proceedings under Section 263 of the Act cannot be invoked by the CIT when there is no material to hold that order was erroneous and pre-judicial to the interest of revenue and it would not be invoked to correct each and every type of mistake and error committed by A.O. He further relied upon paragraph nos.7 and 9 of judgment of the Apex Court in the case of **Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax, 243 ITR 83 (SC),** which are extracted hereunder:

"7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. **An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous.** In the same category fall orders passed without applying the principles of natural justice or without application of mind.

9. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. **Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law."**

9. The second limb of argument of counsel for the assessee is that appeal before the CIT(A) was pending, as such, the CIT has no jurisdiction to revise the order, in view of Clause (c) of Explanation-1 to Section 263 of the Act, which provides that when appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. He relied upon the judgment in the case of **Smt. Renuka Philip vs. ITO (2018)409 ITR 567 (Mad)**, the relevant paragraphs of which are extracted hereunder:

"21. With regard to the merits of the case, the learned counsel for the assessee referred to a decision of the Division Bench of this Court in **Dr.P.K.Vasanthi Rangarajan v. CIT [2012] 23 taxmann.com 299/209 Taxman 628 (Mad.)**, wherein, the Hon'ble Division Bench held that there is no inhibition in the assessee claiming the benefit of investment made in four flats thereby gaining the benefit under Section 54F of the Act. The Court took note of the decision in TCA No. 656 of 2005 dated 04.01.2012. However, we are not examining the merits of the matter at this juncture since, we are only called upon to answer the Substantial Question of Law with regard to the assumption of jurisdiction of the Commissioner under Section 263 of the Act. The power under Section 263 of the Act is not exercisable under certain circumstances. In this regard, we refer to Section 263(1) explanation 1(c), which reads as follows:

"Revision of orders prejudicial to revenue

263(1)...

(a) to (b)

(c)Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted."

10. It has also been contended that remand by the CIT as far as the non-deduction of TDS is concerned, was wrong, as payment was made by the Company, i.e., ERA Land-mark Ltd., and as per Section 194(c) of the Act the TDS was deducted.

11. It was further submitted that all the documents in evidence as proofs and the queries so raised by the assessing officer was submitted and replied by the assessee and the CIT wrongly invoked the jurisdiction under Section 263. Reliance has been placed upon the decision of this Court in the case of **CIT vs. Krishna Capbox Ltd, (2015) 372 ITR 310,** relevant paragraphs of which are extracted hereunder:

9. The Tribunal further considered the question whether discussion of queries and reply received from assessee, in assessment order, is necessary or not. Relying on two judgments of Delhi High Court in ***CIT Vs. Vikash Polymers [2012] 341 ITR 537/ [2010] 194 Taxman 57 and CIT v. Vodafone Essar South Ltd. [2012] 28 taxmann.com 273/ [2013] 212 Taxman 184 (Delhi)***, it held that once inquiry was made, a mere non discussion or non-mention thereof in assessment order cannot lead to assumption that Assessing Officer did not apply his mind or that he has not made inquiry on the subject and this would not justify interference by Commissioner by issuing notice under Section 263 of the Act.

10. In ***Vikash Polymers*** (supra) relevant part of the observations in this regard read as under (page 548 of 341 ITR):

"*This is for the reason that if a query was raised during the course of scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer called for interference and revision."*

11. Further, the relevant observation made in **Vodafone Essar South Ltd.** (supra) in this regard reads as under (page 531 of 1 ITR-OL):

"The lack of any discussion on this cannot lead to the assumption that the Assessing Officer did not apply his mind."

12. Learned counsel for the Department could not place any other

authority before this Court wherein any otherwise view has been taken. On the contrary, learned counsel for assessee has placed before us a decision of Bombay High Court in ***Income Tax Appeal No.296 of 2013 (CIT v. Fine Jewellery (India) Ltd.) [2015] 372 ITR 303/230 Taxman 641/55 taxmann.xom 514 (Bom.)*** decided on February 3, 2015, wherein also Bombay High Court, following its earlier decision in I***dea Cellular Ltd. Vs. Dy. CIT [2008] 301 ITR 407 (Bom.)*** has taken a similar view and said as under (page 307 of 372 ITR):

".....if a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the Assessment Order would not lead to a conclusion that no mind had been applied to it."

12. Similarly in the case of CIT vs. Mahendra Kumar Bansal, 2008(297)ITR 99 (Alld), this Court held that merely because the **income tax officer** had not written lengthy order, it would not establish that the assessment order passed under Section 143(3)/148 of the Act is erroneous and pre-judicial to the interest of the revenue. Relevant paragraph of which is extracted hereunder:-

"In the case of **Goyal Private Family Specific Trust [1988] 171 ITR 698,** this court has held that the order of the Income-tax Officer may be brief and cryptic, but that by itself is not sufficient reason to brand the assessment order as erroneous and prejudicial to the interests of the Revenue and it was for the Commissioner to point out as to what error was committed by the Income-tax Officer in having reached to its conclusion and in the absence of which proceedings under Section 263 of the Act is not warranted.

In the case of **Belal Nisa [1988] 171 ITR 643** the Patna High Court has held that where the Income-tax Officer had not carried out the necessary enquiry enjoined by section 143(1) of the Act the Commissioner is within his power in taking action in terms of Section 263(1) of the Act. Similar view has been taken in by the Patna High Court in the case of **Smt. Kaushalya Devi [1988] 171 ITR 686.**

The principle laid down by the Patna High Court in the aforesaid two cases are not applicable to the facts of the present case in view of the provisions of Section 143(1) of the Act and as the Central Board of Direct Taxes had already issued the circular referred to above that action under Section 263 of the Act is not warranted and this circular appears to have not been brought to the notice of the Patna High Court which is binding upon the departmental authorities.

As held by this Court in the case of **Goyal Private Family Specific Trust [1988] 171 ITR 698**, we are of the considered opinion that merely because the Income- tax Officer had not written lengthy order it would not establish that the assessment order passed under Section 143(3)/148 of the Act is erroneous and prejudicial to the interests of the Revenue without bringing on record specific instances, which in the present case, the Commissioner of Income Tax has failed to do."

13. Lastly, the counsel for the assessee submitted that the argument of counsel for the Department relying upon

fresh assessment order made by the assessing officer under Section 263/143(3) of the Act dated 7.3.2004 for the purpose of Section 263 of the Act is not sustainable, as according to him definition of expression "record" as per Clause (b) of Explanation to Section 263 of the Act includes all the records relating to Section 263 proceedings available at the time of examination by the CIT only, and not in subsequent order or fresh order passed thereafter under Section 263/143(3) of the Act, which could justify the proceedings under Section 263 carried out by the CIT.

14. We heard Sri Shubham Agarwal, learned counsel for the Department, Sri Suyash Agarwal, learned counsel for the respondent-assessee and have perused the record.

15. The revenue in this appeal has tried to establish that ITAT was not correct in setting aside the order passed by the Commissioner under Section 263 of the Act, on the ground, that assessee had not furnished entire details regarding the contracts, which was cancelled and also the A.O. not looking into the provisions of Section 40(a)(i-a) of the Act whereby such expenses on which the T.D.S. was liable to be deducted, but was not actually deducted were required to be disallowed and added back under the said provisions of the Act.

16. On the other hand, the contention of assessee that the A.O. after considering the entire books of account and the reply furnished by the assessee passed the assessment order under Section 143(3) of the Act. Further, from perusal of the assessment order dated 18.11.2010, it is clear that the A.O. had considered all the books of account and further on 13.5.2010 it had required the assessee, the entire information for the relevant assessment years along with copy of bank statement, narration of debit and credit entries, and other details.

17. On 7.7.2010, the assessee had replied the said notice and made available all the documents as required by the A.O. The Tribunal being the last fact finding Court, in paragraph 7 of its judgment, had noted that details of the documents produced before the A.O. included computation of income along with return and details of TDS, copy of balance sheet, trading and profit and loss account, details of sundry debtors as well as copies of the orders issued by the debtors to the assessee.

18. Thus, the case in hand is not a case where the CIT found that the assessment order was erroneous and it is prejudicial to the interest of the revenue, as the A.O. after the case of the assessee was selected in scrutiny had required the assessee to furnish all the documents and only after the production of the said documents and his satisfaction the assessment order was passed under Section 143(3) of the Act. The Apex Court in the case of **Malabar Industrial Co. Ltd. (supra)** while considering the pre-requisite for exercising power by the Commissioner under Section 263 of the Act, held as under:

"A bare reading of Section 263 of the Income Tax Act, 1961 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If

one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to Section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted."

19. Similar view has been taken by the **Bombay High Court in the case of Commissioner of Income Tax vs. Development Credit Bank Ltd., 323 ITR 83(SC),** relevant paragraph of the same is extracted below:

"Held, dismissing the appeal, that there was no basis or justification for the Commissioner to invoke the provisions of Section 263. The Assessing Officer after making an enquiry and eliciting a response from the assessee came to the conclusion that the assessee was entitled to depreciation on the value of securities held on the trading account. The Commissioner could not have treated this findings to be erroneous or to be prejudicial to the interests of the Revenue. The observation of the Commissioner that the Assessing Officer had arrived at a finding without conducting an enquiry was erroneous, since an enquiry was specifically held with reference to which a disclosure of details was called for by the Assessing Officer and furnished by the Assessing Officer and furnished by the assessee. The Tribunal was justified in holding that recourse to the powers under Section 263 was not warranted in the facts and circumstances of the case."

20. In the case o**f CIT vs. Arvind Jewellers, 259 ITR 502 (Gujrat)**, it was held that once the A.O. after issuing notice had considered all the material on record, there was no basis for invocation of jurisdiction under Section 263 of the Act. Relevant paragraph of the said judgment is extracted hereunder:

"Held, that the finding of fact by the Tribunal was that the assessee had produced relevant material and offered explanation in pursuance of the notices issued under Section 142(1) as well as section143(2) of the Act and after considering the material and explanations, the Income-tax Officer had come to a definite conclusion. Since the material was there on record and the said material was considered by the Income-tax Officer and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action under Section 263. The order of revision was not justified."

21. The Bombay High Court in the case of **CIT vs. Gabriel India Ltd., 203 ITR 108 (Bombay),** held that the order of the A.O. would not become erroneous simply because he did not make elaborate discussion. The relevant paragraph of the said judgment is extracted hereunder:

"Held, that the Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these were part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. This decision of the Income-tax Officer could not be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating

proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That was not permissible. The Tribunal was justified in setting aside the order passed by the Commissioner of Income-tax under Section 263."

22. The Division Bench of this Court in the case of **J.P.Srivastava & Sons vs. CIT, 111 ITR 326 (Alld)** had taken a similar view. The relevant paragraph is extracted hereunder:

"We are of opinion that the approach of the Commissioner is erroneous. The failure of the Income-tax Officer to deal with the claim of the assessee in the assessment order may be an error, but an erroneous order by itself is not enough to give jurisdiction to the Commissioner to revise it under Section 33B. It must further be shown that the order was prejudicial to the interests of the revenue. It is not each and every order passed by the Income-tax Officer which can be revised under Section 33B.

Section 33B contemplates a notice to the assessee. In response to the notice the assessee may show to the Commissioner that the order sought to be revised is not prejudicial to the interests of the revenue. In that event, the Commissioner would have no jurisdiction to take any further action. He would be competent to take action only if he rejects the plea of the assessee. It thus becomes necessary for the Commissioner to examine the merits of the objection raised by the assessee. He cannot delegate that power to the Income-tax Officer by setting aside the assessment order and directing him to make a fresh assessment after taking into consideration the objection of the assessee."

23. In the present case, the Tribunal rightly arrived at the finding that all the material in regard to land development expenses was before the Assessing Officer who had required the assessee to produce all the documents in relation to the same and after inquiring about the details of contract and the contract executed by assessee, the bill submitted and payment schedule made, the Assessing Officer accepted the books of account and only disallowed Rs.1,20,000/- and added to the income of the assessee, which was also set aside by order of the CIT(A) while exercising the power under Section 263 of the Act CIT did not have any material for invoking the said provision and it merely did the same on suspicion and presumption. The Punjab and Haryana High Court in the case of **CIT vs. Ram Narain Goel, 224 ITR 180 (P & H)** held that suspicion however drawn cannot take place on evidence or proof. This case was followed in the case of **CIT vs. Faqir Chaman Lal, 262 ITR 295 (P & H).**

24. The argument raised by counsel for the revenue that the Tribunal should have send back the matter to the assessing authority to decide afresh is a fallacy, as the CIT itself on 5.6.2013, while deciding the appeal of the assessee under Section 250 of the Act set aside the assessment order dated 18.11.2010 to the extent of addition of Rs.1,20,000/- made in the assessment proceedings. Further, the appeal before the Tribunal emanated from the order of the Commissioner of Income Tax exercising power under Section 263 of the Act, as such the Tribunal was correct in limiting its scope to decide whether the exercise of power made by the Commissioner was in consonance

with provision of Section 263 and relied upon the decision of **Malabar Industrial Co. Ltd**. (supra).

25. As, Clause (c) of Explanation 1 to Section 263 of the Act provides that when an appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act by CIT is barred. Thus, in the present case, the CIT wrongly exercised jurisdiction under Section 263 of the Act by remanding back the matter to assessing authority on 25.3.2013, while the appeal was decided by CIT (A) on 5.6.2013. Thus, the order passed by the ITAT does not suffer from any irregularity and needs no interference.

26. As far as the word "record" appearing in Clause (b) of Explanation-1 to Section 263 is concerned, it means the record available at the time of examination by the Commissioner of Income Tax and not any material or record available subsequent to his examination or exercise of power under Section 263. Thus, any order passed by the AO in the assessment proceedings after the remand by the CIT cannot be looked upon and the argument made by the counsel for the revenue for relying upon the fresh assessment order made on 7.3.2004 under Section 263/143(3) of the Act cannot be accepted in view of the above provision of law.

27. In the present case, the Tribunal had recorded specific finding of fact that the assessing authority had examined each and every aspect of the case on which the remand order hinges, as such the remand order was not sustainable in the eyes of law.

28. Considering the facts and circumstances of the case, we are of the considered opinion, that the revenue has failed to make any case for interference in the order of the ITAT, as the CIT had proceeded to remand the matter back to the assessing authority while the appeal of the assessee was pending under Section 250 and the power of exercise under Section 263 was barred by Clause (c) to Explanation 1 of Section 263 of the Act. Further, the remand order by the CIT was based merely on suspicion and presumption.

29. The appeal is devoid of merit and is hereby **dismissed.** The question of law is, therefore, answered against the revenue and in favour of the assessee.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

INCOME TAX APPEAL No.159 of 2016

M/S S.D. Traders ...Appellant
Versus
Commissioner of Income Tax,Kanpur &Anr....Respondents

Counsel for the Appellant:
Sri Suyash Agarwal.

Counsel for the Respondents:
C.S.C., I.T., Sri Krishna Agarwal, Sri Pravin Kumar.

A. Income Tax Act, 1961: Sections 44AB, 142(1), 143(1), 149(1)(b), 251, 260-A Power of Commissioner (Appeals) - coterminous with that of ITO - can also direct AO to do what he had failed to do.

Income Tax Appellate Tribunal, affirmed the addition of sundry creditors to the extent of

Rs. 15 lakhs and upheld the disallowance of 25% labour charges claimed by the assessee, as made by the CIT (Appeals). Dismissing the present appeal, the High Court

Held:-Under S.251 of the Income Tax Act, the Commissioner (Appeals) has powers to confirm, reduce, enhance or annul the assessment, by considering and deciding any matter arising out of the proceedings before him irrespective of whether that matter was raised in appeal. The powers are coterminous with that of the assessing authority. (Para 20, 24, 29)

Precedent followed: -

1. Commissioner of Income Tax Vs. NirbheramDeluram, (Para 13, 14, 24)

2. CIT Vs. Kanpur Coal Syndicate, (Para 13)
Jute Corporation of India Vs. CIT, (Para 13, 14, 24, 29)

3. Commissioner of Income Tax Vs. Kashi Nath Candiwala, (Para 14)

4. CIT Vs. K.S. Dattatreya, (Para 15)

5. CIT Vs. McMillan & Co., (Para 15)

Precedent distinguished: -

1. CIT Vs. Shapoorji Pallonji Mistry, (Para 8, 16, 23, 25)

2. ITO Vs. Rai Bahadur Hardutroy Motilal Chamaria, (Para 9, 16, 23)

3. Additional Commissioner of Income Tax Vs. M/s Gurjargravures, (Para 9, 13)

4. CIT Vs. Sardari Lal and Co. (Para 9, 23, 25)

5. Commissioner of Income Tax, Thrissur Vs. B.P. Sherafudin, (Para 10)

Against the order dt. 24.2.2016 of ITAT, Lko Bench for AY 2006-07 (E-7)

(Delivered by Hon'ble Rohit Ranjan Agarwal J.)

1. This is an assessee's appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter called as 'Act') assailing the order of the Income Tax Appellate Tribunal, Lucknow Bench, 'A' Lucknow (hereinafter called as 'Tribunal') dated 24.02.2016, affirming the order of the CIT (A) as far as regarding addition out of sundry creditors to the extent of Rs.15 lacs and disallowance of 25% of the labour charges. The appeal was admitted on 05.07.2016 on the following question of law:-

"(i) Whether the Appellate Tribunal was legally justified in holding that CIT(A) in exercise of power of enhancement u/s 251 has power to consider new source of income which was not dealt by A.O. in assessment order ignoring the Full Bench decision of CIT vs. Sardari Lal & Co. 251 ITR 864 (Del) (FB)?

(v) Whether the Appellate Tribunal was justified in not considering that after set-aside proceedings by Hon'ble high Court, the CIT(A) has not issued fresh notice of enhancement (although time barred) and followed the its earlier order without application of mind?"

2. However, vide order dated 02.05.2019, this Court allowed the application filed by the appellant for additional question of law proposed by him which are as under:-

"(iii) whether the ITAT was correct to disallow Rs.5.95 lacs, being 25% of labour charges ignoring the increasing trend in the G.P rate of 17.79% in this year as compared to 13.79% in A.y 2005-06, specially when all the expenses were vouched and verifiable being the books of accounts are duly

audited u/s 44AB of the Act, in the absence of its rejection and the books have not been rejected.

(iv) whether the ITAT has rightly sustained the addition of Rs.15 lacs out of Sundry Creditors for onus of discharge of verification after 7 years, on appellant while legal observation to preserve the books of Accounts and other documents, for 6 years from the relevant assessment years and third party is under no obligation to provide confirmation or verification beyond 6 years from the relevant assessment years."

3. On 03.05.2019, the above mentioned question of laws were incorporated by the appellant in the paper-book as question nos. III and IV. Assessee/ appellant is in business of civil contract, and for assessment year 2006-07 disclosed his job work receipts amounting to Rs.90,35,009/- and declared gross profit of Rs.16,07,474/- whereas net profit was shown as Rs.3,62,113/-. Return of income was filed on 31.10.2006 and the same was processed under Section 143(1) of the Act on 14.09.2007. Case of the assessee was selected for scrutiny and notice under Section 143(2) was issued on 19.10.2007, as well as notice under Section 142(1) along with questionnaire was issued on 08.08.2008. According to assessee, he replied the queries raised by Assessing Officer. AO completed assessment and made three additions.

4. The order of assessment was challenged by assessee before Commissioner of Income Tax (Appeals), who on 13.09.2013 issued notice requiring appellant to produce labour register including bills, vouchers and ledger accounts as well as details of sundry creditOrs. On 14.11.2013, CIT (A) passed an order enhancing income of appellant by Rs.26.50 lacs which includes disallowances to the extent of 50% of wage expenses claimed by appellant in profit and loss account and 50% of sundry creditors appearing in balance sheet of the assessee.

5. Order of CIT(A) was challenged before the Tribunal by assessee, and on 14.04.2014, Tribunal dismissed the appeal of assessee. Aggrieved by this order assessee preferred an Income Tax Appeal Defective No. 145 of 2014 before this Court. On 10.12.2014, this Court set aside the order of CIT (A) and of the Tribunal, and restored the proceedings for reconsideration before CIT (A), with a direction that appellant shall file all required information and documentary material before CIT (A) by 31st December, 2014 and shall appear before CIT (A) for receiving directions as to hearing on 5th January, 2015. It was further held that in case assessee fails to file required information and documentary material, CIT (A) would be at liberty to pass orders on basis of available records after furnishing an opportunity of being heard to the assessee.

6. In compliance of the order of this Court, it appears that assessee filed an application along with copy of order before CIT (A) along with certain documents which have been enclosed along with this appeal and are part of record as Annexure-6. Further, notice under Section 250 was issued by the CIT (A) for hearing on 05.01.2015. Thereafter, appellant was given several opportunities on 31.12.2014, 18.02.2015, 27.02.2015, 09.03.2015, 17.03.2015 and 25.03.2015. From the order of the CIT (A), it appears that the authorised representative of the appellant appeared from time to time and furnished replies/ documents. On

31.03.2015, CIT (A) partly allowed appeal of the assessee and disallowance of Rs.36,019/- and Rs.20,000/- were deleted, while additions of Rs.11.50 lacs and Rs.15.00 lacs were confirmed. Against this order an appeal was filed by the assessee/ appellant before the Tribunal which was also partly allowed on 24.02.2016 confirming the addition of amount of sundry creditors to extent of Rs.15.00 lacs, while disallowance on labour charges of Rs.5.95 lacs being made. It is against this order that the present appeal has been filed by the assessee.

7. Learned senior counsel appearing for the assessee submitted that Assessing Officer had made three additions which were deleted by the CIT (A) but had wrongly made addition of Rs.11.50 lacs and Rs.15.00 lacs towards labour expenditure and sundry creditors, as he did not had the jurisdiction to introduce a new source of income and assessment was to be confined to those items of income which was subject matter of original assessment, that is the three additions made by AO of Rs.76,019/-, Rs.20,000/- and Rs.54,375/- only.

8. It was submitted that Section 251(1)(a) of the Act only envisages for the appellate authority that is CIT (Appeal) to confine its assessment to the original assessment order and not to include the power to discover a new source of income. Reliance has been placed upon the decision in case of ***CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC).*** Relevant portion relied upon is extracted hereasunder:-

"In our opinion, this Court must be held not to have expressed its final opinion on the point arising here, in view of what was stated at pages 709 and 710 of the report. This Court, however, gave approval to the opinion of the learned Chief Justice of the Bombay High Court that section 31 of the Income-tax Act confers not only appellate powers upon the Appellate Assistant Commissioner in so far as he is moved by an assessee but also a revisional jurisdiction to revise the assessment with a power to enhance the assessment. So much, of course, follows from the language of the section itself. The only question is whether in enhancing the assessment for any year he can travel outside the record that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. It is contended by the Commissioner of Income-tax that the word "'assessment" here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words "enhance the assessments" are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal."

9. Counsel for the assessee also relied upon a decision of the Apex Court in case of ***ITO v. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC)*** which had followed the earlier decision of the Apex Court cited above. Reliance has also been placed on the decision of the Supreme Court in case of ***Additional Commissioner ofIncome Tax v. M/s. Gurjargravures (P.) Ltd. [1978] 111 ITR 1 (SC)***, following the earlier two decisions of the Apex Court. Counsel for the assessee vehemently argued that the power of the first appellate authority does not go beyond what has been considered by the Assessing Officer in appeal and reliance upon the decision of a Full Bench in case of ***CIT v. Sardari Lal and Co. [2001] 251 ITR 864 (Delhi)*** has been placed wherein it has been held as under:-

"7. The learned counsel for the revenue also submitted that this conclusion of the Division Bench needs a fresh look. We have considered this submission in the background of what had been stated by the Apex Court in ***Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688 and CIT v. Nirbheram Daluram [1997] 224 ITR 610. In Jute Corporation of India Ltd.'s*** case (supra), the Apex Court while considering the question whether AAC has jurisdiction to allow the assessee to raise an additional ground in assailing the order of assessment before it, referred to ***Shapoorji Pallonji Mistry's*** case (supra), and draw a distinction between the power to enhance tax on discovery of a new source of income and granting a deduction on the admitted facts supported by the decision of the Apex Court. Relying on certain observations made by the Apex Court in ***CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225,*** the Apex Court held that powers of the first appellate authority are coterminous with those of the Assessing Officer and the first appellate authority is vested with all the wide powers, which the subordinate authority may have in the matter. In ***Nirbheram Daluram's*** case (supra), the decisions of ***Kanpur Coal Syndicate's*** case (supra) and ***Jute Corporation of India Ltd.'s case*** (supra) were also considered and it was observed by the Apex Court that the appellate powers conferred on the first appellate authority under section 251 were not confined to the matter, which had been considered by the ITO, as the first appellate authority is vested with all the wide powers of the Assessing Officer may have while making the assessment, but the issue whether these wide powers also include the power to discover a new source of income was not commented upon. Consequently, the view expressed in ***Shapoorji Pallonji Mistry's*** case (supra) and ***Rai Bahadur Hardutroy Motilal Chamaria's case*** (supra) still holds feet. It may be noted that the issue was considered in ***CIT v. Mc. Millan and Co. [1958] 33 ITR 183 (SC).*** Referring to a decision of the Bombay High Court in ***Narrondas Manordass v. CIT [1957] 31 ITR 909***, it was held that the language used in section 31 is wide enough to enable the first appellate authority to correct the ITO not only with regard to a matter which has been raised by the assessee but also with regard to a matter which has been considered by the Assessing Officer and determined in the course of assessment. It is also relevant to note that in the ***Jute Corporation'of India Ltd.'s*** case (supra), the Apex Court inter alia observed as follows:-

".....The AAC, on an appeal preferred by the assessee, had jurisdiction to invoke, for the first time, the provisions of rule 33 of the Indian Income-tax Rules, 1922, for the purpose of computing the income of a non-resident even if the ITO had not done so

in the assessment proceedings. But, in ***Shapoorji Pallonji Mistri [1962] 44 ITR 891,*** this Court, while considering the extent of the power of the AAC, referred to a number of cases decided by various High Courts including the Bombay High Court judgment in ***Narrondas Manordass [1957] 31 ITR 909*** and also the decision of this Court in ***McMillan and Co. [1958] 33 ITR 182*** and held that, in an appeal filed by the assessee, the AAC has no power to enhance the assessment by discovering new sources of income not considered by the ITO in the order appealed against. It was urged on behalf of the revenue that the words 'enhance the assessment' occurring, in section 31 were not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. The Court observed that there was no doubt that this view was also possible, but having regard to the provisions of sections 34 and 33-B, which made provision for assessment of escaped income from new sources, the interpretation suggested on behalf of the revenue would be against the view which had held the field for nearly 37 years....." (p. 692) [Emphasis supplied]

8. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under sections 147/148 of the Act and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in ***CIT v. Union Tyres [1999] 240 ITR 556*** of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed of."

10. Counsel for the assessee also relied on a decision of the Kerala High Court in case of ***Commissioner of Income Tax, Thrissur v. B.P. Sherafudin [2017] 399 ITR 524 (Kerala).*** Lastly, he submitted that the CIT (A) had issued the notice for enhancement on 13.09.2013, while the time limit expired on 31.03.2013 for assessment year 2006-07 and the said proceedings are barred by limitation in view of Section 149(1)(b) of the Act.

11. Refuting the arguments made by counsel for assessee, Sri Krishna Agarwal, learned counsel appearing for the Revenue submitted that question nos. (i) and (ii) are substantial question of law while question nos. (iii) and (iv) framed as additional questions are questions of fact. He submitted that power of enhancement provided under Section 251 of the Act, is in fact, the power of Appellate Assistant Commissioner coterminous with that of Income Tax Officer and he can do what the Income Tax Officer do and also direct him to do what he has failed to do. It was further contended that CIT (A) had been empowered under Section 251 to enhance the assessment and he may consider and decide any matter arising out of proceedings in which the order appealed against was passed. Power of CIT(A) cannot be limited to any disallowances or additions made by Assessing Officer but it extends to whole of proceedings.

12. He further submitted that assessee filed its return of income along with balance-sheet, profit and loss account and audited books of account in the assessment proceedings, in which he claimed deduction

on account of labour expenses and sundry creditOrs. CIT (A) has power to look into such deductions claimed by assessee in his return as well as any credits in its books of account which assessee does not claim to be its income.

13. Reliance has been placed upon the decision of the Apex Court in case of ***Commissioner of Income Tax vs. Nirbheram Deluram [1997] 91 Taxman 181 (SC), CIT vs. Kanpur Coal Syndicate [1964] 53 ITR 225 (SC) as well as Jute Corporation of India vs. CIT [1991] 187 ITR 688 (SC)***, in which the Apex Court in depth considered the power of the Appellate Assistant Commissioner while exercising power under Section 251 of the Income Tax Act. Further, the Apex Court in ***Jute Corporation of India*** (supra) distinguished the judgment passed in case of ***Gurjargravures (P.) Ltd.*** (supra) and held as under:-

"4. Section 31 of the Income-tax Act, 1922 ('the Act') also conferred power on the AAC to hear appeal against the assessment order made by the ITO. Chagla, C. J. of the Bombay High Court considered the question in detail in ***Narrondas Manordass v. CIT, [1957] 31 ITR 909*** and held that the AAC was empowered to correct the ITO not only with regard to a matter which had been raised by the assessee but also with regard to a matter which may have been considered by the ITO and determined in the course of the assessment. The High Court observed that since the AAC had been the revising authority against the decisions of the ITO; a revising authority not in the narrow sense of revising those matters, which the assessee makes a grievance but the subject-matter of the appeal not only he had the same powers which could be exercised by the ITO. These observations were approved by this Court i***n CIT v. McMillan and Co., [1958] 33 ITR 182*** the AAC on an appeal preferred by the assessee had jurisdiction to invoke, for the first time provisions of rule 33 of the Income-tax Rules, 1922, for the purpose of computing the income of a nonresident even if the ITO had not done so in the assessment proceedings. But in ***CIT v. Shapporji Pallonji Mistry, [1962] 44 ITR 891***this Court while considering the extent of the power of the AAC referred to a number of cases decided by various High Courts including Bombay High Court judgment in ***Narrondas Manordass's*** case (supra) and also the decision of this Court in McMillan and Co.'s case (supra) and held that in an appeal filed by the assessee, the AAC has no power to enhance the assessment by discovering new sources of income, not considered by the ITO in the order appealed against. It was urged on behalf of the revenue that the words 'enhance the assessment' occurring in section 31 were not confined to the assessment reached through particular process but the amount which ought to have been computed if the true total income had been found. The Court observed that there was no doubt that this view was also possible, but having regard to the provisions of sections 34 and 33B of the 1922 Act, which made provisions for assessment of escaped income from new sources, the interpretation suggested on behalf of the revenue would be against the view which had held the field for nearly 37 years. In this view the Court held that the AAC had no power to enhance the assessment by discovering new sources of income. This decision does not directly deal with the question which we are concerned. Power to enhance tax on discovery of new

source of income is quite different than granting deduction on the admitted facts fully supported by the decision of this Court. If the tax liability of the assessee is admitted and if the ITO is afforded opportunity of hearing by the appellate authority in allowing the assessee's claim for deduction on the settled view of law, there appears to be no good reason to curtail the powers of the appellate authority' under section 251(1)(a) of the Act.

6. In ***Gurjargravures (P.) Ltd.'s*** case (supra) this Court has taken a different view, holding that in the absence of any claim made by the assessee before the ITO regarding relief, he is not entitled to raise the question of exemption under Section 84 of the Act before the AAC hearing appeal against the order of the ITO. In that case the assessee had made no claim before the ITO for exemption under Section 84, no such claim was made in the return nor any material was placed on record supporting such a claim before the ITO at the time of assessment. The assessee for the first time made claim for exemption under Section 84 before the AAC who rejected the claim but on further appeal the Tribunal held that since the entire assessment was open before the AAC there was no reason for his not entertaining the claim, or directing the ITO to allow appropriate relief. On a reference the High Court upheld that view taken by the Tribunal. On appeal this Court set aside the order of the High Court as it was of the view that the AAC had no power to interfere with the order of assessment made by the ITO on a new ground not raised before the ITO, and, therefore, the Tribunal committed error in directing the AAC to allow the claim of the assessee under Section 84. Apparently this view taken by two Judge Bench of this Court appears to be in conflict with the view taken by the three Judge Bench of the Court in***Kanpur Coal Syndicate's*** case (supra). It appears from the report or of the decision in Gujrat High Court case the three Judge Bench decision in ***Kanpur Coal Syndicate's*** case (supra) was not brought to the notice of the Bench in ***Gurjargravures (P.) Ltd.'s*** case (supra). In the circumstances the view of the larger Bench in the ***Kanpur Coal Syndicate'***s case (supra) hold the field. However, we do not consider it necessary to over-rule the view taken in **Gurjargravures (P.) Ltd.'s** case (supra) as in our opinion that decision is founded on the special facts of the case, as would appear from the following observations made by the Court:-

".....As we have pointed out earlier, the statement of case drawn up by the Tribunal does not mention that there was any material on record to sustain the claim for exemption which was made for the first time before the AAC. We are not here called upon to consider a case where the assessee failed to make a claim though there was no evidence on record to support it, or a case where a claim was made but no evidence or insufficient evidence was adduced in support. In the present case, neither any claim was made before the Income-tax Officer, nor was there any material on record supporting such a claim..."(p.5)

The above observations do not rule out a case for raising an additional ground before the AAC if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made or that the ground became available on account of

change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the AAC is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the AAC should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised for good reasons. The satisfaction of the AAC depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose."

14. A division Bench of this Court in case of ***Commissioner of Income Tax v. Kashi Nath Candiwala [2005] 144 Taxman 840 (All.)*** relying upon the judgment of ***Nirbheram Deluram*** (supra) and **Jute Corporation of India** (supra) held that in view of Explanation to Section 251 of the Act the appellate authority is empowered to consider and decide any matter arising out of proceedings in which the order appealed against was passed.

"7. We have heard Sri A.N. Mahajan, learned standing counsel for the revenue and nobody has appeared on behalf of the respondent-assessee. The learned counsel for the Revenue submitted that under the Explanation to section 251 of the Act, the Appellate Authority is empowered to consider and decide any matter arising out of proceedings in which the order appealed against was passed notwithstanding the fact that such matter was not raised before him by the appellant and therefore, even though the trading results were not subject-matter of the appeal before the Commissioner of Income Tax (Appeals), he was justified in going into the trading results and substituting it by his own findings. Shri Mahajan has relied upon a decision of Apex Court in the case of CIT v. Nirbheram Daluram [1997] 224 ITR 610 wherein the Apex Court has held that the Appellate Assistant Commissioner is entitled to direct additions in respect of items of income not considered by the Income Tax Officer. The Apex Court has followed its earlier decision in the case of Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688 and has held that the power of the Appellate Assistant Commissioner is coterminous with that of the Income Tax Officer and he can do what the Income Tax Officer can do and also direct him to do what he has failed to do."

15. Further two decisions relied upon by the counsel for the Revenue are in case of ***CIT v. K.S. Dattatreya [2011] 197 Taxman 151 (Kar.)*** and ***CIT v. McMillan & Co. [1958] 33 ITR 182 (SC).***

16. Sri Agarwal submitted that the reliance placed on the decision of ***Shapoorji Pallonji Mistry*** (supra) and ***Rai Bahadur Hardutroy Motilal Chamaria*** (supra) are completely distinguishable on facts, as in both cases the Court held that the AAC could not travel outside the record that is to say the return made by assessee with a view to finding out new source of income not disclosed.

17. Lastly the counsel for the Revenue submitted that there was no requirement of issuance of fresh notice of enhancement once this Court restored the matter back to the CIT (A) to consider the material, giving an opportunity to assessee and fixing 31st December, 2014 as last date for submission of documents/ material and several opportunities being provided by the first appellate authority thus, question of fresh issuance of notice does not arise.

18. We have heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate assisted by Sri Suyash Agarwal, learned counsel for the assessee and Sri Krishna Agarwal, learned cousel for the Revenue.

19. Before proceeding, a glance of provisions of Section 251 of the Act is necessary, which is extracted hereasunder:-

*"**251.** (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—*

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

***Explanation.**-In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant."*

20. A careful reading of Section 251 reveals that power vest in Commissioner (Appeals), in an appeal against an assessment order, where he can confirm, reduce enhance or annul the assessment. Explanation to Section 251 further clarifies the position and empowers Commissioner (Appeals) to consider and decide any matter arising out of proceedings in which the order appealed against was passed, notwithstanding that said matter was not raised before him by the appellant, meaning thereby that power exercisable by CIT (Appeal) under Section 251 cannot be restricted to only the issues raised by the appellant in any appeal before him, but Commissioner can exercise his discretion in accordance with law.

21. The first argument raised by the counsel for the assessee that the CIT (A) while exercising power of enhancement under Section 251 of the Act cannot consider new source of income which was not dealt by the Assessing Officer, in the present case cannot be accepted as after the remand by this Court, the CIT (A) as well as the Tribunal in depth had recorded a finding that there was no new source of income on which the additions had been made and it was all on the records produced before the Assessing Officer that the CIT (A) had made additions of labour charges as well as addition of sundry creditors to the extent of Rs.15.00 lacs.

22. It has been argued by the counsel for the Revenue that CIT (A) has not

travelled beyond the books of accounts and during appeal it was found that only confirmation was available of five parties and the rest of the creditors were untraceable, hence the addition of the amount was made which were part of the books of account. Likewise, the addition made as far as the labour charges are concerned was also on the basis of the books of account submitted by the assessee as such, it cannot be accepted that the CIT (A) had made additions on the basis of new source of income.

23. The argument of the counsel for the assessee relying upon the decision of the Apex Court in case of ***Shapoorji Pallonji Mistry*** (supra), ***Rai Bahadur Hardutroy Motilal Chamaria*** (supra) ***and Sardari Lal & Co.*** (supra) cannot be accepted as the said judgments have their very basis where the Appellate Assistant Commissioner had made addition or deletion on the basis of new source of income, but present case is not of new source of income, as CIT (A) has relied upon the books of accounts submitted by the assessee along with his return and had claimed expenditure made by him in profit and loss account and claim of sundry creditors shown in balance-sheet.

24. The Apex Court while dealing with the power of the Appellate Assistant Commissioner under Section 251 of the Act had in case of ***Nirbheram Deluram*** (supra) and ***Jute Corporation of India*** (supra) had held that power of Appellate Assistant Commissioner is coterminous with that of Income Tax Officer and he can do what the Income Tax Officer can do and also direct him to do what he has failed to do.

25. In the present case, the CIT (A) had deleted addition made by the Assessing Officer and had made two additions of the labour charges and sundry creditors on the basis of the profit and loss account, and balance-sheet filed by the assessee along with his return. Thus, there was no new source of income as claimed by the assessee. The case law relied upon by the assessee in case of ***Sardari Lal & Co***. (supra) and S***hapoorji Pallonji Mistry*** (supra) are all distinguishable in the facts of the present case, and the Hon'ble Courts in those cases had only dealt with the situation wherein AAC found new source of income and made additions to the income, while in the present case no such addition was made from any new source of income but from the return so submitted by the assessee himself.

26. The second question as regards the issuance of fresh notice of enhancement by the CIT (A) is concerned has no relevance, once the order of the Tribunal as well as CIT (A) was set aside by this Court on 10.12.2014 restoring the appeal back to CIT (A) for reconsideration and fixing 31th December, 2014 as last date for the appellant to file all required information and documentary material and to appear before CIT (A) on 05th January, 2015. The question of law raised by the assessee is of no consequence as he, thereafter, had filed the documents before CIT (A) and had appeared, thus, the question of issuance of fresh notice for enhancement does not arise and the CIT(A) rightly decided the question so raised before it.

27. As far as question no. (III) and (IV), which the appellant had incorporated in his appeal with the permission of the Court are not substantial question of law and are questions of fact which have been dealt with by, both CIT

(A) and the Tribunal in depth and have categorically recorded finding of fact, for which no interference is required in this appeal.

28. Thus, argument of the counsel for assessee cannot be accepted so as to restrict the power of Commissioner (Appeals) on the ground of new source of income, as Section 251 clearly envisages the power of the appellate authority for considering and deciding any material arising out of proceedings in which order appealed against was passed. In the present case, all the materials looked upon by the appellate authority was before the assessing authority, as such the Commissioner (Appeals) rightly proceeded to decide the same as it arose out of the proceedings of assessment.

29. The Apex Court has also affirmed that power of Commissioner (Appeals) cannot be restricted and in the case of ***Jute Corporation of India Ltd***. (supra) held that the power of the Commissioner (Appeals) being coterminous with that of the Income Tax Officer, he can do what the Income Tax Officer do and further the section also empowers him to direct the Assessing Officer to do what he had failed to do. The power of the Commissioner is not bridled in any way and the language of the section is plain and simple.

30. Having considered the material on record and the law laid down by the Apex Court in regard to the power of Commissioner (Appeals) exercisable under Section 251 of the Act, we are of the considered opinion that the order of the Tribunal needs no interference and the appeal of the assessee is **dismissed**.

31. The questions of law are, therefore, answered in favour of the Revenue and against the Assessee.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE VIVEK VARMA, J.

Income Tax Appeal No.50 of 2009

M/S Deepak Rugs,Bhadohi ...Appellant
Versus
Commissioner of Income Tax,Varanasi ...Respondent

Counsel for the Appellant:
Sri Shambhu Chopra, Sri Arun Pratap Singh, Sri Rishi Raj Kapoor, Sri Nikhil Agarwal, Sri Kushagra Srivastava.

Counsel for the Respondent:
C.S.C., I.T., Sri Ashish Agarwal.

A. Income Tax Act, 1961: Sections 143(2), 142(1), 144, 145(3), 251, 260-A- In exercise of powers u/s 260A, the finding of fact of the Tribunal cannot be disturbed.

The Assessing Officer noticed that the weaving charges manufacturing expenses were not verifiable and the gross profit rate had gone down considerably as compared to the preceding years. Assessing Officer applied the provisions of S.145(3) and adopted a higher GP rate (15%). CIT (A) rejected the appeal and enhanced the GP rate (to 23.01%). Tribunal dismissed the appeal. Dismissing the present appeal, the High Court

No question of law may arise against enhancement in estimation as it would remain a finding of fact, as long as it is based on cogent material and evidence.

Precedent followed:-

1. M/s Kachwala Gems, Jaipur Vs. Joint Commissioner of Income Tax, (2007) 288 ITR 10 (SC) (Para 37)

2. Shri Venkateswar Sugar Mills Vs. CIT, 2012 341 ITR 588 (Alld.) (Para 38)

3. M. Janardhana Rao Vs. Joint CIT, (2005) 273 ITR 50 (SC) (Para 42)

Precedent distinguished: -

1. M/s Kaka Carpets Vs. Commissioner of Income Tax, Varanasi, Income Tax Appeal NO. 8 of 2008 (Para 36)

Appeal against order 16.3.2009 by ITAT, Allahabad Bench for AY 2004-05 (E-4)

(Delivered by Hon'ble Vivek Varma J.)

1. The present appeal has been filed by the assessee under Section 260-A of the Income Tax Act. 1961 (hereinafter referred to as 'the Act') against the order of the Income Tax Appellate Tribunal, Allahabad Bench dated 16.3.2009 for the Assessment Year 2004-05, by which Tribunal dismissed assessee's appeal and confirmed the order dated 4.9.2006 passed by Commissioner of Income Tax (Appeals) Varanasi.

2. The Commissioner of Income Tax (Appeals), Varanasi, by order dated 4.09.2006 enhanced the addition by estimating the gross profit at 23.01 % and accordingly sustained the addition of Rs. 1,32,02,572/- which includes the addition made by Assessing Officer vide order dated 13.02.2006.

3. The instant appeal was admitted on the following questions of law:

1. Whether, the Income Tax Appellate Tribunal was legally justified in upholding the application of Section 145(3) of the Income Tax Act, 1961, upholding the rejection of books of account, and application of hypothecated G.P. Rate of 23.01 % as enhanced by the Commissioner of Income Tax (Appeals)?

2. Whether the Income Tax Appellate Tribunal as well as learned Commissioner of Income Tax (Appeal) were legally justified in giving their new reasoning for justifying the application of Section 145(3) of the Income Tax Act, 1961 for upholding the rejection of books of account, contrary to the findings and conclusions mentioned by the assessing authority in paras 4.1, 4.II, 4.III, 4.IV and 4.V of the assessment order wherein the assessing authority has recorded positive findings in favour of the appellant for fall of GP rate in the current year, even though applying hypothetical GP rate at 15 %?

3. Whether, the Income Tax Appellate Tribunal was legally justified in upholding the order of lower authorities and addition of Rs. 1,32,02,742/- towards trading profit merely on the basis of surmises and conjectures, ignoring the cogent material on record such as comparative chart, fall in rupee value, etc. and even though no defects were pointed out in the books of account and other records maintained by the appellant and produced before the assessing authority?

4. Whether, the fall in GP rate as declared by the appellant at 14.52% being comparable to the rate in the industry, the addition of trading profits of RS. 1,32,02,742 for the year under consideration is legally sustainable?

4. The assessee is a firm and is engaged in business of manufacture and export of woolen carpet rugs. It filed its return of income showing income at Rs

86,19,540/- for the assessment year 2004-05. The case of the assessee was selected for scrutiny and thereafter notices under section 143(2)/142(1) of the Act were issued.

5. The accountant of the assessee firm and its counsel appeared before the assessing officer and produced cash book, ledger account, journal book, purchase and sale registers, stock register, bills, vouchers etc.

6. The Assessing Officer on examination of records found that sales and purchase was satisfactory. However, on verification, he noticed that the weaving charges and manufacturing expenses were not verifiable as per record of the assessee and the gross profit rate for assessment year 2004-05 has gone down considerably as compared to the preceding assessment years i.e. 2002-03 and 2003-04.

7. The Assessing Officer required the assessee to explain the fall in Gross Profit rate and also the non verifiable nature of weaving charges and other manufacturing expenses and why books of account may not be rejected by invoking the provisions of section 145(3) of the Act.

8. The assessee stated that the fall in G.P. Rate is mainly attributable to increase in cost of raw material, secondly the sale price has gone down as compared to the previous assessment years and the cost of the labour charges (weaving charges payment) paid to weavers and production expenses has increased in the said assessment year.

9. The Assessing Officer after considering the reply of the assessee and after perusing the account books of the assessee came to the conclusion that verifiability of books of account is not possible in the absence of supporting documents, even the trading/manufacturing result shown by the assessee is not acceptable as such the assessing officer applied the provisions of section 145(3) of the Act and rejected the books of the assessee. He adopted G.P. Rate @15% instead of 14.52% as disclosed by the assessee. Accordingly the extra profit was worked out at Rs 7,42,607/-and the same was added to the income of the assessee. Apart from this addition various other additions on account of disallowance of travelling and conveyance expense, disallowance of printing and stationary expenses, disallowance of general expenses and disallowance of other expenses.

10. Thereafter the Assessing Officer made an assesment vide Assessment order dated 13.02.06 and came to the following conclusion.

" *III. On verification of weaving charges payment, it is seen that the payment of Rs. 4,22,48,507 are made to weavers/weavers contractor after deducting tax at source and total of deduction of tax was Rs. 8,49,906, many of weaver/weaver contractor, as per TDS deduction list, are assessed to tax and have been allotted PAN, however, in some of cases PAN have not been quoted. No doubt as far as the genuineness of the person is concerned, the person with the PAN number can be said to be verifiable but as in the maximum no. of weavers cases, they are not maintaining their own books so cross verifiability of correctness of weaving charges is not possible. In some of the weavers cases total payment of 5,89,324 have been made as weaving charges without any deduction of taxes as most of payment were below Rs. 20,000/-*

as the addresses of these persons are not complete so verifiability of weaving charges is not possible. Similarly in the case of manufacturing expenses case it cannot be said to be fully verifiable. In view of these facts applicability of Section 145(3) cannot be ruled out.

IV. The assessee has maintained purchase/ manufacturing and sale register, stock register but in view of nature and work of the industry and maintenance of assessee's own accounts, the stock position and consumption of raw material and cost there upon can not be correctly deduced as piece to piece manufacture, consumption, cost, sale etc is not co-relatable from the books kept by the assessee, so consumption as well as stock cannot be said fully verifiable. Hence applicability of Section 145(3) on this score also cannot be denied. "

11 . The Assessing Officer, thus computed and assessed the income of the assessee at Rs 92,52,420/-

12. The assessee aggrieved by the additions made in the assessment order dated 13.02.2006 challenged the same by filing appeal before the CIT (A). In that appeal the books of account were again examined by the first appellate authority. The CIT(A) vide order dated 04.09.16 rejected the appeal of the assessee and upheld the invocation of the provisions of section 145(3) of the Act, rejecting the books of account. However, he enhanced the addition by estimating the gross profit @23.01%, after considering the past history of the assessee and for this purpose the CIT (A) compared the G.P. Rate of the assessee of the last 5 assesment years and adopted the average of gross profit rate of last two assessment years. The CIT (A) also confirmed and upheld the various other disallownces made by the Assessing Officer.

13. The assessee challenged the order of the CIT(A) before the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad. The Tribunal vide order dated 16.03.2009 dismissed the appeal filed by the assessee and confirmed the order passed the CIT (A).

14. Hence, the present appeal, at the instance of the assessee.

15. Heard Sri Kushagra Srivastava holding brief of Sri Rishi Raj Kapoor, learned counsel for the appellant and Sri Ashish Agarwal, learned counsel for the revenue.

16. It is contended by learned counsel for the appellant that the Tribunal as well as the lower authorities have erred in law as well as on facts in upholding the rejection of book of accounts and application of Section 145(3) of the Income Tax Act. The assessing authority had found that the assessee had maintained purchase/manufacturing register, sale register and stock register. He also submitted that in case the Assessing Officer, CIT(A) or Tribunal doubted the transactions carried out by the assessee regarding the payment of weaving charges they should have summoned the persons/weavers in question. Without summoning those persons, tax liability could not be fastened on the assessee on presumptions and conjectures.

17. It is further submitted, that there was no suppression in sales/purchase order or of raw materials nor excess raw material had been found in assessee's case to assume hypothecated GP rate of 23.01 % as assessed by the Commissioner of Income Tax (Appeal) and upheld by the Income Tax Appellate Tribunal. Learned counsel for the assessee relied upon the judgement of this court in the case of M/s

Kaka Carpets vs Commissioner of Income Tax, Varanasi, Income Tax Appeal No. 8 of 2008, delivered on 28.04.08.

18. To the contrary, learned counsel for the revenue submitted that books of account were not properly maintained by the appellant-assessee which were rightly rejected by the Assessing Officer by invoking provisions of Section 145(3) of the Act. The CIT (Appeals) not only confirmed the action of the assessing officer but also enhanced the GP rate from 15 % to 23.01 %. and there is no apparent error either on the part of the learned Tribunal or in the order passed by the authorities below.

19. It is further submitted that the maximum number of weavers could not be verified in absence of necessary details being furnished by the assessee. Regarding correctness of weaving charges and further the stock position and consumption of raw materials and cost thereupon cannot be correctly deducted as piece to piece manufacture, consumption, cost, sales was also not correlated from the books of account. He also submitted that in maximum number of cases neither PAN was provided nor the address of the weavers were disclosed. As such genuineness of the transaction cannot be established. The Commissioner of Income Tax (A) after giving a detailed notice for the enhancement of Income, in accordance with law enhanced the income of the assessee. The finding of fact recorded by the Assessing Officer and CIT(A) on examination of books of account and other details produced by the assessee would show that the assessee had failed to prove genuineness of the weaving charges, thus the order of Tribunal is wholly just. In any case, the said order records a finding of fact based on appraisal of evidence and therefore warrants no interference by this Court. There is no substantial question of Law involved,

20. We have considered the rival submissions made by learned counsel for the parties and perused the material on record.

21. The assessee during the Assessment year 2004-05 has shown his income from manufacture and export of carpets. The comparative trading chart for the year in dispute as well as the preceding year is quoted below:

Assessment Year	**Sales**	**Gross Profit**	**GP Ratio**
2002-03	91991908	24167934.22	26.27%
2003-04	104485531	21048985.80	20.14 %
2004-05	155555112	22590659.63	14.52 %

22. The above chart shows the fall in GP ratio with reference to previous years, which was due to increase in cost of raw material, as per assessee. To verify the fall in GP rate, the Assessing Officer examined the books of account and found that the sale and purchase were found verifiable. However, on verification of weaving charges payment, it was found that although payment of Rs, 4,22,48,507 was disclosed to have been made to weavers after deducting tax at source however, only some of the weavers/contractors had permanent account number. About half of them, no permanent account number was available.

Total deduction of tax was Rs. 8,49,906, but in case of some of the weavers total payment of Rs. 589324 had been made as weaving charges without any deduction of tax at source. As the addresses of these persons were not complete, verification of weaving charges was not possible. Similarly in the case of manufacturing expenses, it could not be fully verified. The Assessing Officer recorded that the stock position and consumption of raw material and cost thereof cannot be correctly deduced as piece to piece manufacture, consumption, cost, sales is not correlated from the books kept by the assessee and therefore, in view of the unverifiability of the same with reference to the records of the recipients and non maintenance of proper stock records, the AO has invoked the provisions of Section 145(3) of the Act, 1961 and thereafter estimated the GP rate at 15 % as against the 14.52 %.

23. It may be stated here that section 145 (3) of the Act, provides that where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee or where method of accounting or accounting standards under subsection (2) have not been regularly followed by the assessee, The Assessing officer may make assessment in the manner provided under section 144 of the Income Tax Act.

24. The order of Assessing Officer was challenged in Appeal before the CIT(A). The Commissioner (Appeals) called for the books of account at the appellate stage and examined the same and noted that the assesse has debited an amount of Rs 4,28,37,831/- towards weaving charges, Rs 99,20,335 towards repairing charges and Rs 29,38, 933/- towards finishing charges. All these payments had been made in cash. Thus the CIT(A) recorded that there was substantial increase in expenses towards the weaving and repairing, incurred in cash, as per the assessee, but the assessee failed to provide the details justifying the payment in cash towards the said charges. The CIT(A) had also taken note of the fact that there is decline in the cost of raw materials as compared to earlier years. On account of the said unexplained expenses, there is increase in total expenses which resulted in the decrease of the gross profit. He held that the expenses so made, are not verifiable and they are made through self made vouchers. He also recorded that the identity of the weavers could not be established and they could not be contacted and therefore payments made to them cannot be verified. The systematic stock register was not maintained. On being satisfied, the first appellate authority enhanced the addition by estimating the gross profit at 23.01 % and accordingly sustained the addition of Rs. 1,32,02,572/- which includes the addition made by Assessing Officer vide order dated 4.9.2006, after confirming the rejection of the books of account in absence of production of any qualitative details either in assessment proceeding or before it.

25. Being aggrieved, the assessee carried the matter to the Tribunal. The Tribunal confirmed the rejection of books of accounts and recorded the finding to the effect that the assessee has failed to get the weaving charges, manufacturing expenses verified as the addressees of many weavers were incomplete and consumption as well as stock could not be fully verified. It also noticed that there was a change in the method of recording payment of weaving charges, repairing charges and finishing charges. The

accounts were opened and the payments had been rooted to the accounts of the weavers/contractOrs. Thus, it concluded that there is an element of non-genuine expenses. It also took note that there is decline in the cost of raw materials as compared to earlier years. The stock register was not properly maintained and as such it was not possible to ascertain the quantitative details of stock, cost as per unit.

26. Tribunal also noted that the assessee has failed to explain satisfactorily before it as to what was the reason for decline in the gross profit rate and increase in the manufacturing expenses and in absence of any reliable material on record, learned Tribunal did not interfere in the findings arrived at by the authorities below and held that the authorities below were justified in rejecting the book result of the assessee under Section 145(3) of the Act.

27. The Tribunal has recorded categorical finding that the assessee has failed to prove genuineness of weaving charges and no explanation was given as to why weaving charges were kept outstanding in the books of account for years together and even the complete addresses of the weavers were not furnished. Apart from this, a finding has been recorded that in case of half of the weavers no PAN number was provided before the authorities.

28. In the instant case, the burden to establish the identity of the weavers and the genuineness of the transaction rested on the assessee, which was never discharged. Thus upon failure to disclose and establish the identity, an adverse inference has been recorded.

29. The assessee having not led any evidence in the proceedings before the authorities below could not derive any benefit that the Assessing officer and CIT(A) did not summon the weavers. Once the identity of the weavers was not established the assessee could not in any case claim to establish the genuineness of the transaction. Therefore, the objection raised by the counsel for the assessee as to summoning the persons in question is largely inconsequential.

30. Section 251 of the Income Tax Act provides for the powers of the Commissioner (Appeals). Clause (a) of subsection (1) of section 251 provides that the Commissioner (Appeal) may confirm, reduce, enhance or annul the assessment.

31. Sub section (2) of section 251 provides that the Commissioner(Appeals) shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing case against such enhancement. In the instant case , a show cause notice dated 17.07.2006 was sent and after having considered the reply of the asseseee, the CIT(A) considered the previous history of the assessee and concluded that the observation of the Assessing Officer was not based on past record and held that the past history proved that the appellant had disclosed G.P. Rate of 26.27% and 20.14% in the preceding years . The CIT (A) also concluded that the books of accounts are to be rejected being defective and on account of non-verifiability of the expenses.

32. So far as the enhancement of the gross profit rate from 14.52 % to 23.01 % by the CIT (Appeals) was concerned, Tribunal held that the CIT (Appeals) was

right in estimating the gross profit rate on the basis of the previous history of the assessee particularly when huge manufacturing expenses have been claimed by the assessee.

33. The assessee has given details of sales for the assessment year under appeal and the preceding assessment years along with computation of gross profit rate but the Assessing Officer rejected books of account on the ground of non maintenance of stock records and the CIT(A) on appeal has sustained the rejection of books of account of the assessee for want of stock records. Therefore, the findings of CIT(A) on the said point cannot be said to be faulted with when the assessee failed to explain the reason for non maintenance of the stock register and also made a bald statement that it is practically not possible for assessee to maintain stock register. The appellant-assessee failed to submit any cogent explanation.

34. Whether the books of account were being properly maintained or not, whether all the entries about the sale transactions therein were made or not, whether stock register was being maintained properly or not, are all questions of fact. The main issue with regard to weaving charges, the same remained unverified on account of non furnishing of necessary details of the weavers by the assessee. In such circumstances, the Tribunal has come to a conclusion that the assessing officer, has, rightly invoked the provisions of Section 145(3) of the Act and rejected the books of account. This action of the assessing officer has been upheld on the factual satisfaction so recorded, not only by CIT (Appeals) but also by the ITAT. The Tribunal has noted the findings of CIT (Appeal) in para 4 of its judgment.

35. The Tribunal has further recorded that the assessee did not bring on record any material or evidence to contradict the findings of the lower authorities and has failed to explain satisfactorily before the Tribunal as to what was the reason for decline in the gross profit rate and increase in manufacturing expenses. The rejection of books of account is based on due application of mind to relevant facts. It is not based on surmises and conjectures. Detailed reasoning has been recorded by the authorities for the said rejection.

36. The judgement relied upon by the assessee in the case of ***M/s Kaka Carpets vs Commissioner of Income Tax, Varanasi, Income Tax Appeal No. 8 of 2008,*** delivered on 28.04.08 is not applicable to the facts of the present case as in present case, the rejection of books of account had arisen because the assessee could not produce the details of the weavers to whom heavy payments had been made, whereas in the case of Kaka Carpets (supra) that assessee had placed on record individual affidavits of the weavers to whom it had made payments.

37. In this regard, we find that the Hon'ble Supreme Court in the case of ***M/S Kachwala Gems, Jaipur Vs Joint Commissioner of Income Tax reported in (2007) 288 ITR 10 (SC),*** has held as follows.

It is well settled that in a best judgement assessment there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessary some

amount of guess work involved in a best judgment assessment, and it is the assesee himself who is to blame as he did not submit proper accounts. In our opinion there was no arbitrariness in the present case on the part of Income-Tax authorities. Thus, there is no force in this appeal, and it is dismissed accordingly. No costs.

38. In the case of ***Shri Venkateswar sugar mills V/s CIT (2012) 341 ITR 588 (AllD).*** In paragraph no. 12, 13 and 14 it has been laid down as follows.

12. For the assessment year under consideration, the assessee has shown the G.P. Rate 16.20 per cent, as against 33.44 percent. In the previous assessment year. Thus, during the assessment year under consideration, the G.P. Rate was low. The commissioner of Income- tax (Appeals) discussed the facts and circumstances pertaining to the manufacturing cost and selling price. The Assessing Officer has taken the G.P. rate at 27 percent. When the books of account were not properly maintained and the vouchers pertaining to the consumable items were not available for verification, then we find justification for rejection of the books of accounts by the Assessing Officer Once the books of account rejected, then there is no option before the Assessing Officer except to estimate the sale and G.P. Rate which he determined by taking by taking by comparative figure of the assessee for the previous assessment year. The Tribunal has already given the partial relief in the facts and circumstances of the case, there is no scope to give any further relief specially when the estimation is a question of fact. The Tribunal is a final fact finding authority as per the ratio laid down in the case of Kamala Ganapathy SubramaniumV. CED (2002) 253 ITR 692 (SC).

13. In the instant case, the addition is made on the estimate basis, which is a question of fact as per the ratio laid down in the case of Utkal Road Lines v. Registrar, ITAT (2011) 336 ITR 149 (Orissa), wherein it was observed that the application of G.P. Rate on estimate basis is a question of fact. The hon'ble Supreme Court in the case of CIT v. Indo Nippon Chemicals Co. Ltd. (2003 261 ITR 275 (SC) observed that valuation of raw material for the purpose of tax on estimate basis is a question of fact. Similar views were expressed in the following cases:

1. New Plaza Restaurant v. ITO (2009) 309 ITR 259 (HP) :

2. Sanjay Oilcake Industries v. CIT (2009) 316 ITR 274 (Guj):

3. Shri Ram Jhanwar Lal V.ITO (2010) 321 ITR 400 (Raj).

4. Zora Singh v. CIT (2008) 296 ITR 104 (P&H):

5. Bharat Hari Singhania v. CWT (!(($) 207 ITR 1 (SC) ; (1994) Suppl. (3) SCC 46;

6. CIT v. Green world Corporation (2009) 314 ITR 81 (SC) ; (2009) 7 SCC 69 ; and

7. Brij Lala v. CIT (2010) 328 ITR $&& (SC); (2011) 1 SCC 1.

14. In view of the above, no substantial question of law is emerging from the impugned order. Hence, we find no reason to interfere with the impugned order passed by the Tribunal which is hereby sustained along with reasons mentioned therein.

39. We have also gone through the, findings arrived at by the Tribunal as well as by the CIT (Appeals) and find that under the circumstances, the AO was right in invoking the provisions of Section 145(3) in rejecting the book result and estimating the gross profit. The assessee could not lead any evidence to the satisfaction of the AO to prove its genuineness. As regards the adoption of gross profit rate @23.01% the Tribunal has

upheld the reasoning given by the CIT(A) wherein the CIT(A) has taken the average of the gross profit rate of the two preceding assessment years after considering the previous history of the assessee. On this issue, we find that the finding recorded by the Tribunal is a concluded finding of fact recorded on the basis of material and evidence on record and warrants no interference.

40. The law as to what amounts to substantial question of law is also well settled. It has been emphasized that the finding of fact recorded by the AO or the first appellate authority or the Tribunal cannot be disturbed by the High Court in exercise of powers under Section 260-A of the Act unless such finding is perverse or is such which no person of reasonable prudence could arrive at in the given facts of the case.

41. Undisputedly the powers of First Appellate Authority in matters of assessment are co-extensive with the Assessing Authority, in so far as the CIT (A) had issued a notice and thereafter made the enhancement on the basis of relevant material, no question of law may arise against such estimation as it would remain a finding of fact. In so far as the enhancement made by the CIT (A) is based on cogent material and evidence, the said finding does not suffer from any error of Law.

42. In **M. Janardhana Rao Vs Joint CIT, reported in (2005) 273 ITR 50 (SC)**, the Hon'ble Supreme Court held that in the exercise of the powers under Section 260-A of the Act, the findings of fact of the Tribunal cannot be disturbed. The Hon'ble Court held as follows.

14. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section 260A without adhering to the procedure prescribed under Section 260A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A. Such appeal cannot be decided on merely equitable grounds.

(emphasis supplied)

43. Thus, we do not find any infirmity in the order of the Tribunal. The findings recorded by it are clearly findings of fact based on material evidence. In view of the above we answer the question no. 1, 2, 3 and 4 in favour of revenue and against the assessee.

44. The appeal is dismissed. No costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

INCOME TAX APPEAL No.58 of 2013

Commissioner of Income Tax,Kanpur
... Appellant
Versus
M/s Kesarwani Sheetalaya ...Respondent

Counsel for the Appellant:
Sri Krishna Agrawal,C.S.C., Sri Manu Ghildyal , Sri Dhananjay Awasthi.

Counsel for the Respondent:
Sri Umesh Chandra Kesharwani, Sri Suyash Agrawal, Sri Ravi Kant.

A. Income Tax Act, 1961. Section 68 and 69-A. Cash in hand in the books of account was found in excess of actual cash found during the course of search - Only presumption available - assessee has spent the difference amount. No ground to make addition either under section 68 or 69A. (Para19)

B. Section 260-A. Finding of fact – Undisputedly, the assessee did not violate any provision of U.P. Regulation of Cold Storage Act, 1976- Tribunal rightly set aside the finding by the AO and the first appellate authority that the assessee was in the business of potatoes. Addition rightly knocked off.(Para22)

The appeal is dismissed. The question of law is, therefore, answered against the Revenue and in favour of the assessee.(Para26) (E-7)

(Delivered by Hon'ble Bharati Sapru J.
Hon'ble Rohit Ranjan Agarwal J.)

1. This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter called as "Act') has been filed assailing the order of the Income Tax Appellate Tribunal, Allahabad (hereinafter called as "ITAT') dated 30.11.2012.

2. T his appeal was admitted on 26.11.2013 on the following question of law:-

"(1) Whether on the ITAT erred in law as well as on facts in deleting the addition of Rs.23,31,28,321/- made on account of investment in potatoes in disregard of all the evidences on record, and the fact that this belonged to one of the partners Raj Kumar Kesarwani.

(2) Whether the ITAT has erred in law as well as in the facts and circumstances of the case in deleting the addition of Rs.37,30,710/- made on account of difference of cash balance as reflected in the balance sheet and cash as per seized documents on wrong appreciation of facts.

(3) Whether the ITAT was justified in substituting it own views which were based on interpretation of word "either" as used by both the A.O. and C.I.T.(A) in coming to conclusion that case reflected was either bogus liability or unexplained cash.

(4) Whether the ITAT has erred in law as well as in the facts and circumstances of the case in directing the A.O. to re-decide the issue by considering the books of accounts produced by the assessee, ignoring the provision of Section 142A."

3. Thereafter two additional substantial questions of law were added which are as under:-

"1. Whether the ITAT is legally justified in reversing the concurrent finding of fact of the authorities below without appreciating the material on record ?

2. Whether the ITAT is legally justified in reversing the concurrent findings of fact of the authorities below in the balance of fresh material placed before it ?"

4. Respondent-assessee is a partnership firm engaged in cold storage business having its Head Office at Sahson, Allahabad. The dispute relates to the assessment year 2008-09. It appears

that action under Section 132(1) of the Act was taken in group cases of Kesarwani Zarda Bhandar, Allahabad and its partners on 27.8.2009.

5. The Assessing Officer framed assessment under Section 153-A of the Act on 28.12.2011 for the assessment year in question. The order of the AO was challenged before the Commissioner Income Tax (Appeals). The major challenge by the assessee was for two additions and dis-allowances of expenses. As far as the challenge to addition by the assessee was for Rs.37,30,710/- being the lesser cash in hand as per the seized paper as compared with the books of account, in which the assessee has shown more cash in hand. The other major addition was of Rs.23,31,28,321/- on the ground that the assessee was engaged in the business of potatoes. The CIT(A) accepted the addition so made by the AO.

6. Being aggrieved the assessee filed an appeal before the ITAT which was allowed to the extent as far as the addition of amount of Rs.37,30,710/- and addition of Rs.23,31,28,321/- are concerned, while the Tribunal remanded back the matter to the Assessing Authority as far the addition of Rs.5,47,92/- on account of addition under the heading "building'.

7. Sri Manu Ghildyal, learned Counsel appearing for the Revenue submitted that ITAT was not correct in deleting the addition of Rs.23,31,28,321/- made on account of investment in potatoes in disregard of all evidences on record, and further the papers seized during the search at the residential premises of one of the partners of assessee firm namely Raj Kumnar Kesarwani. He further submitted that the actual cash with the assessee firm was only Rs.27,39,932/- whereas in the audited balance-sheet, the amount was shown as Rs.64,70,642/- Thus the difference of Rs.37,30,710/- was considered as unexplained income by the Assessing Officer and the same was added. Lastly, it was submitted that ITAT was not correct to reverse the concurrent finding of fact recorded by the Income Tax Authorities without appreciating the material on record.

8. Per contra, Sri Ravi Kant, learned Senior Advocate assisted by Sri U.C. Kesarwani, learned Counsel for the Assessee submitted that no papers were seized from the residential premises of the partners of the firm and the documents relied upon were seized from the residence of the Chartered Accountant, an assessee being not the author of the document nor the same having been signed by any of the partners, nor the Chartered Accountant examined at the time of search or at the assessment stage. It was further contended that the assessee had maintained the proper books of account and the AO had wrongly relied upon the provisions of Section 68 of the Act, which was not applicable in the case, and subsequently in appeal, the Commissioner of Income Tax (Appeals) held that the provisions of Section 69A were applicable, which according to him, the First Appellate Authority did not have the power to change the law to sustain the addition.

9. He further submitted that the assessee firm is not engaged in the business of potatoes and the assessee is running a cold storage and the business is of storing potatoes for which rent is realised from the farmers who store agricultural produce in the Cold storage.

10. The assessee maintains complete record as far as the storage of potatoes is done and the assessee maintains the storage (bhandaran) and delivery (nikasan) register and issues rent receipt for the period for which potatoes are stored.

11. Sri Ravi Kant, learned Senior Counsel further placed on record the U.P. Regulation of Cold Storage Act, 1976, which regulates the functioning of the Cold storage in the State of Uttar Pradesh.

12. Section 2 (c) defines the "cold storage', means an enclosed chamber insulated and mechanically cooled by refrigeration machinery to provide refrigerated condition to agriculture produce stored therein but does not include refrigerated cabinets and chilling plants. Further Section 2(d) defines the word "hirer' means a person who hires on payment of the prescribed charges spaces in a cold storage for storing agricultural produce. Section 2(f) defines "licensee' means any person to whom a licence is granted under this Act. Section 2(i) defines "receipt' means a cold storage receipt including a duplicate receipt issued by licensee under this Act. Section 5 of the Act provides restrictions on carrying on the business of cold storage.

13. Section 12 of the Act provides for reasonable care of goods, while Section 13 is in regard to the duty to exhibit the capacity of the cold storage. Section 19 is in regard to the delivery of goods, where on the demand made by hirer, every licensee shall deliver the goods stored in the cold storage provided the hirer surrenders the receipt and pays all charges due to the licensee. Section 20 provides that the licensee is entitled to retain possession of the goods until the receipt therefor is surrendered and necessary charges are duly paid. Further Section 37 of the Act provides for penalty in case where any provision of the Act, or any rule, order or direction is contravened, then on conviction punishment with imprisonment for a term which may extend to two years or fine which may extend to Rs. 10,000/- or both shall be made.

14. Section 38 provides for the offences by companies, in the explanation to the said section, "company' means any body corporate, and includes a firm or other association of individuals, and "director' in relation to a firm, means a partner in the firm. Section 39 further provides for the cognizance of the offence punishable under the Act by the Court not inferior to that of a Magistrate of the first class, who shall try any such offence.

15. Sri Ravi Kant, learned Senior Counsel laid emphasis that a cold storage cannot run without a licence being granted by licensing authority and no agricultural produce in a cold storage can be stored except in accordance with the terms and conditions of the licence. If, there is any contravention of any provision of the Act, the licensing authority can take punitive action as provided under the Act.

16. In the present case, no violation has been noticed or has been brought on record by the Assessing Officer meaning thereby that the assessee did not violate any of the terms of provisions of U.P. Regulation of Cold Storage Act, 1976. He further submitted that the addition is made merely on presumption and no material or evidence has been brought on record to

prove that assessee is engaged in the business of potatoes. As in a cold storage potatoes can only be stored and it cannot be used for any other purposes. It was also submitted that the case of the assessee is only of bailee and the transaction between the assessee and the constituents are the bailment i.e. the storage of potatoes and later on delivery.

17. We have heard learned Counsel for the parties and perused the material on record.

18. It is not in dispute that the assessee is running of a cold storage, after being granted the licence as mandated under the U.P. Regulation of Cold Storage Act, 1976. Under the said Act, it is only the storage of the agricultural commodity for which the licence is granted and no other business can be carried out by the licensee. The Act and the rules lay down the procedure for the storage of agricultural commodity and also the maintenance of the necessary records for regulating the storage of such commodity.

19. In the present case, learned Counsel for the Revenue has mainly relied upon the two deletion made by the ITAT of the addition so made by the AO as confirmed by the CIT (A). As to the addition made of Rs.37,30,710/-, which is lesser cash in hand as compared with the books of accounts in which the assess has shown more cash in hand, the Tribunal held that it is neither a case under Section 68 of the IT Act nor Section 69-A of the Income Tax Act. The Tribunal further went on to hold that it was not a case where money is not recorded in the books of account of assessee, and in the present case cash in hand in the books of account was found to be more than the actual cash found during the course of search. At the most, authorities could have presumed that assessee has spent the difference of amount in question somewhere as per cash in hand, as per books of account and lesser cash as per seized documents, but that would also not suffice to make addition under any of the above propositions.

20. As far as the other addition made of Rs.23,31,28,321/-, the assessee had challenged the same on the ground that they are not engaged in business of potatoes and the entries in the seized register, gate pass and exit record were totally ignored by the assessing authority as well as by the first appellate authority. The Tribunal being the last fact finding authority recorded a categorical finding that the assessee had submitted all the documents as well as all the entries of the bhandaran and exit register (nikasan) tallied with the stock, as such the addition made by the authorities were wrong.

21. The argument raised by the counsel for the assessee as far as no violation of the provisions of U.P. Regulation of Cold Storage Act is concerned, has force, as the Assessing Officer has failed to bring on record any notice given by any of the concerned licencing authority regarding violation of the Act or any proceedings pending against the assessee firm.

22. When this fact was confronted with the counsel for the Revenue, he failed to produced any document in regard to any violation made by the assessee, Cold Storage of the provisions of the U.P. Regulation of Cold Storage Act. Once it is established that the assessee did not violate any terms of provisions of U.P.

Regulation of Cold Storage Act, 1976, then, the finding recorded by by AO as well as the first appellate authority that the assessee was in the business of potatoes and the addition so made by the Assessing Officer was merely on the basis of presumption and assumption and without any material on record.

23. The Tribunal has also recorded a categorical finding that no evidence of purchase, sales or unaccounted stock belonging to the assessee during the course of search or survey was found or established, thus, there was no justification for the authorities to make or confirm the addition of the said amount. There is no doubt that the business of running a cold storage is governed by the U.P. Act of 1976 and it is only after the grant of licence by the licencing authority that a cold storage can run according to the terms and conditions of the licence. Any violation of the terms of licence has penal consequences as provided under Section 37 and 38 of the Act, for which the Magistrate of Ist Class is empowered to take cognizance of any offence so made by the licence holder. As, in the case in hand, during the search and survey in the business premises of the assessee, no such violation was found or recorded, nor any notice was given or action was taken against the asssessee, as is evident from the perusal of the documents before us. Further, the counsel for the Revenue also could not point out to any such violation made by the assessee of the U.P. Act of 1976.

24. Once it is established that the assessee had not violated the terms of licence, so granted by the licencing authority, merely on the basis of presumption and assumption from any documents or papers seized during search and survey cannot be the basis for the addition of such an amount.

25. Having considered the facts and circumstances of the case and going through the records of the case, we are of the considered opinion that the Revenue has failed to establish that the order of the Tribunal is manifestly illegal and suffers from error apparent on face of the record. As the Tribunal being the last fact finding court has categorically recorded finding that the authorities below had wrongly made the additions without any material on record on the basis of mere presumption and assumption.

26. The appeal is **dismissed**. The question of law is, therefore, answered against the Revenue and in favour of the assessee.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

INCOME TAX APPEAL No.223 of 2013

M/S Meerut Roller Flour Mills Pvt. Ltd.
... Appellant
Versus
Commissioner of Income Tax,Meerut &Anr. ...Respondents

Counsel for the Appellant:
Sri Suyash Agarwal. Sri Rakesh Ranjan Agarwal.

Counsel for the Respondents:
C.S.C., I.T., Income Tax, Sri Gaurav Mahajan.

A. Income Tax Act, 1961: 142(1), 143(1), 143(3), 260A, 263: Mere non-discussion and non-mentioning about the reply in the order—no assumption of order being erroneous.

CIT while exercising power u/s 263 partly accepted the objection of the assessee and for certain details relegated the case back to the assessing officer. Tribunal dismissed the appeal. Allowing the appeal, held:-Assessment order cannot be called as erroneous, if it was passed after issuing notice and raising certain queries, to the assessee, which were answered to the satisfaction of assessing authority. (Para 16)

Mere non-discussion and non-mentioning about the reply in the order of the assessing authority, or merely because the order of the assessing authority is not lengthy, does not lead to an assumption that the order has been passed without application of mind and the order is erroneous and prejudicial to the interest of the revenue. (Para 19, 20)

Precedent followed: -

1. CIT Vs. Krishan Capbox Ltd., (2015) (Para 9, 19)

2. CIT Vs. Mahendra Kumar Bansal (Para 10, 20)

3. CIT Vs. Goyal Private Family Specific Trust, (Para 10, 20)

Precedent distinguished: -

1. Malabar Industrial Company Vs. CIT, (Para 8, 12, 14)

2. CIT Vs. Anand Kumar Jain, (Para 12, 16)

3. Swarup Vegetable Products Vs. CIT, (Para 12, 17)

4. CIT Vs. Bhagwan Das, (Para 12, 18)

Appeal against order dated 02.04.2013 by ITAT, Delhi for AY 2007-08 (E-4)

(Delivered by Hon'ble Rohit Ranjan Agarwal J.)

1. This appeal under Section 260 A of the Income Tax Act, 1961 (hereinafter called as 'Act') has been filed assailing the order passed by the Income Tax Appellate Tribunal, Delhi Bench "E" New Delhi dated 02.04.2013 and Revisional order dated 09.02.2012, passed by Commissioner of Income Tax, Meerut, under Section 263 of the Act.

2. The appeal was admitted on 06.09.2013 on the following questions of law:-

"I. Whether on the facts and circumstances of the case the ITAT rightly held that the Commissioner of Income Tax, Meerut has correctly assumed jurisdiction under Section 263, in revising the assessment order dated 15.12.2009 passed under Section 143(3) of the Act for A.Y. 2007-08?

II. Whether the ITAT is right in upholding the order of CIT passed under Section 263 which has been passed without controverting the appellant's explanation/submissions dated 15.10.2009, 05.11.2009 and 04.12.2009 before the A.O. In compliance of his queries in relation to verification of loan creditors and trade creditors?"

3. The case relates to the assessment year 2007-2008. The assessee filed return of income on 31.10.2007 declaring income of Rs. 10,59,560/-. The said return was processed under Section 143(1) of the Act. Case of the assessee was selected for scrutiny and notice under Section 143(2) of the Act was issued by the Assessing Officer on 26.09.2008, further notice under Section 142(1), dated 25.03.2009, along with questionnaire raising 28 queries was issued and served on the assessee. The assessee on 15.10.2009 filed his replies to the queries raised in notice dated 25.03.2009. It appears that Assessing Officer further required the

assessee to furnish explanation, which was submitted by the assessee in form of written submission on 05.11.2009. On 15.12.2009, order under Section 143(2) of the Act was passed by the Assessing Officer, accepting the return of income of Rs.10,59,560/-.

4. Commissioner Income Tax, Meerut exercising power under Section 263 of the Act on 27.10.2010 issued notice to the assessee, a detailed objection in form of written submission was submitted by the assessee before him on 18.10.2011, stating that all the the details and documentary evidence in regard to the investment in share capital, unsecured loans, creditors and expenses was submitted before the Assessing Officer by the assessee in reply to the 28 queries raised by the Assessing Officer.

5. On 09.02.2012, the Commissioner Income Tax, Meerut passed an order, partly accepting the objection of the assessee as far as the investment in share capital was concerned but, as regards unsecured loans and creditors were concerned, the case of the assessee was relegated back to the Assessing Officer directing him to examine, call for requisite details, confirmations and examine them properly after affording assessee proper and reasonable opportunity to explain its case and verify the details with the help of documentary evidence.

6. The order passed by the Commissioner Income Tax, Meerut under Section 263 of the Act was challenged by the assessee before the Income Tax Appellate Tribunal (hereinafter called 'ITAT'). The ITAT dismissed the appeal of the assessee upholding the order passed by the Commissioner of Income Tax, Meerut.

7. Sri Suyash Agarwal, learned counsel appearing for the assessee/ appellant submitted that the Tribunal failed to consider that the Commissioner Income Tax was not justified in invoking the provisions of Section 263 of the Income Tax Act, as the order passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of the revenue. It was further contended that after the case of the appellant was selected for scrutiny, the Assessing Officer had issued notice under Section 143(2) of the Act, raising 28 queries which were in regard to the investment in share capital, unsecured loans, creditors and expenses, which was replied by the assessee, furnishing the entire details along with the documentary evidence. It was also submitted that details of all unsecured loans was furnished to the Assessing Officer along with their PAN numbers and other details as required.

8. He further submitted that the Commissioner Income Tax while exercising power under Section 263 as well as the ITAT dismissing the appeal had wrongly applied the law laid down by the Apex Court in case of ***Malabar Industrial Company vs. CIT (2000) 109 Taxman 66 (SC).***

9. The second limb of argument of the counsel for the assessee is that mere non-discussion and non-mentioning about the reply to the queries submitted by the assessee cannot lead to an assumption by the CIT as well as ITAT that Assessing Officer has not applied his mind, he relied upon the decision in case of ***CIT vs. Krishan Capbox Ltd. (2015) 372 ITR 310 (Allahabad).***

10. It was further contended that the queries raised during assessment

proceedings and the same not having been dealt in the assessment order would not lead to the conclusion that no enquiry was made and the Assessing Officer has not applied his mind. Reliance has been placed on the decision of ***CIT vs. Mahendra Kumar Bansal (2008) 297 ITR 99 (Allahabad).*** Another decision which has been relied on by the counsel for the assessee is in the case of ***CIT vs. Goyal Private Family Specific Trust (1988) 171 ITR 698 (Allahabad).***

11. Per contra, Sri Gaurav Mahajan, learned counsel appearing for the Department submitted that the assessment order dated 15.12.2009 is totally silent in respect of unsecured loans and creditors and the Assessing Officer was bound to examine the identity of creditors, creditworthiness of creditors and genuineness of the transactions before any loan or cash credit is accepted.

12. He further contended that the Commissioner of Income Tax had rightly exercised his power mandated, under Section 263 and, it was only after giving due opportunity of hearing to the assessee that the assessment order was set aside to certain extent with direction to the Assessing Officer to verify the details. Sri Mahajan lastly submitted that the Tribunal, being the last fact finding Authority, and it was after appreciating the evidence and material on record, came to the conclusion that the matter required no interference in the order passed under Section 263 of the Act. He has relied upon the decision in cases of ***CIT vs. Anand Kumar Jain (2015) 231 Taxman 534 (Allahabad), Malabar Industrial Company vs. CIT (2000) 109 Taxman 66 (SC), Swarup Vegetable Products vs. CIT (1991) 54 Taxman 175 (Allahabad) and CIT vs. Bhagwan Das (2005) 142 Taxman 1 (Allahabad).***

13. We have heard counsel for the parties and perused the material on record.

14. As it is undisputed, that Assessing Officer after the case was selected for scrutiny had issued notice under Section 143(2) of the Act and also notice under Section 142(1) with 28 queries to the assessee, which was replied by him along with the documentary evidence, and the Assessing Officer being satisfied passed the order under Section 143(3) of the Act on 15.12.2009. The CIT while exercising power under Section 263 of the Act, partially accepted the reply submitted by the assessee as regards the investment in share capital holding that the outstanding unsecured loans of six persons to be adjusted against the share application money account, but as regards the unsecured loans and creditors, it directed the Assessing Officer to examine, call for requisite details, confirmations and examine them properly and relegated the matter back to him. While passing the said order the CIT relied upon the decision of the Apex Court in case of ***Malabar Industrial Company Ltd***. (supra). Paragraph Nos. 6, 7, 8, 9 and 10 of the said judgment are extracted hereinasunder:-

"6. A bare reading of this provision makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied with twin conditions, namely, (i). the order of the Assessing Officer sought

to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue- recourse cannot be had to Section 263(1).

7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The High Court of Calcutta in ***Dawjee Dadabhoy & Co. v. S.P. Jain [1957] 31 ITR 872,***the High Court of Karnataka in ***CIT v. T. Narayana Pai [1975] 98 ITR 422,*** the High Court of Bombay in ***CIT v. Gabriel India Ltd. [1993] 203 ITR 208***and the High Court of Gujarat in***CIT v. Smt. Minalben S. Parikh [1995] 215 ITR 81/ 79 Taxman 184 t***reated loss of tax as prejudicial to the interests of the revenue.

8. Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in***Venkatakrishna Rice Co. v. CIT [1987] 163 ITR 129*** interpreting 'prejudicial to the interests of the revenue'. The High Court held, "In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the ITO, which might set a bad trend or pattern for similar assessments, which on abroad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration". In our view, this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.

9. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue- ***Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT, [1973] 88 ITR 323 (SC).***

10. In the instant case, the Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO

failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant- company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts, the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under Section 263(1) was justified."

15. In the present case, the CIT himself while relying upon the reply submitted by the assessee had partially accepted the claim as far as investment in share capital was concerned but it did not accept the documentary evidence and reply submitted by the assessee before the Assessing Officer as far as unsecured loans and creditors are concerned. The reliance placed by the counsel for the Department on the aforesaid judgment is of no help to him as he has failed to point out how the order of the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the revenue. While the counsel for the assessee relying upon Para No. 10 of the said judgment submitted that the order passed by the assessing authority was not without application of mind, as the same was passed after the replying upon the documentary evidence submitted by the assessee.

16. Similarly, this Court in case of ***Anand Kumar Jain*** (supra) while interpreting the language of Section 263 had held that where the Assessing Officer passes an order without application of mind or an incorrect statement of fact or incorrect application of law, then the order so passed would be erroneous. But in the present case, Assessing Officer after issuing notice and raising certain queries to the assessee passed the assessment order which cannot be called as erroneous.

17. Reliance has also been placed on the judgment of ***Swarup Vegetable Products*** (supra), wherein this Court while dealing with a case, where assessee received refund of excise duty and placed the said amount in suspense account and not in profit and loss account and claimed that this amount should not be included in his income, and stated before the Assessing Officer that large part of this amount was claimed by one Sugar Mill who had filed a suit and also a writ petition claiming the said amount and as such, this amount should not be included in his taxable income. This claim was accepted by the ITO. However, when the matter came to the notice of Commissioner, he exercising power under Section 263 held that the ITO had not made proper inquiries before accepting the claim of assessee, and the assessment order was set aside and fresh assessment was directed. This Court refused to interfere in the findings of the Commissioner as the order of the ITO was prejudicial to the revenue.

18. Similarly, the case relied upon by the Department in case of ***Bhagwan Das*** (supra) also is not applicable in the present case, as in the case in hand the Assessing Officer after duly putting the assessee under notice and requiring him to produce all the relevant documents had passed the assessment order.

19. The argument of the counsel for the assessee that mere non-discussion and non-mentioning about the reply in the order of the assessing authority would not lead to an assumption that there was no application of mind and the order is erroneous. In ***Krishna Capbox (P.) Ltd.*** (supra), this Court held as under:-

9. The Tribunal further considered the question whether discussion of queries and reply received from assessee, in assessment order, is necessary or not. Relying on two judgments of Delhi High Court in ***CIT Vs. Vikash Polymers [2012] 341 ITR 537/ [2010] 194 Taxman 57 and CIT v. Vodafone Essar South Ltd. [2012] 28 taxmann.com 273/ [2013] 212 Taxman 184 (Delhi),*** it held that once inquiry was made, a mere non discussion or non- mention thereof in assessment order cannot lead to assumption that Assessing Officer did not apply his mind or that he has not made inquiry on the subject and this would not justify interference by Commissioner by issuing notice under Section 263 of the Act.

10. In ***Vikash Polymers (***supra) relevant part of the observations in this regard read as under (page 548 of 341 ITR):

"This is for the reason that if a query was raised during the course of scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer called for interference and revision."

11. Further, the relevant observation made in ***Vodafone Essar South Ltd.*** (supra) in this regard reads as under (page 531 of 1 ITR-OL):

"The lack of any discussion on this cannot lead to the assumption that the Assessing Officer did not apply his mind."

12. Learned counsel for the Department could not place any other authority before this Court wherein any otherwise view has been taken. On the contrary, learned counsel for assessee has placed before us a decision of Bombay High Court in ***Income Tax Appeal No.296 of 2013 (CIT v. Fine Jewellery (India) Ltd.) [2015] 372 ITR 303/230 Taxman 641/55 taxmann.xom 514 (Bom.)*** decided on February 3, 2015, wherein also Bombay High Court, following its earlier decision in ***Idea Cellular Ltd. Vs. Dy. CIT [2008] 301 ITR 407 (Bom.)*** has taken a similar view and said as under (page 307 of 372 ITR):

".....if a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the Assessment Order would not lead to a conclusion that no mind had been applied to it."

20. In case of ***Mahendra Kumar Bansal*** (supra), this Court held that merely because the order of the ITO is not lengthy, it would not establish that the assessment order passed under Section 143(3) of the Act is erroneous and prejudicial to the intrest of the revenue. Relevant Para Nos. 11,12 and 14 are extracted hereinasunder:-

"11. In the case of ***Goyal Private Family Specific Trust [1988] 171 ITR 698,*** this court has held that the order of the Income-tax Officer may be brief and cryptic, but that by itself is not sufficient reason to brand the assessment order as erroneous and prejudicial to the interests of the Revenue and it was for the Commissioner to point out as to what error was committed by the Income-tax

Officer in having reached to its conclusion and in the absence of which proceedings under Section 263 of the Act is not warranted.

12. In the case of ***Belal Nisa [1988] 171 ITR 643*** the Patna High Court has held that where the Income-tax Officer had not carried out the necessary enquiry enjoined by section 143(1) of the Act the Commissioner is within his power in taking action in terms of Section 263(1) of the Act. Similar view has been taken in by the Patna High Court in the case of ***Smt. Kaushalya Devi [1988] 171 ITR 686.***

14. As held by this Court in the case of ***Goyal Private Family Specific Trust [1988] 171 ITR 698***, we are of the considered opinion that merely because the Income- tax Officer had not written lengthy order it would not establish that the assessment order passed under Section 143(3)/148 of the Act is erroneous and prejudicial to the interests of the Revenue without bringing on record specific instances, which in the present case, the Commissioner of Income Tax has failed to do."

21. It is clear that after the notice was issued by the Assessing Officer raising 28 queries from the assessee, which was also replied by him along with the documentary evidence in regard to each of the query, thus the assessment order passed under Section 143(3) of the Act would not render the same as erroneous and prejudicial to the interest of Revenue, unless the Commissioner exercising power under Section 263 brings on record to show that the order of the Assessing Officer is erroneous, as the same was passed without application of mind or the Assessing Officer had made an incorrect assessment of fact or incorrect application of law, but the same not being the case, and the CIT relying upon the reply and the documentary evidence submitted by the assessee granted partial relief, as such the order dated 09.02.2012 passed under Section 263 relegating back the matter to the Assessing Officer as regards unsecured loans and creditors is unsustainable.

22. Having examined the matter at length on facts as well as on the law, we are of the considered opinion that in the present case, it is abundantly clear that the order passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of the Revenue.

23. In view of the above, the order dated 02.04.2013 passed by the Income Tax Appellate Tribunal, Delhi Bench "E" New Delhi and revisional order dated 09.02.2012 passed by Commissioner Income Tax, Meerut under Section 263 are set aside.

24 . The question of law is therefore answered in favour of the assessee and against the Revenue. The appeal stands ***allowed.***

25. However no order as to costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE PIYUSH AGRAWAL, J.

INCOME TAX APPEAL No.281 of 2017

Jugender Singh Yadav, Agra ... Appellant
Versus
Principal Commissioner of Income Tax ,Agra &Anr. ...Respondents

Counsel for the Appellant:
Sri Suyash Agarwal.

Counsel for the Respondents:
C.S.C., I.T., Sri Krishna Agarwal.

A. Income Tax Act, 1961: Sections 40(a)(ia), 40A(3), 44AD, 44AB, 143, 144, 260A, 271(1)(c). Books of account –not maintained. Rejection of books of accounts and enhancement in net profit justified.

Substantial amount has been spent by making payment in cash against vouchers that too, with vouchers having been self-made and not verifiable. Assessee had not maintained the stock register and quantitative tally. The rejection of the books of account and enhancement in net profit was justified. No substantial question of law arises.
(Para 12, 13, 14)

Appeal against order dated 28.04.2017 passed by ITAT for AY 2011-12 (E-4)

(Delivered by Hon'ble Piyush Agrawal J.)

1. We have heard Shri Suyash Agarwal, learned counsel for the assessee - appellant and Shri Krishna Agarwal, learned standing counsel for the respondents - Department and perused the materials brought on record.

2. The present appeal has been filed against the judgement & order dated 28.04.2017 passed by the Income Tax Appellate Tribunal, Agra Bench, Agra for the Assessment Year 2011-12.

3. The said appeal was admitted on 21.09.2017 by this Court on the following questions of law formulated in the memo of appeal:-

"(i) Whether the Appellate Tribunal was legally justified in applying net profit rate at 8% u/s 44AD when the gross turnover of the Appellant exceeded 1 crore and books of accounts were maintained as per section 44AB of the IT Act?

(ii) Whether the Appellate Tribunal was justified in framing assessment by applying net profit rate at 8% on the basis of statement of assessee contrary to standard procedure of assessments provided under section 143 and 144 of IT Act?

(iii) Whether the Appellate Tribunal is legally justified in treating interest income from FDR and rental income from JCB as income other than business income for the assessment year in question?"

4. The facts of the case, in brief, are that the appellant is a civil contractor engaged in execution of works contract with Agra Development Authority, Agra. The present appeal relates to the Assessment Year 2011-12. The assessee filed its returns showing net profit of Rs. 42,62,972/-, which gives net profit @ 5.09% on gross receipt of Rs. 8,37,12,896/-. The appellant has earned interest on FDR and JCB machines amounting to Rs. 3,46,883/-, the total income being Rs. 46,09,455/-.

5. The appellant filed its return on 10.09.2012 showing total income of Rs. 44,95,900/-. The return was processed under section 143 (1) of the Income Tax Act and the case was selected for scrutiny. Consequently, on 13.09.2012, notice under section 143(2) of the Income Tax Act was issued, which was properly served upon him on 14.09.2012. A notice dated 14.06.2013 under section 142(1) of the Income Tax Act, along with questionnaire, was issued. In response to the said notice, the reply was submitted along with required documents were also attached. Thereafter, on 17.01.2014, another notice was

issued directing the appellant to produce complete books of account. On verifying the books of account, bill, vouchers, etc., it was found that most of the expenses were paid in cash and vouchers were self-made, which was not verifiable.

6. The assessee admitted, during the course of assessment proceedings, that the maintenance of stock register and quantitative tally is not possible. The Assessing Authority, while framing the assessment order dated 22.01.2014, has enhanced the net profit @ 8% and has observed as under:_

"During the period assessee's contractual gross receipt is Rs. 8,37,12,897/-. Net profit taken @ 8% on gross receipt comes to Rs. 66,97,032/-, assessee has also shown interest from FDRs Rs. 1,93,893/- & from rent of JCB Rs. 1,52,590/-, total net profit comes to Rs. 70,43,515/- in which assessee has already shown net profit in his P&L Account of Rs. 46,09,455/-. Therefore, difference of Rs. 24,34,060/- (Rs. 70,43,515 - 46,09,455/-) disallowed out of expenses and added back in his total income. This disallowance also includes Rs. 4,88,222/- u/s 40(a)(ia) on non deduction of tax payment of M/s Agra Development Authority as interest and any other possible disallowance u/s 40(a)(ia) or 40A(3). Assessee is agree for the same vide order sheet entry dated 22.01.2014. Penalty notice u/s 271(1)(c) of the IT Act is being issued separately for concealment & furnishing of inaccurate particulars in income."

7. Feeling aggrieved by the aforesaid assessment order, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals), Agra, who vide order dated 31.07.2015, dismissed the appeal and confirmed the assessment order. The Commissioner of Income Tax (Appeals), in its order, has observed as under:-

" ... Here it is a matter of legal principles that once an assessing officer detects any defects in the books of accounts, any conditional offer by the assessee for offering any income as not supported by the bills and vouchers as also a request that he is accepting such income to avoid litigation and to purchase peace of mind has no legal validity. .....

Since in this case, assessing officer while verifying the books of accounts of the assessee has detected that the assessee is not maintaining stock register of the raw materials, making various payments of labour wages and some small material purchase in cash and instead of maintaining proper bills and vouchers towards various expense is only maintaining some self-made vouchers which were not verifiable, therefore, the rejection of books of accounts by the assessing officer is justified."

8. Still feeling aggrieved by the order of the Commissioner of Income Tax (Appeals), Agra, the assessee - appellant preferred an appeal before the Tribunal, who by the impugned order, has dismissed the appeal of the appellant observing as follows:-

"14. We find the order of the ld. CIT (A) is reasonable and justified in respect of estimation of income at the NP rate admitted by the assessee himself, in the course of assessment proceedings. We also find that the ld. CIT (A) has not applied the provisions of section of section 44AD of the Act, rather he had justified the assessee's

admission of 8% NP rate before the A.O. With the support of judicial pronouncements, wherein net profit rate ranges from 8% to 13% in the cases of civil contractOrs. Thus, the ld. CIT (A) considered the facts and circumstances of the case that the assessee has admitted NP of 8% in compliance to show cause issued by the A.O. during the course of assessment proceedings and that subsequently, retraction in appeal is irrelevant on account of conditional admission, because the penalty proceedings under section 271(1)(c) of the Act, does not change the basic fact that assessee was not maintaining stock register and expenditure vouchers of the assessee were not verifiable. However, the assessee's admission of an estimated income at the NP rate of 8% which has been treated as if detected by the A.O. in compliance to show cause notice, during the course of assessment proceedings has not been supported with corroborative documentary evidences to prove to the contrary, that it was not the offer of the assessee to show his bonafides that he is offering such income to avoid litigation, or to buy peace of mind. Thus, the fact as regards to the conditional admission of NP rate of 8% by the assessee either of his own or in compliance to the show cause notice during the course of assessment proceedings, has not been established.

15. In view of the above, it is proved that the assessee has made an admission of 8% net profit rate before the A.O. vide order sheet entry dated 22.01.2014. The ld. CIT (A) action in confirming the net profit rate at 8% as admitted by the assessee before the A.O. vide order sheet entry dated 22.01.2014 as above, is justified, with the support of judicial precedent relevant and the law applicable in the case of assessee. We also notice that the allegation raised by the assessee, in respect of the lower authorities, are baseless and without documentary evidence as regards the estimation of his income, in any arbitrary or capricious manner."

9. Feeling aggrieved by the aforesaid order of the Tribunal, the assessee has preferred the present appeal.

10. It has been argued by the counsel for the appellant that at the time of assessment proceedings, the assessee has given consent for acceptance of 8% of gross net profit only with a condition that no penal action shall be taken against him and therefore, when the penalty proceedings were initiated, he retracted with his consent. He further submits that the appellant has produced all books of account before the authorities below, but the same have wrongly been rejected. It is further submitted that since the nature of the business of the assessee is of the works contractor and in many cases, the payment has to be made in cash, for which relevant bills cannot be produced, therefore, it is not a case for rejection of books of account on that count. It is further submitted that the net profit has to be commensurate with the previous years, in which the net profit of 6.7% has been accepted and therefore, in the disputed year, the net profit of 8% is not justified.

11. Learned counsel for the Department has supported the orders passed by the lower authorities and has argued that all the authorities below have decided the issue against the appellant and it is concluded by findings of fact and no substantial question of law arises in the present appeal.

12. From the perusal of the record, it reveals that the books of account of the assessee has been rejected and the authorities have rightly made the assessment enhancing the net profit @ 8%. Once, on finding of fact,

it has been found that substantial amount has been spent by making payment in cash and that too, with vouchers having been self-made and not verifiable, admittedly, the appellant has not maintained the stock register and quantitative tally is not being made. Further, the assessee has also not shown the interest derived from FDR to the tune of Rs. 1,93,893/- as well as the lease rent of Rs. 1,52,590/- so received from leasing out of JCB machines.

13. Once it has been found that the assessee has not voluntarily maintained its books of account, as required under the Act, the books of account have rightly been rejected and the net profit, which has been fixed at 8%, is quite reasonable. Moreover, all the authorities below have rejected the contention of the appellant. At this stage, no substantial question of law arises in the present appeal.

14. The appeal is, accordingly, dismissed. The substantial questions of law are answered accordingly against the Assessee and in favour of the Revenue.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

INCOME TAX APPEAL No.276 of 2015
connected with
INCOME TAX APPEAL No. 277 of 2015
INCOME TAX APPEAL DEFECTIVE No. 197 of 2015
INCOME TAX APPEAL DEFECTIVE No. 198 of 2015
INCOME TAX APPEAL DEFECTIVE No. 199 of 2015
AND
INCOME TAX APPEAL DEFECTIVE No. 200 of 2015

Principal Commissioner of Income Tax (Central) ,Kanpur ...Appellant
Versus
Sri Dinesh Chandra Jain ...Respondent

Counsel for the Appellant:
S.S.C.I.T., Sri Praveen Kumar.

Counsel for the Respondent:
Sri Abhinav Mehrotra.

A. Income Tax Act, 1961: Sections 68, 132, 153A, 260A, 271(1)(c)-Burden of proof varies in penalty proceedings from that in assessment proceedings—assessment finding cannot be automatically adopted.

Tribunal upheld the order of the assessing authority, making an addition to the income by treating exempted gifts received by his minor son as assessee's income. No further challenge w.r.t. quantum. First Appellate Authority partly allowed penalty proceedings initiated. Tribunal while deciding appeals of both the parties, dismissed Revenue's appeal and allowed assessee's. Revenue's appeal dismissed.

B. "Concealment of income" and "furnishing of inaccurate particulars" are different events. Both refer to deliberate act on the part of assessee. A mere omission or negligence would not constitute a deliberate act of *supressio veri* or *suggestio falsi.* (Para 21)

C. Burden of proof. In penalty proceedings the burden of proof varies from assessment proceedings. Any finding in assessment proceedings, though constitutes good evidence for penalty proceedings, cannot automatically be adopted in a penalty proceedings. The authorities are required to consider the matter afresh from a different angle, and have to independently arrive at a finding

regarding "concealment of income" or of "inaccurate particular". (Para 22, 24)

Precedent followed: -

1. CIT Madras Vs. Khoday Eswarsa and Sons, [1972 83 ITR 369 (SC) (Para 20, 24)

2. Dilip N. Shroff Vs. C.I.T. (2007) 6 SCC 329 (Para 21, 24)

3. Anantharam Veersinghaiah & Co. [123 ITR 457] (Para 11, 22)

4. C.I.T. Vs. Sonali Jain, IT Appeal No. 88 of 2008 (Para 16)

5. Additional CIT Vs. Jeevan Lal Sah [1994] 205 ITR 244 (Para 14)

6. Reliance Petroproducts [322 ITR 158] (Para 13)

7. T. Ashok Pai [292 ITR 11] (Para 12)

Precedent distinguished: -

1. Ram Baboo Agrawal Vs. Commissioner of Income Tax and another, (2018) 404 ITR 198 (All.) (Para 8, 23)

Appeal against order dated 26.09.2014 by ITAT, Delhi for the AY 2000-01 (E-4)

(Delivered by Hon'ble Rohit Ranjan Agarwal J.)

1. All these six appeals under Section 260-A of the Income Tax Act, 1961 (hereinafter called as 'Act') arise out of the common order passed by the Income Tax Appellate Tribunal, Delhi, Bench "B", New Delhi (hereinafter called as 'Tribunal') dated 26.09.2014. The leading appeal is Income Tax Appeal No. 276 of 2015 for the assessment year 2000-01. These appeals were heard and decided on 22.02.2019 on the preliminary objection raised by the assessee regarding the territorial jurisdiction of this Court. Today with the consent of both the parties, the appeal is heard on merit.

2. This appeal was admitted on 16.11.2016 on the following question of law:-

"(A) Whether on the facts and circumstances of the case, the Hon'ble ITAT, New Delhi is legally justified in deleting the penalty of Rs.75,76,441/- imposed by the AO ignoring the quantum appeal which had been confirmed by the Ld. CIT(A) as well as the ITAT, New Delhi on which the penalty was imposed.

(B) Whether on the facts and circumstances of the case, the ITAT has not erred in law in deleting the penalty of Rs.75,76,441/- imposed by the AO contradicting their findings in deciding the quantum appeal that the whole transaction was designed to show huge amounts as gifts without any liability of paying taxes."

3. Income Tax Appeal No. 276 of 2015 for the assessment year 2000-01 is being treated as leading case. The brief facts of the case are that under Section 132 of the Act, search and seizure was conducted on the business premises of the persons related to Begum Gutkha Group on 09.12.2003. During course of search and seizure, various books of accounts and other documents were found and seized. In response to notice under Section 153-A of the Act, the assessee filed a letter on 23.02.2007 stating that his original return filed may be treated as return required under Section 153-A of the Act.

4. The assessee had filed return declaring income of Rs.1,63,65,386/- on 31.10.2000 for assessment year 2000-01. The assessment in this case was completed under Section 153-A/143(3) on

08.11.2007 at an income of Rs.3,27,87,990/- as against return income of Rs.1,63,65,386/-. The AO in his assessment order had made an addition of Rs.1,64,22,604/- by treating the exempted gifts received by the assessee's minor son of Rs.1,52,20,000/- as his income from other sources. Against the said assessment order, an appeal was filed before the Commissioner of Income Tax (hereinafter called as 'CIT'). The assessment order was confirmed in appeal and further on appeal before the Tribunal, the order of the assessing authority was upheld. No further appeal was filed by the assessee challenging the order of the Tribunal as far as the quantum is concerned.

5. While, penalty proceedings under Section 271(1)(c) of the Act were initiated against assessee on the ground of concealment of particulars of income and a sum of Rs.75,76,441/- was imposed as penalty for assessment year 2000-01, on the ground that assessee had furnished inaccurate particulars and had concealed particulars of its income amounting to Rs.1,52,20,000/-. Aggrieved by the penalty order under Section 271(1)(c), assessee filed an appeal before CIT (A) III, New Delhi, who partly allowed the appeal of the assessee reducing penalty at 100% instead of 150%.

6. Against the said order, assessee as well as Revenue filed appeal before the Tribunal at New Delhi. The Tribunal dismissed the appeal of Revenue and allowed the assessee's appeal for assessment year 2000-01 to 2005-06.

7. Sri Praveen Kumar, learned counsel appearing for the Department submitted that Tribunal was not correct to set aside the penalty imposed against the assessee under Section 271(1)(c) of the Act, as assessing authority had categorically given finding that gifts are not genuine and allowable, and after holding the gifts as unexplained, an amount of Rs.1,52,00,000/- were taxed as income from other source. He further submitted that the facts of the case suggest that furnishing of incorrect particular/ claim and consequently the concealment on assessee's part for which the proceedings were initiated. It has also been contended that assessment order clearly demonstrated the gifts to be a sham transaction and the said finding has been upheld by the CIT holding these transactions being designed to avoid payment of tax. It was also contended that the order of the assessing authority, First Appellate Tribunal was confirmed by the Tribunal, imposition of tax under Section 68 of the act and the findings given therein had become final and further no appeal was filed by the assessee.

8. The second limb of argument of the counsel for the Revenue is that order impugned passed by the Tribunal setting aside the penalty, in fact is an order passed by Tribunal as if it was sitting in appeal against the order of the Tribunal in the quantum proceedings. It has also been submitted that the findings of original assessment proceedings are good item of evidence in penalty proceeding, and when that is the case that the finding of creation of a malicious design, on the part of the assessee, would clearly be a relevant evidence and has to be taken into account while passing the penalty order. He further laid stress that Tribunal has made fresh inquiry and set aside the finding given by the Tribunal itself in quantum proceedings and rejected the imposition of penalty on the assessee. He has relied

upon the judgment of this Court in case of ***Ram Baboo Agrawal v. Commissioner of Income-Tax and another (2018) 404 ITR 198***

9. Per contra, the counsel for the respondent- assessee submitted that the order of the Tribunal cannot be discarded, as while deciding the appeal it had recorded categorical finding in regard to the factum of gift which was duly disclosed by the assessee in his return of income. Further, assessee had substantiated its claim by legal evidence which has been discussed by the Tribunal in Para Nos. 18, 19, 20, 21 and 22 of its order, analysing and examining in detail the documents submitted by the assessee in respect of the gift before the Assessing Officer in penalty proceedings as well as the statements of both the donors Naresh Jain and Anil Jain being recorded in the said proceedings.

10. It is further submitted that gifts were disbelieved by citing human probability and perception. It has been stated that it would have been different where any tangible, cogent and relevant material was discovered by the Revenue to disapprove the gift, but it is not correct to merely disbelieve it on the basis of subjective perception. It was further contended that except for the addition on the account of alleged fictitious gift, all other additions made by the Revenue to the income of assessee were deleted by the appellate authorities.

11. Replying to the argument of the Revenue on the question of quantum proceedings, it was submitted that they are not sacrosanct and impregnable for proving a charge of concealment of income for furnishing of inaccurate particulars of income, for causing a determination on the question of liveability of penalty under Section 271(1)(c) of the Act. The counsel for the assessee to prove his case on this point has relied upon the judgment of the Apex Court in case of A***nantharam Veersinghaiah and Company [123 ITR 457],*** which is extracted here as under:-

"Since the burden of proof in a penalty proceeding varies from that involved in an assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted as a finding to that effect in the penalty proceeding. In the penalty proceeding the taxing authority is bound to consider the matter afresh on the material before it and, in the light of the burden to prove resting on the revenue, to ascertain whether a particular amount is a revenue receipt. No doubt, the fact that the assessment order contained a finding that the disputed amount represents income constitutes good evidence in the penalty proceeding but the finding in the assessment proceeding cannot be regarded as conclusive for the purposes of the penalty proceeding. That is how the law has been understood by this court in ***Anwar Ali's Case [1970] 76 ITR 696 (SC),****and we believe that to be the law still. It was also laid down that before a penalty can be imposed the entirety of the circumstances must be taken into account and must point to the conclusion that the disputed amount represents income and that the assessee has consciously concealed particulars of his income or deliberately furnished inaccurate particulars. The mere falsity of the explanation given by the assessee, it was observed, was insufficient without there being in addition cogent material or*

evidence from which the necessary conclusion attracting a penalty could be drawn.These principles were reiterated by this court in ***CIT v. Khoday Eswarsa and Sons [1972] 83 ITR 369.***"

12. He further relied upon in case of ***T. Ashok Pai [292 ITR 11]*** and the Apex Court held as under:-

"Since burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitute good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle."

13. Reliance has been placed on a recent judgment of the Apex Court in case of ***Reliance Petroproducts [322 ITR 158]***, in which the Apex Court in regard to the penalty proceedings held as under:-

"We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."

14. The second argument of the counsel for the assessee is that the finding arrived by the Tribunal is finding of fact to the effect that there is no material in possession of Revenue to prove the charge of concealment of income or furnishing of inaccurate particulars by assessee and the present appeals on the behest of the Revenue are not maintainable. He has relied upon the decision of the Apex Court in case of ***Additional CIT v. Jeevan Lal Sah [1994] 205 ITR 244.***

"Similarly, the question whether the assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income continues to remain a question of fact."

15. Lastly, it has been contended that by invoking provisions of Section 68 of the Act or by rejecting the explanation of assessee, a presumption was drawn against him but that presumption was rebuttable and not at all conclusive, particularly when considering the said explanation in the light of penalty proceedings. It was further submitted that the explanations had not remained unsubstantiated and further it can also not be held that explanation was not bona fide as prescribed in explanation to Section 271(1)(c) of the Act.

16. A decision of this Court in case of ***CIT vs. Sonali Jain, IT Appeal No. 88 of 2008*** has been relied upon, wherein this Court held in Para Nos. 16 and 17 as under:-

"16. In view of above, neither the assessee-respondent failed to furnish any explanation regarding the material facts for computation of her income nor the explanation so furnished by her was false. At least there is no finding to this effect. At the same time, the assessee-respondent having surrendered the above gifts as part of her income just in order to buy peace of mind, may be on realising that she may also be ultimately affected by the racket of gift deeds busted by the department without any such thing being deducted in respect of her return or gifts, cannot be said to have failed to prove or substantiate her explanation regarding the to be bona fides of the two transactions.

17. Accordingly, the assessee is not a person who has failed to offer an explanation or the explanation offered by her was found to be false or that she was unable to substantiate the explanation or that the transactions were not bona fide so as to attract the deeming provision contained in Explanation 1(B) to Section 271(1)(c) of the Act. Therefore, the amount added to her income would not be deemed to be income in respect of which particulars had been concealed."

17. We have heard Sri Praveen Kumar, learned counsel for the Revenue and Sri Abhinav Mehrotra, learned counsel for the assessee.

18. Before proceeding, it would be necessary to have a glance of provisions of Section 271(1)(c) of the Act:-

*"**271.** (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-*

(a) .....

(b) .....

(c) has concealed the particulars of his income or furnished inaccurate particulars of [such income, or]

(d) .....

he may direct that such person shall pay by way of penalty,-

(i) .....

(ii) .....

(iii) .....

***Explanation 1.**-Where in respect of any facts material to the computation of the total income of any person under this Act,-*

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

19. It is not in dispute that the assessee had disclosed the fact of gift in his return for the relevant assessment year, but it was after the assessment proceedings that the Assessing Officer who did not accept the creditworthiness of the donor as well as the genuineness of transaction made an addition of Rs.1,52,00,000/- as income from other source. The said addition was sustained by

the CIT (A) and the Tribunal. As from the reading of Section 271(1)(c), it is clear that that the said provisions contemplate for levy of penalty where two conditions are satisfied, that the assessee has concealed particulars of his income or has furnished inaccurate particulars of such income thus, concealment of income and furnishing of inaccurate particulars of income are two basic ingredients for the initiation of proceedings for penalty under the relevant section. The explanation further provides, where any such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner to be false or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof was for the purpose of Clause (c) of this Sub-section, be deemed to represent the income in respect of which particulars have been concealed.

20. The Apex Court while considering the case ***CIT Madras v. Khoday Eswarsa and Sons [1972] 83 ITR 369 (SC)*** held as under:-

"No doubt the original assessment proceedings, for computing the tax may be a good item of evidence in the penalty proceedings but the penalty cannot be levied solely on the basis of the reasons given in the original order of assessment.

In the case before us we have already pointed out that in the order levying penalty the income-tax Officer has categorically stated that the reasons for adding the disputed amounts in the total income of the assessee have been already discussed in the original order of assessment and that they need not be repeated again. The Appellate Assistant Commissioner, we have already pointed out, has made only a guess-work. That clearly shows that except the reasons given in the original assessment order for including the disputed items in the total income, the department had no other material or evidencefrom which it could be reasonably inferred that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars.

For all the reasons given above, it follows that there is no merit in the appeal and it is accordingly dismissed. As the respondent has not appeared, there will be no order as to costs."

21. Further, the Apex Court while dealing with phrase 'concealment of income' and 'inaccurate particulars' as used under Section 271(1)(c) of the Act discussed in detail in the judgment of ***Dilip N. Shroff v. CIT (2007) 6 SCC Page 329.*** Relevant paras are Para Nos. 48, 49, 50, 51 and 71 which are extracted here as under:-

"48. The expression "conceal" is of great importance. According to Law Lexicon, the word "conceal" means:

"To hide or keep secret.

The word 'conceal' is derived from the latin concelare which implies con + celare to hide. It means 'to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of'. The offence of concealment is thus a direct attempt to hide an item of income or a portion thereof from the knowledge of the Income Tax Authorities."

49. In Webster's Dictionary, "inaccurate" has been defined as:

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."

It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars.

50. The term "inaccurate particulars" is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the Explanations are taken recourse to, a finding has to be arrived at having regard to clause (A) of Explanation 1 that the assessing officer is required to arrive at a finding that the explanation offered by an assessee, in the event he offers one, was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which was material to the computation of his income.

51. The explanation, having regard to the decisions of this Court, must be preceded by a finding as to how and in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income Tax Officer must arrive at a satisfaction in this behalf. [See ***CIT v. Ram Commercial Enterprises Ltd., (2000) 246 ITR 568 (Del) and Diwan Enterprises v. CIT, (2000) 246 ITR 571(Del).***

71. "Concealment of income" and "furnishing of inaccurate particulars" are different. Both concealment and furnishing inaccurate particulars refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. Although it may not be very accurate or apt but suppressio veri would amount to concealment, suggestio falsi would amount to furnishing of inaccurate particulars."

22. As noticed above in the case of ***Anantharam Veersinghaiah and Company*** (supra), it has been constant view of the Apex Court that burden of proof in penalty proceedings varies from that in the case of assessment proceedings and any finding in assessment proceeding that a particular receipt is income cannot automatically be adopted, though finding in assessment proceeding constitutes good evidences in the penalty proceedings. In penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle.

23. Argument of the counsel for the Revenue that assessee failed to prove the identity of the creditors, their creditworthiness and the genuineness of transaction and the same being confirmed by the Tribunal in the quantum proceedings, cannot be reopened now and looked upon in the penalty proceedings, cannot be accepted, as penalty cannot be levelled solely on the basis of reason given in the original assessment order. The reliance placed on the decision of ***Ram Baboo Agrawal*** (supra) is in relation to the proceedings under Section 68 and is not applicable in the present case. As in the penalty proceedings, case is examined afresh for limited purpose for determining whether the assessee has furnished inaccurate particulars of income or has

concealed the income so as to make him liable for penalty under Section 271(1)(c) of the Act.

24. In ***Khoday Eswarsa and Sons*** (supra) as well as in ***Dilip N. Shroff*** (supra), the Apex Court had examined in depth what would constitute 'concealment of income' and 'inaccurate particulars'. In penalty proceedings the burden of proof varies from that in assessment proceedings, and any finding in assessment proceeding would not automatically be adopted in penalty proceedings, thus, in penalty proceedings the taxing authorities have to independently arrive at a finding regarding the 'concealment of income' or of 'inaccurate particular'.

25. In the present case, the Assessing Officer did not record any finding as to incorrect, erroneous or false return of income filed by the assessee which could lead to the fact that assessee has furnished inaccurate particulars of income and make him liable for penalty under Section 271(1)(c) of the Act. The Assessing Officer had only doubted the genuineness of the gifts on ground of human probabilities and had also doubted the creditworthiness of donors and genuineness of transaction. The Tribunal on the other hand had recorded finding regarding the identity of creditors, their creditworthiness and genuineness of the transactions which were before the Assessing Officer but he had not properly appreciated the same and discarded and doubted the genuineness of gifts on ground of human probabilities, though they were tax payers and the amounts gifted had been disclosed in their tax return for relevant year.

26. Instant case, is not a case of either concealment of income or of furnishing inaccurate particulars as neither the assessing authority nor first appellate authority recorded any finding to such effect that details furnished by the assessee to be incorrect, erroneous or false.

27. Considering the facts and circumstances of the case, we are of the considered opinion that the Tribunal had recorded finding of fact that no penalty can be imposed under Section 271(1)(c) of the Act as Revenue has failed to establish that assessee has concealed income or furnished inaccurate particulars.

28. These appeals have no merit and are hereby **dismissed.** The question of law, therefore, is answered in favour of the assessee and against the Revenue.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE PIYUSH AGRAWAL, J.

INCOME TAX APPEAL No.113 of 2016
Connected with

INCOME TAX APPEAL No.114 of 2016

Pr. Commissioner of Income Tax, Gorakhpur ...Appellant
Versus
Sahara States Gorakhpur. ...Respondent

Counsel for the Appellant:
Sri Manu Ghildyal, Sri Ashok Kumar.

Counsel for the Respondent:
Archi Agarwal, Sri Abhinav Mehrotra, Sri Archit Mehrotra.

A. Income Tax Act, 1961: Sections 80 IB (10), 142(1), 143(2), 147, 148, Section

80 IB(10)(d) is prospective–not retrospective.

Exemption claimed u/s 80 IB (10) was allowed after scrutiny. Reassessment proceedings initiated on the ground of eligibility to claim exemption. CIT confirmed the rejection of claim. Tribunal allowed the appeal, set aside the reassessment proceedings and allowed the exemption u/s 80IB. Dismissing the present appeals, the High Court. Held:-Prior to its amendment on 01.04.2005, u/s 80IB there was no condition that the project should be completed and a completion certificate be obtained within 4 years. Section (IB)(10)(d) will be applicable prospectively and not retrospectively.
(Para 24, 29)

Precedent followed:-

1. CIT Vs. Brahma Associates, 333 ITR 289 (Bombay) (Para 18, 26)
2. CIT Vs. Sarkar Builders, [2015] 375 ITR 392 (SC) (Para 19, 28)

Appeal against order dated 07.12.2015 by ITAT, Allahabad for the AYs 2005-06 & 2006-07. (E-4)

(Delivered by Hon'ble Piyush Agrawal J.)

1. The present appeals have been filed against the common order dated 7.12.2015 passed in ITA No. 04 & C15/Alld 2012 for the Assessment Year 2005-06 & 2007-08 passed by the Income Tax Appellate Tribunal, Allahabad, Bench Allahabad.

2. The aforesaid appeals on 3.5.2016 was firstly admitted on question No. B, which reads as under:

"(B) Whether on the facts and the circumstances of the case, the order of the Income Tax Appellate Tribunal was correct in Law holding that Section 80-IB(10) which is substituted w.e.f. 1.4.2005 is not applicable to the project approve before 01.04.2004. The provision of Section 80(IB)(10)(a)(i) is as such applicable for the all projects which has been accepted and admitted one more question of law mentioned as 'C' in memo of appeals, which reads as under:

"Whether on the facts and in the circumstances of the case, the order of the Income Tax Appellate Tribunal was correct in law holding that there is change of opinion by the Assessing Officer. As such, there is no change of opinion as information regarding completion of project has been collected by the Assessing Officer is a new information and Assessing Officer had correctly applied the provision of Section 147/148 for reopening the assessment of A.Y. 2007-08."

3. In both the appeals common facts and question of law are involved, as well as both the parties are agreed for disposal of the appeals by a common order.

4. The facts of the case are that the respondent-assessee (hereinafter referred to as 'assessee') is engaged in the business of development of land, construction of house and its sales thereof. For the purpose of factual background the facts of the assessment year 2005-06 has been taken up.

5. The assessee filed its return showing income of Rs. 59,37,200/- and claimed the deduction under Section 80IB(10) of the Income Tax Act (hereinafter referred to as 'the Act').

6. The case of the assessee was selected under the scrutiny and subsequently on 24.12.2007, assessment order was passed on the total income of Rs. 61,91,134/-, then exemption as claimed by the assessee under Section 80-IB(10) of the Act was allowed.

7. Thereafter, the reassessment proceeding were initiated on the basis of some information received during the assessment proceeding for the year 2006-07 that the assessee has not obtained completion certificate within four year from Local Authority who have approved the project and therefore, there was a violation of the provision of Section 80-IB(10)(a)(i) of the Act.

8. The assessing authority was of the opinion that since the assessee has lost the eligibility for claiming the deduction under Section 80IB(10) of the Act. Therefore, the claim cannot be legally permitted, the proceeding for reassessment were initiated for both assessment years.

9. The notice dated 5.6.2009 was issued under Section 148 of the Act which was served upon the assessee on 8.6.2009. The assessee submitted his return under protest on 8.7.2007 and further made a request for supply the copy of reasons recorded for reopen the completed assessment. The assessee has filed his objection on 27.10.2010 pointing out that the re-assessment proceedings have been initiated on the basis of change of opinion and the assumption of jurisdiction has been made without any tangible fresh material /information on record which is permissible under the provision of Section 147 of the Act.

10. Notice under Section 143(2) of the Act was issued on 10.6.2010 and thereafter notice under Section 142 (1) along with questionnaire were issued on 18.6.2010 and the same was served upon the assessee on 24.6.2010.

11. Assessing authority by its re-assessment order dated 27.10.2010 has rejected the claim of exemption under Section 80IB(10) of the Act to the Tune of Rs. 58,44,230/-.

12. Again the aforesaid order, the assessee preferred an appeal before Commissioner of Income Tax (appeals), Lucknow who vide its order dated 23rd September, 2011 partly allowed the appeal but has confirmed the rejection of claim under Section 80IB(10) of the Act.

13. Feeling aggrieved by the said order the assessee preferred an appeal before Income Tax appellate Tribunal who by its impugned order has allowed the appeal and has set aside the re-assessment proceeding and directed the assessing authority to allow the claim

14. Feeling aggrieved by the impugned order the revenue has preferred the present appeals.

15. Heard Mr. Manu Ghildyal, learned counsel for the Revenue and Mr. Archit Mehrotra, learned counsel for the assessee.

16. It has been argued on behalf of the Revenue that Section 80IB(10) of the Act has been substituted by Finance Act, 2004 and a sub-section (d) in Section 80IB(10) of the Act has been inserted which operates retrospectively and therefore the said amendment is applicable in the case of the respondent even though whose projects have been approved before 1.4.2004 and therefore the impugned order passed by the Tribunal are not justifiable which deserves to be set aside.

17. It was further argued that since there is no change of opinion, Tribunal was not justified in allowing the appeal of the

assessee and directing the assessing authority to grant the benefit of Section 80IB(10)of the Act to the assessee. The reassessment proceeding was rightly initiated.

18. The counsel for the assessee has vehemently opposed the contention of the Revenue and has argued that the Tribunal has rightly passed the impugned order and has further submitted that the Tribunal was justified in relying upon the judgment of the Bombay High Court in the case of ***CIT vs. Brahma Associates reported in 333 ITR 289 (Bombay)*** wherein the Bombay High Court has specifically held that the amendment made in Section 80IB(10)(d) of the Act is prospectively and not retrospectively.

19. It was further argued that the Apex Court in the case of ***CIT vs. Sarkar Builders reported in [2015] 375 ITR 392(SC)*** has also approved the judgment of the Bombay High Court.

20. We have perused the record of the case and finds that the assessee projects were approved by the respective Development Authority on April 2003 for construction of 7 types of residential units comprising all 429 units out of which 120 units were sold against Income of Rs. 83,74,72028/- and net profit of Rs. 1,17,81,384/- has been declared after debating expenditure of Rs. 82,56,90,664/- on account of land and development, construction & Development, personnel & site running expenses and selling and distribution expenses etc.

21. The assessee has claimed deduction under Section 80-IB(10) of the Act of Rs. 58,44,230/- on the net profit of Rs. 1,17,81,384/-.

22. The record reveals that reassessment proceedings have been initiated on the basis of observation made by the assessing officer during the assessment proceeding for the assessment year 2006-07 that the respondent has not obtained completion certificate within four years from the local authority and has not fulfilling the condition as stipulated under Section 80IB(10)(d) of the Act and therefore the assessee has lost eligibility of claim deduction under Section 80-IB(10) of the Act in the disputed assessment years.

23. The Section 80-IB(10) of the Act for the relevant assessment year is quoted below:

"Section 80-IB(10) prior to the amendment of 1.4.2005:

"(10) amount of profits in case of an undertaking developing and building housing projects approved before the 3 I" day of March, 2005, by a local authority, shall be hundred percent, of the profits derived in any previous year relevant to any assessment year from such housing project if,-

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1" day of October, 1998;

(b) the project is on the size of a plot of land which has minimum area of one acre; and

(c) the residential unit has a minimum built up area of one thousand square feet where such residential unit is situated within the cites of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

24. From perusal of the said section which provides that only three conditions for the eligibility of the deduction under Section 80-IB(10) of the Act and in the said provision there is no such condition that the project in question should be completed and obtained completion certificate with the period of four years.

25. In the impugned order the Tribunal has recorded a finding of fact that there was no such requirement under the Act for completing the project before a particular date and would have obtained the completion certificate from the Local Authority who have approved the project.

26. The ***Bombay High Court in the case of CIT vs. Brahma Associates (Supra)*** has observed (see page 399) as under:

" Held that clause (d) inserted to Section 80-IB(10) with effect from April 1, 2005, is prospective and not retrospective and hence could not be applied were on the profits derived from the housing projects under Section 80-IB(10) were on the profits derived from the housing project approved by the local authority as a whole, the Tribunal not justified in restricting the Section 80-IB (10) deduction only to a part of the project. However, in the present case, since, the assessee has accepted the decision of the Tribunal in allowing 80-IB (10) deduction to a part of the project, the findings of the Tribunal in that behalf could not be disturbed."

27. Subsequently, against the judgement of the Bombay High Court the revenue preferred the SLP before the Hon'ble Supreme Court being SLP (C)-No. 24330 of 2011 and others) the Hon'ble Supreme Court by its judgement and order dated 15th May, 2015 has dismissed the appeal of the Revenue and has confirmed the order and judgement passed by the Bombay High Court.

28. Hon'ble Supreme Court in the case of ***CIT vs. Sarkar Builders(supra)*** while considering the bunch of cases has observed as under (see page 399):

"We would also like to point out that following this judgment of the Bombay High Court, or independently, other High Courts had also taken similar view. Against the aforesaid judgments, special leave petitions were filed by the Revenue in this Court. All these SLPs have been disposed of by this Court vide order dated 29.04.2015, we would like to reproduce the said order in entirety hereunder:

"All these special leave petitions are filed by the Revenue/ Department of Income tax against the judgments rendered by various High Courts deciding identical issue which pertains to the deduction under Section 80IB(10) of the Income Tax Act, as applicable prior to 01.04.2005. We may mention at the outset that all the High Courts have takenidentical view in all these cases holding that the deduction under the aforesaid provision would be admissible to a "housing project".

All the assessees had undertaken construction projects which were approved by the municipal authorities/local authorities as housing projects. On that basis, they claimed deduction under Section 80IB(10) of the Act. This provision as it stood at that time, i.e., prior to 01.04.2005 reads as under: -

Section 80IB(10) [as it stood prior to 01.04.2005] "(10) The amount of

profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if,

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) the project is on the size of a plot of land which has a minimum area of one crore; and

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place." However, the income tax authorities rejected the claim of deduction on the ground that the projects were not "housing project" inasmuch as some commercial activity was also undertaken in those projects. This contention of the Revenue is not accepted by the income tax Appellate Tribunal as well as the High Court in the impugned judgment. The High Court interpreted the expression "housing project" by giving grammatical meaning thereto as housing project is not defined under the Income Tax Act insofar as the aforesaid provision is concerned. Since sub-section (10) of Section 80IB very categorically mentioned that such a project which is undertaken as housing project is approved by a local authority, once the project is approved by the local authority it is to be treated as the housing project. We may also point out that the High Court had made observations in the context of Development Control Regulations (hereinafter referred to as 'DCRs' in short) under which the local authority sanctions the housing projects and noted that in these DCRs itself, an element of commercial activity is provided but the total project is still treated as housing project. On the basis of this discussion, after modifying some of the directions given by the ITAT, the conclusions which are arrived at by the High Court are as follows: -

"30. In the result, the questions raised in the appeal are answered thus:-

a) Upto 31/3/2005 (subject to fulfilling other conditions), deduction under Section 80IB(10) is allowable to housing projects approved by the local authority having residential units with commercial user to the extent permitted under DC Rules/Regulations framed by the respective local authority

b) .....

c) .....

d) .....

(See page 401)

e) Clasue (d) inserted to section 80-IB(10) with effect from April 1, 2005, is prospective and not retrospective and, hence, cannot be applied for the period prior to 2005.

We are in agreement with the aforesaid answer given by the High Court to the various issues."

(See page 402)

".....In the aforesaid scenario, we revert back to the question that is to be answered. We have already pointed out that the parties are ad idem that the amendment is prospective in nature and, therefore, it operates from 01.04.2005. We have also mentioned that in the instant appeals, all these assessees had got the housing projects sanctioned prior to 01.04.2005 and the construction

of the said housing project also started before 01.04.2005. All other conditions mentioned namely the date by which approval was to be given and the dates by which the projects were to be completed as on the date when the project was sanctioned, are also met by the assessees....." *(See page 404)*

"..... The Revenue had argued that clause (d) inserted with effect from 01.04.2005 should be applied retrospectively, which argument was repelled by the High Court. Therefore, for better understanding, we would like to begin our discussion with the meaning given to 'housing project' along with the issue of retrospectivity of clause (d), as raised by the Revenue, which was dealt with by the High Court and repelled. That portion of the discussion contained in the High Court judgment, which has some bearing on the issue at hand, runs as under: "21. Thus, on the date on which the legislature introduced 100% deduction under the Income Tax Act, 1961 on the profits derived from housing projects approved by a local authority, it was known that the local authorities could approve the projects as houding projects with commercial user to the extent permitted under the DC Rules framed by the respective local authority. In other words, it was known that the local authorities could approve a housing project without or with commercial user to the extent permitted under the Development Control Rules. If the legislature intended to restrict the benefit of deduction only to the projects approved exclusively for residential purposes, then it would have stated so. However, the legislature has provided that Section 80IB(10) deduction is available to all the housing projects approved by a local authority. Since the local authorities could approve a project to be a housing project with or without the commercial user, it is evident that the legislature intended to allow Section 80IB(10) deduction to all the housing projects approved by a local authority without or with commercial user to the extent permitted under the DC Rules.

22. It is not in dispute that where a project is approved as a housing project without or with commercial user to the extent permitted under the Rules/Regulations, then, deduction under Section 80IB(10) would be allowable. In other words, if a project could be approved as a housing project having residential units with permissible commercial user, then it is not open to the income tax authorities to contend that the expression 'housing project' in Section 80IB(10) is applicable to projects having only residential units.

23. Once it is held that the local authorities could approve a project to be housing project without or with the commercial user to the extent permitted under the DC Rules, then the project approved with the permissible commercial user would be eligible for Section 80IB(10) deduction irrespective of the fact that the project is approved as 'housing project' or approved as 'residential plus commercial'. In other words, where a project fulfills the criteria for being approved as a housing project, then deduction cannot be denied under Section 80IB(10) merely because the project is approved as 'residential plus commercial'.

24. The fact that the deduction under Section 80IB(10) prior to 1.4.2005 was allowable on the profits derived from the housing projects constructed during the specified period, on a specified size of the plot with residential units of the

specified size, it cannot be inferred that the deduction under Section 80IB(10) was allowable to housing projects having residential units only, because, restriction on the size of the residential unit is with a view to make available large number of affordable houses to the common man and not with a view to deny commercial user in residential buildings. In other words, the restriction under Section 80IB(10) regarding the size of the residential unit would in no way curtail the powers of the local authority to approve a project with commercial user to the extent permitted under the DC Rules/Regulations. Therefore, the argument of the Revenue that the restriction on the size of the residential unit in Section 80IB(10) as it stood prior to 1.4.2005 is suggestive of the fact that the deduction is restricted to housing projects approved for residential units only cannot be accepted.

25. The above conclusion is further fortified by Clause (d) to Section 80IB(10) inserted with effect from 1.4.2005. Clause (d) to Section 80IB(10) inserted w.e.f. 1.4.2005 provides that even though shops and commercial establishments are included in the housing project, deduction under Section 80IB(10) with effect from 1.4.2005 would be available where such commercial user does not exceed five per cent of the aggregate built- up area of the housing project or two thousand square feet whichever is lower. By Finance Act, 2010, clause (d) is amended to the effect that the commercial user should not exceed three percent of the aggregate built-up area of the housing project or five thousand square feet whichever is higher. The expression 'included' in clause (d) makes it amply clear that commercial user is an integral part of housing project. Thus, by inserting clause (d) to Section 80IB(10) the legislature has made it clear that though the housing projects approved by the local authorities with commercial user to the extent permissible under the DC Rules/Regulation were entitled to Section 80IB(10) deduction, with effect from 1.4.2005 such deduction would be subject to the restriction set out in clause (d) of Section 80IB(10). Therefore, the argument of the revenue that with effect from 1.4.2005 the legislature for the first time allowed Section 80IB(10) deduction to housing projects having commercial user cannot be accepted.

29. Lastly, the argument of the revenue that Section 80IB(10) as amended by inserting clause (d) with effect from 1.4.2005 should be applied retrospectively is also without any merit, because, firstly, clause (d) specifically inserted with effect from 1.4.2005, and therefore, that clause cannot be applied for the period prior to 1.4.2005. Secondly, clause (d) seeks to deny Section 80IB(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from 1.4.2005 cannot be applied retrospectively. Thirdly, it is not open to the revenue to contend on the one hand that Section 80IB(10) as stood prior to 1.4.2005 did not permit commercial user in housing projects and on the other hand contend that the restriction on commercial user introduced with effect from 1.4.2005 should be applied retrospectively. The argument of the revenue is mutually contradictory and hence liable to be rejected. Thus, in our opinion, the Tribunal was justified in holding that clause (d) inserted to Section 80IB(10) with effect f*rom 1.4.2005 is prospective and not retrospective and hence cannot be applied to the period prior to 1.4.2005."*

The issues dealt with from paras 21 to 25 by the High Court already stands approved by this Court. In para 29, the High Court has held that clause. (d) has prospective operation, viz., with effect from 01.04.2005, and this legal position is not disputed by the Revenue before us. What follows from the above is that prior to 01.04.2005, these developers/assessees who had got their projects sanctioned from the local authorities as 'housing projects', even with commercial user, though limited to the extent permitted under the DC Rules, were convinced that they would be getting the benefit of 100% deduction of their income from such projects under Section 80IB of the Act..."

29. In view of the observation of the Hon'ble Apex Court, we are of the opinion that the projects which were approved prior to 1.4.2005 the applicability of Section 80IB(10)(d), of the Act is not permitted. In other words, Section 80(IB)(10)(d) of the Act will be applicable prospectively and not retrospectively.

30. Once it has come on record by fact finding Authority also that there is no such condition to have completion certificate within four years from the local authority granting approval of the projects in question, the reassessment proceedings taken against the assessee are bad and against the settled principle of law.

31. Therefore, the Tribunal has rightly set aside the re-assessment proceeding and directed the assessing authority to grant benefit of Section 80IB(10) of the Act to the assessee.

32. In view of the above facts and circumstances of the case the question of law are answered in favour of assessee and against the Revenue.

33. The appeals are, accordingly, answered. Both the appeals fail and are therefore dismissed.

34. Copy of this order be placed in the connected Income Tax Appeal No. 114 of 2016.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Civil Misc. Writ Petition No. 142 of 2019

Shriram Jaiswal ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Sharma, Sri Neeraj Sharma.

Counsel for the Respondents:
Shri. Avinash Chandra Tripathi, S.C..

A. United Provinces Excise Act, 1910: Sections 34, 72(c), U.P. Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002: Rule 21, S.34(3)— 'security amount' is also 'deposit made'. Latter phrase cannot be confined to the words 'fee paid'. It includes 'security amount' money also.

The license of the petitioner to vend country liquor was cancelled, stocks, license fee and advance security deposit were also confiscated by the District Magistrate. Appeal was dismissed and revision was rejected. Present writ petition challenges the confiscation of stocks, license fee and advance security deposit etc., though not the cancellation of the vending license. Partly allowing present petition, the High Court. Held: - Under Section

34(3), the licensee would lose all rights to seek refund of any fee paid or deposit made, or other compensation for cancellation or suspension of his license. The words "in respect thereof" are clearly not suffixed or used to confine the word 'deposit' to the words 'fee paid'. (Para 22, 23)

B. After amendment - discretion to forfeit 'security amount converted into mandatory confiscation of any 'deposit made'. It is an automatic consequence of cancellation of licence.

Merely because the words "security amount" had been added by amendment w.e.f. 01.04.2018 in Rule 21(3), would not mean that prior to that day, there was no power to forfeit any security amount. Prior to 01.04.2018, the power to forfeit security amount was discretionary; post 01.04.2018, the confiscation of security amount is mandatory (Para 25, 26, 28)

C. An authority can pass a composite order dealing with different aspects of cancellation of licence, forfeiture and penalty. Only requirement is of prior show cause notice on all aspects.

An authority can pass a composite order dealing with different aspects, though different aspects of that order may be appealable before different forums. This only has a bearing on the remedy that the aggrieved may have against the order, but does not affect the validity or correctness of the composite order and cannot be used to differently/narrowly interpret the scope of power of the authority. (Para 32, 33, 34)

Precedent distinguished:

1. Chandra Pal Singh Vs. State of U.P.& 4 Ors.

2. Writ Tax No. 356 of 2014 decided on 27.05.2014 (Para 6, 36) (E-4)

(Delivered by Hon'ble Saumitra Dayal Singh J.)

1. The present writ petition has been filed against the order dated 25/27.10.2015 passed by the District Magistrate/Licensing authority. By that order, the petitioner's license for retail vend of country liquor has been cancelled; stock of lawful/unlawful liquor confiscated; holograms, wrappers and corks, basic license fee, advance security and cash Rs. 17,530/- forfeited. That order is disclosed to have been passed with reference to the powers vested in that authority under Section 34 and Section 72(c) of the United Provinces Excise Act, 1910 (hereinafter referred to as the Act) and Rule 21 of the U.P. Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002 (hereinafter referred to as the Rules).

2. Challenge has also been raised to the order dated 05.05.2016 passed by Excise Commissioner, U.P. dismissing the appeal filed by the petitioner against the order dated 27.10.2015. Further, challenge has been raised to the order dated 27.09.2018 passed by the State Government rejecting the revision filed by the petitioner against the appellate order dated 05.05.2016. Thus, the cancellation of license as also forfeiture and confiscation of basic license fee, security deposit, advance security deposit, lawful/unlawful stock of liquor, wrappers, cash and other items discovered during the inspection/survey dated 21.09.2015 has been confirmed.

3. Heard Sri Neeraj Sharma assisted and Sri Abhishek Sharma learned counsel for the petitioner and Sri A.C. Tripathi, learned Standing Counsel for the revenue.

4. At the outset, Sri Neeraj Sharma has confined the submissions and prayer made in the present writ petition against the forfeiture and confiscation of advance

security, lawful stock of liquor and cash Rs. 17,530/-. Challenge has not been pressed to the other part of the impugned orders whereby country liquor license of the petitioner has been cancelled; unlawful stock of liquor and basic license fee for the excise year 2015-16 had been forfeited.

5. Learned counsel for the petitioner first states, upon the inspection conducted on 21.09.2015, no seizure of stock of liquor etc. had been made. However, a wholly false FIR had been lodged against the petitioner on the same day. About a week thereafter, on 29.09.2015, a show cause notice had been issued to the petitioner in exercise of power under Rule 21(2) of the Rules to show cause why the petitioner's license may not be cancelled. The petitioner had furnished his reply to that show cause notice. In that reply, he objected to the proposed forfeiture of the lawful stock of country liquor; cash; as also advance security deposit.

6. Placing heavy reliance on the language of the Rule 21(2) and (3) of the Rules as also the judgment of the learned single judge of this Court in Writ Tax No. 356 of 2014, **Chandra Pal Singh Vs. State of U.P. & 4 Ors.**, decided on 27.05.2014, it has been submitted, though the order cancelling the country liquor license is not being challenged in the present proceedings, however, there could not have been any forfeiture of security, cash money found in the shop and confiscation stock of lawfully procured liquor.

7. First, it has been submitted, under Rule 21(2) and (3) of the Rules, the licensing authority could have required the petitioner to show cause against proposed cancellation of license and forfeiture of security or basic license fee or license fee, alone. No action could have been taken under that provision of law to forfeit the security money or confiscate the stock of lawfully procured liquor or cash. The proceedings under Rule 21 of the Rules are distinct and different from those under Section 72 of the Act. While proceedings for suspension and cancellation of license may arise in accordance with Rule 21 of the Rules read with Section 34 of the Act, those proceedings have to be drawn up by the licensing authority. On the other hand, the proceedings for confiscation, as contemplated under Section 72 of the Act have to be drawn up by the Collector after seizure of items/animals, etc that may be subjected to confiscation proceedings. In the present case, only one notice had been issued (dated 29.09.2015), by the licensing authority. No other notice was issued by the Collector in exercise power under Section 72 of the Act. Therefore, it has been submitted, the mandatory requirement of the Act had been violated. The confiscation of the valid stock of liquor and cash could not have been made by the licensing authorities while exercising powers under Rule 21 of the Rules.

8. It is his further submission, in any case, unamended Rule 21(3) of the Rules did not contemplate or provide for forfeiture of security amount. This Rule was amended by Ninth Amendment, 2018 w.e.f. 01.04.2018 whereby the words "security amount deposited by him" were added after the words "basic license fee and license fee" appearing in the unamended rule. Therefore, no security amount could not have been forfeited prior to 01.04.2018.

9. Also, it has been submitted, in any case, even under Section 34(3) of the Act, the word "deposit" only refers to the license fee that may have been paid by the licensee. For that reason also, there was no jurisdiction or authority whereby, prior to 01.04.2018, the security deposit furnished by the petitioner could be forfeited. The words "in respect thereof" appearing at the end of the sub-section (3) of Section 34 of the Act, clearly go to indicate that the word "deposit" appearing in that provision of law refers only to license fee that may have been deposited.

10. Opposing the present petition, learned Standing Counsel submits, in the first place, the powers of the licensing authority and the Collector (two authorities under Rule 21 of the Rules and Section 72 of the Act) are wielded by one and the same officer who discharges those functions in twin capacities. The District Magistrate, appointed by the State Government, also functions as the Collector and the licensing authority under the Act. In any case, no objection appears to have been raised before the original authorities or before the appeal authorities, as to lack of jurisdiction. Therefore, that plea may not be entertained, at this belated stage.

11. Second, it has been submitted, in the facts of the present case, the notice dated 29.05.2015 makes it plain that the same had been issued in dual capacity of the District Magistrate as the Collector and also as the Licensing Authority. Therefore, there was never any defect in the exercise of the jurisdiction.

12. Third, again as a fact, the notice makes a clear mention of the proceedings being initiated. First, the notice refers to Rule 21 of the Rules and proposes to cancel the license of the petitioner in light of the infractions of the law committed by the petitioner. Also, the notice proposes to forfeit/confiscate the basic license fee and security deposit as also the entire stock of lawful/unlawful liquor being 7552 bottles of country liquor of Rs. 17,530/- in cash. Not only does the notice refer to the above, it also draws the attention of the petitioner to the provisions of the Section 72(c) of the Act viz a viz the proposed action to forfeit the basic license fee, security deposit as also to confiscate the entire stock of lawful and unlawful liquor and cash. Therefore, it has been submitted, the show cause notice dated 29.09.2015 did not suffer from any jurisdictional, legal and factual errOrs.

13. Then, referring to the Rule 21(2) of the Rules, it has been submitted, authority was fully empowered to seek cancellation of license and forfeiture of security, even in the light of the unamended Rule 21 of the Rules. Here, reference has been made to the provisions of Rule 21(2) of the Rules, which provides for issuance of a show cause notice to cancel the license and also to forfeit security money. Besides the above, reliance has been placed on Section 34(3) of the Act to submit, under that provision of law, upon suspension or cancellation of his license, the petitioner lost his right to claim refund of any fee paid or deposit made with respect to the country liquor license (that had been earlier issued to him), and which became the subject matter of suspension and cancellation proceedings. The words "in respect thereof" do not restrict the word "deposit" to any fee paid but they restrict the word "deposit" and relate it to the country liquor license against which such deposit may have been made.

14. Last, referring to Section 72(c) of the Act, it has been submitted, once the petitioner was found to have committed the offence punishable under the Act, every quantity of intoxicant whether in his lawful or unlawful possession was exposed to confiscation proceedings. The fact that the petitioner did not file any appeal against that part of the order before the District Judge as provided under the Act, does not make any difference to the merits of the order.

15. Having heard learned counsel for the parties and having perused the record, in the first place, it has to be recognized that the Act does separately provide for suspension and cancellation of country liquor license, forfeiture and for confiscation. While making such separate provisions, it also appears that the power to cancel and suspend licenses has been conferred on the licensing authority while the power for confiscation has been vested in the Collector. Though the word "Collector" has not been defined under the Act, under Section 3(2) of the Act, the Excise Officer has been defined to mean a Collector or any officer or person appointed under Section 10 of the Act. On the other hand, under Rule 2(k) of the Rules, "licensing authority" is defined to mean a Collector or the District Magistrate. In the present case, the District Magistrate was the licensing authority under the Act.

16. Thus, in absence of any case that the issuing authority/District Magistrate was not the Collector, it remains undisputed, even if separate notices had to be issued, one under Section 34 read with Rule 21 of the Rules for cancellation of license and another under Section 72(5) of the Act for confiscation of items, those two notices would still have been issued by the same signatory in different capacities.

17. Then, factually, in the present case, the notice dated 29.09.2015 specifically refers to both Section 34 and Section 72(c) of the Act as well as Rule 21 of the Rules. Also, the subject matter of the notice refers to both Section 34 of the Act read with Rule 21 of the Rules as also Section 72(c) of the Act. In other words, the said notice speaks both, of the proposal to cancel the country liquor license as also to forfeit security money and confiscate, stock of lawful and unlawful liquor as also cash. Thus, it cannot be the case of the petitioner that he had not been issued any prior show cause notice before the proceeding for forfeiture were undertaken. The action of confiscation of stock of liquor and cash and forfeiture of security is found to have been preceded by a notice issued under Section 34 of the Act read with Rule 21 of the Rules and section 72(c) of the Act. There is no procedural defect in the same.

18. Coming to the other objection raised on behalf of the petitioner, first, the statutory provisions may be taken note of. The provision of Rule 21(2) and (3) of the Rules, both prior to and after the amendment may, first be noted as below:

Column-I *Existing rule*	Column-II *Rule as hereby substituted*
2) The licensing Authority shall immediately suspend the license and issue a show cause notice for cancellation of license and forfeiture of security the licensee shall submit his explanation within 7 days of the receipt of notice. There after the	(2) The licensing Authority shall immediately suspend the license and issue a show cause notice for cancellation of license and forfeiture of security the licensee shall submit his explanation within seven days of the receipt of notice. There after the licensing authority shall

licensing authority shall pass suitable orders after giving due opportunity of hearing to the licensee.	pass suitable orders after giving due opportunity of hearing to the licensee.
Provided that the procedure of suspension and cancellation of license related to relevant matter as adduced in the sub paragraph (f) of the aforesaid rule-21(1) shall be executed in accordance with the rule-14.	Provided that the procedure of suspension and cancellation of license related to relevant matter as adduced in the sub paragraph (f) of the aforesaid rule-21(1) shall be executed in accordance with the rule-14.
(3) In case the license is cancelled the basic license fee, license fee deposited by him shall stand forfeited in favour of the Government and the licensee shall not be entitled to claim any compensation or refund. Such licensee may also be blacklisted and debarred from holding any other excise license.	(3) In case the license is cancelled the basic license fee, license fee and security amount deposited by him shall stand forfeited in favour of the Government and the licensee shall not be entitled to claim any compensation or refund. Such licensee may also be blacklisted and debarred from holding any other excise license.

19. For a proper consideration of the submission advanced by the learned counsel for the parties, it is also necessary to take note of the language of Section 34 of the Act and Section 72 of the Act. Thus, provisions of Section 34 of the Act are noted below:

"34. Power to cancel or suspend licences, etc.- *(1) Subject to such restrictions, as the State Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it*

(a) if any duty or fee payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such licence, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such licence, permit or pass; or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the [Dangerous Drugs Act, 1930,] or under the Merchandise Marks Act, 1889, or of any offence punishable under Sections 482 to 489 (both inclusive) of the Indian Penal Code; or

(d) where a licence, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(e) if the conditions of the licence or permit provide for such cancellations or suspension at will.

(2) When a licence, permit and pass held by any person is cancelled under clauses (a), (b) or (c) of sub-section (1), the authority aforesaid may cancel any other licence, permit or pass granted to such person by, or by the authority of the State Government under this Act or under any other law for the time being in force relating to excise revenue or under the Opium Act, 1878.

(3) The holder shall not be entitled to any compensation for the cancellation or suspension of his licence, permit or pass under this section nor to a refund of any fee paid or deposit made in respect thereof."

20. Also, relevant to the issue at hand, the provisions of Section 72 of the Act are noted below:

72. What things are liable to confiscation.- *(1) Whenever an offence*

punishable under this Act has been committed-

(a) every intoxicant in respect of which such offence has been committed;

(b) every still, utensil, implement or apparatus and all materials by means of which such offence has been committed;

(c) every intoxicant lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any intoxicant liable to confiscation under clause (a);

(d) every receptacle, package and covering in which any intoxicant as aforesaid or any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any) of such receptacle or package; and

(e) every animal, cart, vessel or other conveyance used in carrying such receptacle or package shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act, the officer seizing and detaining such property shall, within three working days from the date of such seizure and detention; produce a detailed report for confiscation along with such seized property, seizure memo and other relevant documents before the Collector. The Collector shall, upon receiving the said report along with seizure memo and seized property, immediately order for safe custody and storage of goods as he may deem fit. The Collector, if satisfied for reasons to be recorded that an offence has been committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted:

Provided that in the case of anything (except an intoxicant) or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such fine as the Collector thinks adequate, not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized things, including any animal, cart, vessel or other conveyance, is of the opinion that any such things or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do, he may order such things (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4) Where any such things or animal is sold as aforesaid, and-

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section (6); or

(b) an order passed on appeal under sub-section (7) so requires; or

(c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal is seized, the order of the court so requires;

the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitled thereto.

(5) (a) No order of confiscation under this section shall be made unless

the owner thereof or the person from whom it is seized is given-

(i) a notice in writing informing him of the grounds on which such confiscation is proposed;

(ii) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and

(iii) a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to satisfaction of the Collector that it was used in carrying the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person in-charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to Collector within one month from any order of confiscation made under sub-section (2), or as the case may be, after issuing notice on his own motion within one month from the order under the sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from the mistake apparent on the face of the record including any mistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of the confiscation under subsection (2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to such judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confiscation was ordered the thing or animal shall subject to the provisions of sub-section (4) be disposed of in accordance the order of the Court.

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act.]

21. For the purpose of giving true meaning for the language of Rule 21 (2) and (3) of the Rules, both before the amendment and after amendment, first notice must be had to the language of the principal legislation. Here, it appears, under Section 34(1) of the Act, the legislature has authorized the licensing authority to cancel or suspend a license (that may have been granted under the Act). Subject to any restriction placed by the State Government, the contingencies wherein the license may be suspended or cancelled are provided under Section 34(1)(a) to (e) of the Act. Insofar as the cancellation of the license of the petitioner has not been questioned, no further discussion is required to be made as to the contingency for cancellation. So

far as the Section 34(2) of the Act is concerned, it provides for consequences for cancellation of the license on other license/s as may be existing in favour of such person. Again, that is not the issue involved in the present case.

22. Then, sub-Section (3) of Section 34 refers to the effect that a cancellation order would have on the rights of the licensee that may have otherwise existed in view of the license granted to him. Here, it appears the legislature has clearly provided, upon cancellation of a license, the licensee would lose all rights or entitlement to seek compensation for cancellation or suspension of the license, permit or pass, that may have been issued to him. Further, he would lose his right or entitlement to claim refund or any fee paid or deposit made. The words "in respect thereof" are clearly not suffixed or used to confine the word 'deposit' to the words "fee paid".

23. While providing the consequence and the effect of cancellation on the right of the licensee, the legislature appears to have clearly provided, the licensee would lose all rights that he may otherwise claim on the strength of his license. It is in light of that concept and it is in that context that his right to claim compensation has been done away. Upon the occurrence of cancellation of his license, the licensee's right to claim refund of any fee paid or deposit made has been taken away. There is no suggestion contained in the statutory language as may confine the use of word 'deposit' to the words "fee paid". The word "or" used between the words "fee paid" and "deposit" appearing in sub-Section (3) of Section 34 of the Act also mitigates against the interpretation being offered by the learned counsel for the petitioner.

24. Here, it is relevant that under Rule 21(2) of the Rules, the licensing authority was always authorized to issue a show-cause notice to cancel the license and to forfeit the security and to pass final order providing for such confiscation. That power arises under the first part of Rule 21(2) of the Rules that obligates the licensing authority to issue a show-cause notice for cancellation of license and forfeiture of security.

25. Sub-Rule (3) of Rule 21 of the Rules would in any case remain consequential to sub-Rule (2) of Rule 21 of the Rules i.e. it would come into play as soon as cancellation order is passed. Therefore, under the amended law, once the licensing authority, who was duly empowered to issue a notice, amongst others, to forfeit the security [under Rule 21(2) of the Rules] had acted in exercise of that power and he was fully enabled [under that sub-rule itself] to pass an order after hearing the licensee to forfeit the security as well. It is not possible to accept the contention advanced by the learned counsel for the petitioner that merely because the word "security amount" did not appear in the unamended text of sub-Rule (3) of Rule 21 of the Rules and since those words had been added by the amendment w.e.f. 01.04.2018, therefore, prior to that amendment, there did not exist any power to forfeit security amount. That interpretation would render the earlier part of Rule 21(2) of the Rules redundant.

26. In fact, true reading of sub-Rule (3) of Rule 21 of the Rules makes it clear, even prior to the amendment to that Rule, by way of direct and mandatory

consequence of cancellation of license, the basic license fee and the license fee deposited by a licensee would be forfeited as a consequence of cancellation of license. However, if the licensing authority wanted to forfeit the "security amount" it had a discretion in terms of sub-Rule (2) of Rule 21 of the Rules. By virtue of amendment made w.e.f. 01.04.2018, the consequence of mandatory confiscation has been extended to "security amount" as well.

27. Therefore, post amendment to Rule 21(3) of the Rules, a simple order of cancellation of the license would result in the licensee losing his rights over the security amount along with basic license fee and the license fee, that may have been deposited by him. It is only with respect to other consequences such as black-listing and debarring the licensee to hold any other license that sub-Rule (3) leaves a discretion with the licensing authority. However, we are not concerned with that aspect of the matter. That effect and differentiation is further accentuated by use of the words "shall" (while providing for confiscation) and "may" (while providing for black-listing).

28. In view of the above, I am unable to accept the contention advanced by the learned counsel for the petitioner that prior to the amendment made to sub-Rule (3) of Rule 21 of the Rules, there did not exist any power with the licensing authority to forfeit the security amount. That power is found to be pre-existing, by virtue of sub-Rule (2) of Rule 21 of the Rules. The introduction of the words "security amount" by amendment made to sub-Rule (3) has the effect of making confiscation of "security amount", a mandatory consequence of an order of cancellation of license.

29. In the facts of the present case, the forfeiture was proceeded by a specific show cause notice, in terms of section 34 of the Act read with Rule 21(2) of the Rules and section 72(c) of the Act. The order for forfeiture of advance security deposit as has been passed is referable only to sub-Rule (2) and not to the sub-Rule (3) of Rule 21 of the Rules. Sub-Rule(3) only provides for the mandatory and other consequences of cancellation of the license. It does not authorize the licensing authority to pass an order. That power is contained completely in sub-Rule (2). One is therefore not required to look into sub-Rule (3) for the purposes of the decision of the present case.

30. Insofar as Section 72 of the Act is concerned, sub-Section (1) provides for confiscation of different items and also animals, carts and vessels or other conveyance in the event of offence punishable under the Act being committed. Sub-Section (2) provides for confiscation of any animal. Under sub-Section (3) and (4), the Collector upon receiving the report of seizure or upon inspection of seized things or animal etc may, if such seized items or animal is subject to speedy or other decay provide for its disposal. Sub-Section (5) provides for issuance of show-cause notice to the owner of the thing or animal, etc. that may be made subject matter of confiscation proceeding. The owner has thus been given a statutory right to object in writing and also to be heard before confiscation order may be passed. Sub-Section (6) provides for a power of limited review in certain circumstances, while sub-Section (7) gives the right to the person from whom such any property may have been seized, a right to appeal to a duly appointed judicial authority. Sub-

Section (8), on the other hand, relates for disposal of the thing or animal in the event of prosecution being instituted. Sub-Section (9) provides that confiscation would not act as a bar on punishment which may otherwise be imposed on the offender.

31. Thus, relevant for our purpose, under Section 72(1)(c) of the Act, any intoxicant, whether lawfully imported or not is made liable to confiscation in the event of offence punishable under the Act being found committed.

32. Though, a right of appeal given to the owner, under Section 72 of the Act is separate and distinct from the right of appeal under section 11 of the Act that a licensee may have against an order passed in terms of Rule 21 of the Rules, it may not necessarily imply that the original authority must therefore pass two separate orders, though he was otherwise vested with both the power to suspend or cancel the license and also the power to confiscate. The fact that he exercised the power compositely may only make a difference on the remedy that the petitioner may have against the order.

33. Thus, against the impugned order dated 05.05.2016, the petitioner may have had a right to appeal before the Appeal Authority, which was the Commissioner under Section 11 of the Act, insofar as that order related to the cancellation of license and denial of refund of security amount, but he may also have had a separate right of appeal against the other part of the order which relates to confiscation of lawful stock of liquor and cash. However, that difference of appeal forum made available to the petitioner would not lead to a different conclusion insofar as the interpretation is to be given to the language of Rule 21(3) of the Rules.

34. The submission of the learned counsel for the petitioner that no proceedings was instituted under Section 72 of the Act and therefore forfeiture of liquor is illegal is also found unacceptable in view of the reasoning given above. The show cause notice dated 29.9.2015 was a composite notice, both seeking cancellation of license and forfeiture of license fee and security deposit as also for confiscation of liquor. The petitioner also appears to have replied to that notice and participated in the proceedings. His reply, on merits, was considered and decided. In absence of any inherent lack of jurisdiction with the issuing authority, merely because the proceedings for confiscation of liquor are provided under Section 72 of the Act to be undertaken by the Collector, it would make no real difference since, as noted above the District Magistrate was the Collector and the Licensing Authority. The objection being raised by the petitioner is found to be cosmetic in nature and substantially unreal. Thus, as a fact the show cause notice was issued by the proper authority. It was replied to and thereafter the order had been passed in the prescribed manner after by following the procedure contemplated under Section 72 of the Act. Therefore, the proceeding did not suffer from defect of jurisdiction.

35. In view of the above, neither I consider it a proper or a fit case to now relegate the petitioner for the remedy of appeal before the District Judge in respect to the confiscation of lawful and unlawful stock and liquor. To that extent, I decline to exercise jurisdiction of Article 226 of

the Constitution of India in view of the facts that have transpired and the proceedings that the petitioner had already availed. Also, substantially the claim of the petitioner is found to be lacking on merit. Once the cancellation order has been accepted on merits, the petitioner lost all rights to deal with lawful or unlawful stock of liquor.

36. Insofar as the decision in the case of **Chandra Pal Singh Vs. State of U.P. & 4 Ors. (supra)** is concerned from a bare perusal of the order dated 27.05.2014, it appears that the State could not point out any provision of law to resist that petition. Though the SLP against that decision has been dismissed, the submissions similar to those advanced by the learned Standing Counsel, in the present case, appear to have been raised (in that case), only upon review petition being filed. It came to be rejected on a technical plea that the same would fall outside the scope of review. Thus since the decision in **Chandra Pal Singh Vs. State of U.P.& 4 Ors. (supra)** was based, practically on the concession made by the State, the further fact that the SLP therefrom may have been dismissed would not amount to any declaration of law, that may bind the Court. That decision would remain a decision on facts.

37. However, there is no provision of law which the learned Standing Counsel could refer to as may enable the excise authorities or the Collector to confiscate any amount of cash that may have been found at the time of inspection or survey. The cash found is clearly not excisable goods and there is no allegation or finding against the petitioner that the same were proceeds of unlawful trade in liquor. In view of the above, the amount of Rs. 17,530/- is liable to be refunded to the petitioner forthwith, in accordance with law. To that extent, the petition must succeed. It is declared that the excise authorities or the Collector had no authority to confiscate the cash Rs. 17,530/-.

38. Accordingly, the petition is partly **allowed**.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

CIVIL MISC. WRIT (TAX) PETITION NO. 311 of 2016

Cantonment Board, Meerut &Anr. ...Petitioners
Versus
M/S B.K. Das & Sons. ...Respondent

Counsel for the Petitioners:
Sri Udit Chandra

Counsel for the Respondent:
C.S.C., Sri Kiran Kumar Arora, Miss Priyanka Arora.

A. The Cantonment Act, 2006: Sections 73(a), 73(b), 76. The choice of method of valuation u/s 73(a) and 73(b) is legislatively predetermined—no discretion with the assessing authority. Adjudicatory procedure cannot be adopted to create law.

The two methods of valuation provided under Sections 73(a) and (b) are mutually exclusive. The choice of method to be adopted is legislatively pre-determined. There is no discretion or choice in that regard with the assessing authority. (Para 19)

B. Interpretation of S.73(a) – "any other building". Intention of legislature to identity and subject to similarly tax all buildings in class of buildings, on the basis of their identity emerging from use and not otherwise.

The words "any other building" appearing in S.73(a), appear after the words "hotels, colleges, schools, hospitals and factories". These preceding words clearly bring out the intention of legislature to identity and subject to tax certain buildings, on the basis of their user such as boarding accommodation for students etc.; educational institutions; hospitals and factories. (Para 22)

C. Notice issued u/s.73(a) is only a proposal and not a decision. Decision must precede and exist independent of the procedure for revision of assessment list. Adjudicatory procedure cannot be adopted to create a law. Otherwise, it would confer powers to pick and choose, and also deprive the owner/occupier of its right to file objections (u/s 76) to the revision. (Para 25-27, 29, 31-33)

D. In a case where CEO had not accepted the method of valuation proposed by respondent, it would have been proper for the Appellate Authority to remit the case to the CEO, to pass fresh order as per S.73(b). (Para 35) (E-4)

(Delivered by Hon'ble Saumitra Dayal Singh J.)

1. Supplementary counter affidavit titled 'Supplementary affidavit' has been filed today by the respondent. Taken on record. Learned counsel for the petitioner does not propose to file any response to the same. Accordingly, the matter has been heard.

2. Heard Sri Udit Chandra, learned counsel for the petitioner and Sri Kiran Kumar Arora, learned counsel for the respondent.

3. The present writ petition has been filed by the Cantonment Board, Meerut against the judgement and order dated 23.11.2015 passed by learned Additional District Judge, Court no.2, Meerut in Tax Appeal No. 06 of 2010. By that order, the learned court below has allowed the appeal filed by the respondent and set aside the revision of the assessment list made by the Cantonment Board, by its order dated 26.03.2009 passed under Section 73(a) of the Cantonment Act, 2006 (hereinafter referred to as the Act). Thereafter, the learned court below has itself revised the assessment list of the respondent under Section 73(b) of the Act and thereby fixed the Annual Rateable Value (ARV in short) of the buildings of the respondent, at Rs. 4,96,000/- for the period 2008 to 2011. Accordingly, the demand of tax has been directed to be taken out against the said respondent.

4. Admittedly, the respondent is the holder of the occupancy rights in Bungalow Nos. 170 & 170-A, Abu Lane, Kabari Bazar, Meerut Cantt. He appears to have let out part of those premises for commercial use while the remaining part of those premises is under his self-occupation. Portions of those buildings that have been let out are being used for running a car showroom, a bank and a shoe showroom.

5. By a notice dated 21.2.2009 issued by the Chief Executive Officer, Meerut Cantt, it was proposed to revise the ARV of the aforesaid properties being Bungalow Nos. 170 & 170-A. In the calculation sheet appended to the aforesaid notice, the method of proposed

revision was disclosed - Cost of Land = (Area x STR x 40 x 2) / 10. Thereafter, the cost of construction was disclosed at rate applicable to the constructed area and the Annual Rateable Value (ARV) was proposed to be calculated applying the formula - ARV = (Cost of land + Cost of Construction) / 20. The respondent filed his objections to the aforesaid notice and disputed the proposed computation. He relied on the annual rent received by him from letting out all parts of the premises. Thus, the method of computation of ARV proposed by the Cantonment Board was disputed.

6. The Chief Executive Officer, rejected that objection by his order dated 30.03.2009. In that order, the Chief Executive Officer referred to Section 73(a) of the Act and proceeded accordingly. Inasmuch as the notice for revision of the assessment had been issued disclosing the basis for that as provided under Section 73(a) of the Act, the actual rent received by the respondent was found not relevant, hence not considered.

7. In the appeal before the Additional District Judge, specific objections were raised that the procedure adopted under Section 73(a) of the Act was not applicable. The said objections found favour with the learned Additional District Judge, who has reasoned that there was no prior decision of the Chief Executive Officer to adopt the method provided under Section 73(a) of the Act, before proceeding to revise the ARV of the buildings of the respondent. Thereafter, the learned Additional District Judge has set-aside the revision to the assessment as made. Further, he has himself proceeded to consider the material on record and made a revision to the assessment on the basis of rent received i.e. he has proceeded to revise the ARV under section 73(b) of the Act.

8. Assailing the above order, learned counsel for the petitioner submits, in the first place, the notice dated 21.2.2009 read with the calculation sheet clearly disclosed the decision of the Chief Executive Officer to proceed to revise the ARV of the respondent under Section 73(a) of the Act. That notice was also acted upon and the respondent furnished his reply disclosing the computation under Section 73(a) of the Act at Rs. 95,00,000/-. Therefore, it has been submitted, there was no error in the assessment made by the Chief Executive Officer and the learned Additional District Judge has erred in setting aside that assessment.

9. Once the notice itself disclosed the decision made by the Chief Executive Officer to proceed under Section 73(a) of the Act, there was no further or other decision required to be taken or disclosed by him. Further, referring to the language of Section 76 of the Act, it has been submitted, learned Additional District Judge has completely erred in reaching the conclusion that there was no decision to proceed under Section 73(a) of the Act.

10. In that regard, it has also been submitted, no other interpretation can be given to the language of Section 73(a) of the Act inasmuch as if any other or separate decision were to be made, another step or condition would have been introduced before a notice for assessment may be issued. Neither there is such suggestion arising from a plain reading of the language of Section 73 of the Act nor

there is any procedure provided therefor. Therefore, the order passed by the learned Additional District Judge is patently erroneous. On the other hand a complete opportunity to rebut the proposed revision of assessment was available to the respondent under Section 76 of the Act, which had also been availed.

11. Alternatively, it has been submitted, in any case, the Cantonment Board had never made any assessment under Section 73(b) of the Act and that course should have been left open to the Cantonment Board to be adopted if the assessment made under Section 73(a) of the Act was being set-aside but no final assessment could have been made at the hands of the appellate authority.

12. Responding to the above, Shri Arora submits, Section 73 of the Act provides for definition of "Annual Rateable Value" (ARV in short) of different premises. It reads:

*"**73. Definition of "annual rateable value**"- For the purposes of this chapter, "annual rateable value" means-*

(a) in the case of hotels, colleges, schools, hospitals, factories and any other buildings which the Chief Executive Officer decides to assess under this clause, one-twentieth of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appertaining thereto; and

(b) in the case of building or land not assessed under clause (a), the gross annual rent for which such building exclusive of furniture or machinery therein or such land is actually let or, where the building or land is not let or in the opinion of the Chief Executive Officer is let for a sum less than its fair letting value, might reasonably be expected to let from year to year:

Provided that, where the annual rateable value of any building is, by reason of exceptional circumstances, in the opinion of the President Cantonment Board, excessive if calculated in the aforesaid manner, the President Cantonment Board may fix the annual rateable value at any less amount which appears to him to be just".

13. In the first place, under sub-section (a), a method has been provided to compute the ARV. By very nature, such a method would lead to the computation of the highest ARV as the value of the land and the present value of the construction form the basis for such computation, which value is bound to escalate with time while actual rent payable for such premises may or may not increase, correspondingly or proportionately.

14. The Act has prescribed that method for assessment of the ARV of buildings where hostels, colleges, schools, hospitals and factories are being run. Admittedly, the present buildings do not fall under that description. Then, "any other building" that may be subjected to that highest ARV would have to be first included or notified by a decision made by the Chief Executive Officer. Inasmuch there was no prior decision of the Chief Executive Officer to apply the provisions of Section 73(a) of the Act to the class of buildings, namely, banks, car or other showrooms, section 73(a) of the Act could not have been applied for the purpose of making the revision to the ARV of such building/s.

15. Even at the stage of the original assessment, in his objection, the respondent had clearly relied on the actual rental value of the premises in question as the basis to determine their ARV and had thereby relied on section 73(b) of the Act. Only in the alternative, by way of argument, it had offered valuation in accordance with Section 73(a) of the Act.

16. As to the assessment made by the Appellate Authority, it has been submitted, the actual rental value of the premises, as disclosed by the respondent, was never disputed by the Cantonment Board and, therefore, the Appellate Authority has not erred in accepting the same in the interest of bringing a closure to an old dispute. Even in the present petition, the computation offered by the respondent has not been disputed on facts. Therefore, the present writ petition deserves to be dismissed.

17. Having heard learned counsel for the parties and having perused the record, in the first place, it cannot be said that the respondent had not objected to the method of assessment proposed in the notice dated 21.02.2009. While the ARV was proposed to be revised solely on the basis of method provided under Section 73(a) of the Act, the respondent clearly objected to the same and offered the properties for assessment on the basis of actual rent received. Therefore, the respondent had clearly invoked the provision under Section 73(b) of the Act as the correct basis for making the assessment.

18. Then, the statutory intendment is clear. ARV of "all other buildings", falling outside the description of buildings used to run hostels, colleges, schools, hospitals and factories may, in the first place may be determined under Section 73(b) of the Act, i.e. on the basis of the gross annual rent for which such building is actually let. That value may be much lower and in any case would be different from the value determined under Section 73(a) of the Act owing to difference in method of computation. Besides the fact that the value of the land appurtenant and current value of construction of such building are not to be included in the ARV, in any case, the actual rent received may have too far fetched and/or no direct or proportionate or rationale connection with the total value of the property in question.

19. Also, it plainly emerges from a reading of section 73 of the Act that the two methods provided thereuder are mutually exclusive. The choice of the method to be adopted to estimate the ARV of any particular building is legislatively pre-determined. Under the mandatory prescription made by the legislature, the ARV of the types of buildings classified under sub-clause (a) of section 73 of the Act, alone has to be determined in the manner prescribed under that provision of law. Similarly, all other buildings have to be subjected to determination of ARV under section 73(b) of the Act, according to the method prescribed thereunder. There is no discretion or choice in that regard with the assessing authority to choose one or the other method. That choice is legislatively governed.

20. Therefore, in such fact and in such position of law, the objections are found to clearly bring out that the respondent had taken a categorical stand that the property be assessed under

Section 73(b) of the Act on the basis of actual rent received and not on the basis of value of the land and the current value of erection of all construction existing thereon. By way of an alternative stand, the respondent had disclosed the value for the purposes of Section 73(a) of the Act. It would not, in any way, dilute the objection that the properties could not be assessed under Section 73(a) of the Act. In view of the mandatory legislative intent noted above, there is no room to consider acquisence or estoppel, contrary to law. Thus, it has to be accepted that the respondent had objected to the method adopted by the Chief Executive Officer under Section 73(a) of the Act.

21. Coming to the core issue, whether the properties could have been assessed under Section 73(a) of the Act, that provision of law provides a special method for computation of the ARV with respect to class of buildings namely hostels, colleges, schools, hospitals and factories. While generally, all buildings (irrespective of their use), are subjected to tax on the basis of their ARV assessed under section 73(b) of the Act, certain specified categories or class of buildings have been excluded from applicability of the general method provided under Section 73(b) of the Act, on the basis of their user. They must necessarily be assessed to tax by the Cantonment Board by applying the method provided under section 73(a) of the Act i.e. one-twentieth of the sum total of the value of the land and the estimated present cost of construction of the building standing thereon.

22. The car and other showroom and bank being run in the buildings of the respondent clearly and admitedly do not fall in the description of buildings specifically given in section 73(a) of the Act. They are neither hostels nor colleges nor schools nor hospitals nor factories. Then coming to the power delegated by the legislature upon the Chief Executive Officer of the Cantonment Board, to include "any other building" to which the method of determination of ARV provided under section 73(a) may be applied, in the first place the power delegated is legislative not executive. Then, the words "any other building" appearing in section 73(a) of the Act, appear after the words "hostels, colleges, schools, hospitals and factories". These preceeding words clearly suggest or bring out the intention of the legislature to identify and subject to tax certain buildings (by following the method specified therein), on the basis of their user such as boarding accomodation for students etc.; educational institutions; hospitals and factories.

23. Therefore reading the entire provision of section 73(a) consistently the phrase "any other building" may be also read as referring to any building identified as a class/type of buildings, chosen on the basis of general use to which it is put and not on the basis of its ownership or individual sub-identity. Just as all hostels or all colleges or all schools or all hospitals or all factories, without any exception would be subjected to assessment in accordance with provisions of section 73(a) of the Act, so also, "any other building" that may be included by delegated legislative action would have to belong to a class of building identified by its user such that all buildings being put to similar use would necessarily be simultaneously subjected to the same method of valuation of ARV.

24. The legislature has clearly chosen to first specify certain class/type of buildings, on the basis of their user as the basis to apply the exceptional or special method of valuation of their ARV. In absence of other any statutory indication to the contrary, the language in the later part of the sub-section must be read in consonance with that inherent/underlying legislative intent or guideline. The same basis or criteria must bind the delegate of the legislature in exercise of his powers, to include and thus subject to tax "any other building" in accordance with the method contained in section 73(a) of the Act.

25. Even otherwise, if the submission being advanced by learned counsel for the petitioner is to be accepted, though in the first place, Section 73(a) of the Act would apply to a class of buildings namely hostels, colleges, schools, hospitals and factories but the Chief Executive Officer could chose to adopt the method provided under that sub-section to one particular building belonging to any other class and leave out the remaining buildings of the same class.

26. Thus, the Chief Executive Officer of the Cantonment Board could include one car or other showroom or bank within the scope of Section 73(a) of the Act while leaving all other similarly situated car or other showrooms or banks from the ambit of that provision. It would lead to grossly different property assessments being made within the same cantonment area, though the nature and use of all such buildings may be the same and even though they may be situated in vicinity and even though they may be owned by the same person and be fetching exactly same amount of actual annual rent.

27. The said interpretation would in effect allow the Chief Executive Officer to pick and choose according to his whims and fancies, some of the buildings to a higher rate of tax while leaving out all others in the same class. Besides the fact that such interpretation would be plainly arbitrary it would be wholly contrary to the legislative intent contained in the first part of the Section 73(a) of the Act where the legislature itself has chosen to subject all occupants of same category of buildings to be treated similarly, based on the objective criteria of use to which the buildings have been put. If allowed it would necessarily introduce plain arbitrariness and hostile discrimination in the enforcement of law.

28. Second, in the facts of the present case, there does not appear to exist any decision by the Chief Executive Officer to subject car or other showrooms or banks to tax or revision of tax under Section 73(a) of the Act. No decision has been brought on record nor any communication issued by the Chief Executive Officer has been brought on record in that regard. Therefore, that power is not shown to have been exercised. Hence, it was not open to the Chief Executive Officer to apply the provisions of Section 73(a) of the Act against the respondent.

29. Still otherwise, if it is assumed that the power under section 73(a) of the Act could be applied to subject individual building/s to the method of determination of ARV provided therein, the submission that the notice dated 20.02.2009 itself contained the decision of the Chief Executive Officer to invoke Section 73(a) of the Act also cannot be accepted. That decision must, by very nature, precede

and also be shown to exist independent of the procedure for the revision of the assessment list.

30. The proposal to revise the assessment list is a proposal to which the owner or occupier has a right to object by virtue of Section 76 of the Act. Therefore, normally there would arise objections that any particular building does not subscribe to the description of class or type of buildings specified under section 73(a) of the Act and/or to the valuation proposed of such a building, however, it cannot be contemplated that in such proceedings it may be objected and thereafter adjudicated whether a building be included thereunder or be subjected to that method of valuation.

31. Whether there exists a decision to provide for a category specification of the building (that may be subjected to such revision under Section 73(a) of the Act) or not either by plain declaration made by the principal legislature (or by his delegate, the Chief Executive Officer), is a matter of existence or otherwise of statutory law - whether by way of principal legislation or delegated legislation. The only issue that may fall for consideration is the existence or otherwise of such law or whether the subject building ascribes to that law. However, this adjudicatory procedure cannot be adopted or be utilised to create a law. It would remain a matter that would fall outside the scope of the Section 76 of the Act. Such decision would remain a legislative action and therefore it must be shown to exist independent of the notice containing the proposal to revise the assessment. Even otherwise, the notice issued under section 73(a) of the Act is only a proposal and not a decision, which may or may not be enforced upon the final order being passed.

32. In other words, the proposal to revise the assessment is consequential to the decision of the Chief Executive Officer that must precede the issuance of the notice. Unless a decision is first made to categorize buildings to be subjected to the higher/different method of valuation under section 73(a) of the Act, it cannot be left open to the Chief Executive Officer to issue a notice seeking to revise such assessment.

33. Keeping in mind that the decision to be made by the Chief Executive Officer would be an act of delegated legislation there cannot be allowed to exist any ambiguity about its existence. The decision must be clearly taken and disclosed to all before any notice may be been issued to revise the assessment list on that basis. Any ambiguity about its pre-existence may invalidate the exercise of the power itself.

34. The further submission advanced by the learned counsel for the petitioner that there is no procedure provided for making the decision by the Chief Executive Officer, to include any other buildings within the scope of Section 73(a) of the Act, does not appeal to reason. While making such a decision, the Chief Executive Officer acts as a delegate of the legislature and not as a quasi-judicial authority. Therefore, principally, there is neither any procedure required to be followed to exercise that power, nor rules of natural justice have any application to that exercise.

35. However, the last submission advanced by the learned counsel for the petitioner does merit acceptance, inasmuch as the Chief Executive Officer has only made assessment under Section

73(a) of the Act and had not applied his mind to the nature of objections raised by the respondent nor he considered the material produced with reference to Section 73(b) of the Act. In such a case, where the applicability of Section 73(a) of the Act was in dispute, the CEO had not accepted the method of valuation proposed by the respondent, it would have been proper for the Appellate Authority to remit the case to the Chief Executive Officer, to pass a fresh order in accordance with Section 73(b) of the Act.

36. Accordingly, the writ petition succeeds in part. While findings of the Appellate Authority regarding the assessment made under Section 73(a) of the Act being illegal are wholly proper and are thus sustained, the later part of the order making quantification/ assessment under Section 73(b) of the Act is found to be pre-mature and is accordingly set-aside. The matter is remitted to the Chief Executive Officer, Cantonment Board, Meerut Cantt, to pass a fresh order, in light of the observations made above, as expeditiously as possible, preferably within a period of three months from today, after affording reasonable opportunity of hearing to the respondent.

37. The writ petition is accordingly **partly allowed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Civil Misc. Writ Petition No. 78 of 2018

M/s Camphor & Allied Products Ltd.
...Petitioner
Versus
Unionof India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Kartikeya Narain

Counsel for the Respondents:
A.S.G.I., Sri Ramesh Chandra Shukla, S.C.

A. Interpretation – Period of limitation to file rebate claim. General and Special law - Central Excise Act, 1944: Section 11B- Central Excise Tariff Act, 1985: First Schedule read with Rule 18 Central Excise Rules, 2002; Central Excise Notification No. 19/2004 dated 06.09.2004 (Clauses (2), 3(b), 3(c)) and; Central Excise Notification No. 18/2016 dated 01.03.2016. Special law to prevail over general law.

Notification contains special scheme of rebate to exporters. It is a self-contained code. It does not prescribe any limitation for filing a rebate claim. General period of limitation provided under Section 11B of Central Excise Act, does not apply to such a special case. No time limit to file rebate claim by exporter.

The petitioner filed claims for rebate of excise duty more than one year after the actual shipment of the goods. Adjudicating authority rejected the claims as barred by time u/s 11B. The appeals, and further revisions filed against the orders of the appellateauthority, were also rejected. Allowing the present petition, the High Court. Held:- Notification No. 19/2004 provided a special and comprehensive scheme for filing rebate claims by exporters. Notification No. 19/2004 was a self-contained code in respect of matters covered under the Notification. The general provisions in Section 11B of the Central Excise Act, would not apply while considering the rebate claims covered by Notification No. 19/2004. No time limit for filing rebate claims was provided under Notification No. 19/2004 till its amendment by Notification No. 18/2016 with effect from 01.03.2016. (Para 34, 35, 36, 37)

Precedent followed: -
1. DCCE Vs. Dorcas Market Makers Pvt. Ltd., 2015 (321) ELT 45 (Mad.) (Para 15, 27, 28, 29, 37, 40)

2. CCE Vs. Ram Swarup Electricals Ltd., 2007 (217) ELT 12 (All.) (Para 15, 25, 38, 40)

3. JSL Lifestyle Ltd. Vs. UOI, 2015 (326) ELT 265 (P&H) (Para 15, 30, 40)

4. CCE Vs. Raghuvar (India) Ltd., 2000 (118) ELT 311 (SC) (Para 15, 16, 17, 21, 25, 27, 28, 30, 31, 38, 39, 40)

Precedent distinguished: -
Everest Flavours Ltd. Vs. UOI, 2012 (282) ELT 481 (Bom.) (Para 15, 16, 20, 27, 29, 30, 40)

Writ Petition from order dated 11.10. 2017 by Addl. Sec. GOI (E-4)

(Delivered by Hon'ble Saumitra Dayal Singh J.)

1. The present writ petition has been filed against the order dated 11.10.2017 passed by the Additional Secretary to the Government of India, in a revision application filed by the petitioner under Section 35EE of the Central Excise Act, 1944 (hereinafter referred to as the 'Act'). That revision had been filed against the order/s-in-appeal dated 16.12.2013 and 21.03.2014 passed by the Commissioner, Central Excise (Appeals-I), Kolkata. Those appeals had arisen from the order(s)-in-original dated 03.09.2013, 16.09.2013 and 29.01.2014. By those orders-in-original, the claims for rebate from duty (by the petitioner on export of Camphor USP) were rejected, as time barred.

2. The facts giving rise to the present writ petition are that the petitioner is a manufacturer of Camphor USP falling under Chapter sub-heading 29142120 of the Central Excise Tariff Act, 1985. By Central Excise Notification No. 19/2004 dated 06.09.2004, the Central Government in exercise of its powers under Rule 18 of the Central Excise Rules, 2002 (hereinafter referred to as the 'Rules'), in supersession of earlier notifications, granted rebate on the whole of the duty paid on all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985, when exported to any country, other than Nepal and Bhutan. The said rebate was made subject to the conditions, limitations and procedures specified in that notification. Rule 18 of the Rules read as under:

*"**Rule 18. Rebate of duty.** - Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.*

Explanation. - For the purposes of this rule, "export", with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India and includes shipment of goods as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft."

3. The conditions and limitations for providing the rebate are contained in clause (2) of that notification. They read as below:

*"**(2) Conditions and limitations :-***

(a) that the excisable goods shall be exported after payment of duty, directly from a factory or warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order;

(b) the excisable goods shall be exported within six months from the date on which they were cleared for export from the factory of manufacture or warehouse or within such extended period as the Commissioner of Central Excise may in any particular case allow;

(c) that the excisable goods supplied as ship's stores for consumption on board a vessel bound for any foreign port are in such quantities as the Commissioner of Customs at the port of shipment may consider reasonable;

(d) the rebate claim by filing electronic declaration shall be allowed from such place of export and such date, as may be specified by the Board in this behalf;

(e) that the market price of the excisable goods at the time of exportation is not less than the amount of rebate of duty claimed;

(f) that the amount of rebate of duty admissible is not less than five hundred rupees;

(g) that the rebate of duty paid on those excisable goods, export of which is prohibited under any law for the time being in force, shall not be made."

4. As to the presentation of claim for rebate to Central Excise, the procedure is prescribed under clause 3(b) and 3(c) of that notification. They read as under:

*"**3 (b) Presentation of claim for rebate to Central Excise:-***

(i) Claim of the rebate of duty paid on all excisable goods shall be lodged alongwith original copy of the application to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, the Maritime Commissioner;

(ii) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part.

***3(c) Claim of rebate by electronic declaration** :- An exporter may enter the requisite information in the shipping bill filed at such place of export, as may be specified by the Board, for claiming rebate by electronic declaration on Electronic Data Inter-change system of Customs. The details of the corresponding application shall be entered in the Electronic Data Inter-change system of Customs upon arrival of the goods in the Customs area. After goods are exported or order under Section 51 of the Customs Act, 1962 (52 of 1962) has been issued, the rebate of excise duty shall, if the claim is found in order, be sanctioned and disbursed by the Assistant Commissioner of Customs or the Deputy Commissioner of Customs."*

5. Undisputedly, the petitioner exported its final product, namely Camphor USP to countries other than Nepal and Bhutan. The disputed transactions are ten such transactions performed between the

period February 2012 to October 2012. Again, undisputedly, the petitioner claimed rebate from payment of duty on such exports beyond one year from the date of shipment being dispatched. Thus, the refund claims were made during the period February 2013 to October 2013, such that in each case the claim came to be made more than a year after the actual shipment of the goods.

6. All ten claims came to be rejected by separate orders dated 03.09.2013, 16.09.2013 and 29.01.2014, as time barred under the provisions of Section 11B of the Act. For ready reference, the relevant extract of Section 11B of the Act is quoted below:

"SECTION [11B. Claim for refund of [duty and interest, if any, paid on such duty].-(1) *Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person :*

... ...

[Explanation.- *For the purposes of this section,-*

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,-

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;"

7. The petitioner's appeals against the aforesaid orders also came to be rejected. Those orders have been affirmed by the revising authority by the order impugned in the present writ petition.

8. Heard Shri Nishant Mishra assisted by Shri Tanmay Sadh and Shri Kartikeya Narain, Advocates, for the petitioner and Shri Ramesh Chandra Shukla, learned Senior Standing Counsel for the revenue.

9. Learned counsel for the petitioner submits, in the first place, the scheme for grant of rebate from payment of excise duty was a separate scheme under the Rules read with Notification no. 19/2004 dated 06.09.2004 distinct from the scheme for levy of excise duty under the Act. The petitioner did not claim refund

of excise duty paid by it rather, it made a separate and distinct claim of rebate. Section 11B of the Act inter alia prescribed the period of limitation to make a claim for refund only. It had no applicability to a claim for rebate. Therefore, in is his submission the provisions of Section 11B of the Act that provide for refund of duty paid in excess are not applicable to claims of rebate from excise duty claimed by the present petitioner.

10. Alternatively, it has been submitted, even if the claim of rebate being claimed is treated at par with a claim for refund (in view of the language of Explanation (A) appended to Section 11B of the Act) then, the rebate from excise duty on goods exported by the petitioner was a special beneficial scheme. Section 11B of the Act has no applicability in the same.

11. Then, referring specifically to the method of presentation of claim for rebate provided under clauses 3(b) and 3(c) of the notification, it has been further submitted that the Central Government had provided a special procedure for making a claim for rebate from payment of excise duty. It stipulated lodging of that claim with the designated authority in original. Moreover, under clause 3(c) of the notification, that claim had been permitted and provided to be made by electronic declaration. While providing that special procedure, again, the Central Government did not deem fit to provide for a period of limitation or to incorporate the period of limitation provided under Section 11B of the Act.

12. Rule of limitation of one year cannot be read into such special procedure to bar the claim made by the petitioner within and otherwise reasonable period. Here, it would be the submission of the learned counsel for the petitioner that being money claim, the reasonable period cannot be assumed to be lesser than three years as contemplated under the general rule under the Limitation Act.

13. Then, referring to Notification No. 18 of 2016 dated 01.03.2016, it has been submitted, later, the Central Government had specifically introduced the rule of limitation in the scheme of rebate from excise duty, arising under Notification No. 19/2004 dated 06.09.2004. With effect from 01.03.2016, it provided, such claims be made before expiry of the period specified under Section 11B of the Act. Thus, the delegate of the legislature had, for the first time, amended the stipulation of limitation provided under the notification dated 06.09.2004 and consequently introduced a further condition by way of rule of limitation to make a claim for rebate.

14. The aforesaid amendment having been made prospectively, according to the learned counsel for the petitioner, the same cannot be read into the fact situation of the present case. The claim of the petitioner had arisen about two years prior to the amendment to that law. The same was wholly valid and maintainable and would be governed by the unamended law.

15. Reliance has been placed on the decisions of the Supreme Court in the case of **CCE Vs. Raghuvar (India) Ltd., 2000 9118) ELT 311 (SC)**, as followed in **CCE Vs. Ram Swarup Electricals Ltd., 2007 (217) ELT 12 (All.); DCCE Vs. Dorcas Market Makers Pvt. Ltd., 2015**

(321) ELT 45 (Mad); and JSL Lifestyle Ltd. Vs. UOI, 2015 (326) ELT 265 (P&H). Also, great stress has been laid to distinguish the judgment of a Division Bench of the Bombay High Court in the case of **Everest Flavours Ltd. Vs. UOI, 2012 (282) ELT 481 (Bom)**. In that regard, it has been submitted that the ratio of the judgment of the Supreme Court in the case of **Raghuvar (India) Ltd. (supra)** contained in paragraphs 14 and 15 of that report had remained from being considered by the Bombay High Court. Therefore, that decision does not lay down the correct law. On the other hand, stress has been laid on the decisions of the Madras and Punjab and Haryana High Courts in the cases of **Dorcas Market Makers Pvt. Ltd (supra) and JSL Lifestyle Ltd.(supra)** noted above, to submit, those decisions had taken note of the complete ratio of the decision of the Supreme Court in the case of **Raghuvar (India) Ltd. (supra)** and, therefore, they lay down the correct law.

16. The reasoning of the revising authority, insofar as it has followed the decision of the Bombay High Court in **Everest Flavours Ltd. (supra)**, has been assailed as incomplete. The points of distinction noted by the Madras High Court and Punjab & Haryana High Court in their respective decisions, flowing from the ratio embedded in paragraphs 14 and 15 of the decision of the Supreme Court in **Raghuvar (India) Ltd.** has been completely misread or not appreciated by the revising authority. Also, it has been submitted, the revising authority has otherwise failed to independently consider the submission advanced by the petitioner that the rule of limitation contained in section 11B of the Act could not be applied to the claim of rebate made by the petitioner (prior to the amendment), has not been decided.

17. Opposing the present petition, Shri Shukla, learned standing counsel for the revenue submitted, the decision in the case of **Raghuvar (India) Ltd. (supra)** is wholly distinguishable. In that case, the question involved was with respect to recovery of MODVAT wrongly availed. The Supreme Court had the occasion to consider the provisions of Section 11A of the Act and Rule 57-I of the old Rules (with respect to grant of MODVAT). In that context it had been reasoned that Section 11A of the Act is not an omnibus provision of limitation for all or any kind of action taken under the Act or the Rules but that it would attract only to cases where duty of excise had not been levied or paid or had been short levied or short paid or erroneously refunded. That position of law was distinguished and held inapplicable to enforce a recovery of MODVAT wrongly availed.

18. In that case, it was the manufacturer who claimed the benefit of Section 11A of the Act by stating - no recovery could be made from him beyond the period of one year limitation under Section 11A of the Act. The Supreme Court negated that claim, amongst others, on the reasoning - a recovery contemplated under Section 11A is different and distinct from recovery of MODVAT wrongly claimed. For reaching that conclusion, the Supreme Court considered the separate nature of duty liabilities contemplated under Section 11A of the Act and the MODVAT scheme enforced by Rule 57A to 57P of the old Rules.

19. The above position does not arise in the present case, inasmuch as by

virtue of Explanation (A) appended to Section 11B, all claims of rebate from excise duty have been specifically included in the statutory definition of claims for refund. By virtue of that statutory inclusion, any distinction that may otherwise have existed between the true meaning, purport and scope of a refund claim and a rebate claim, has been rendered inconsequential and extraneous.

20. Therefore, in his submission, under the Act, their do not exist two separate provisions providing limitation to file claims for refund and rebate. A claim of rebate and claim of refund are one and same for the purpose of Section 11B of the Act. Consequently, in his submission, the rule of limitation provided under Section 11B of the Act would apply with equal force to a claim of rebate. He has placed full faith in the decision of the Bombay High Court in the case of **Everest Flavours Ltd. (supra).**

21. Having heard learned counsel for the parties and having perused the record, in the first place, it would be fruitful to consider the ratio of the Supreme Court in the case of **Raghuvar (India) Ltd. (supra).** As noted above, it was a case where the revenue was seeking to recover from the manufacturer MODVAT wrongly availed. While the entitlement to availment of MODVAT arose to the manufacturer with effect from 10.03.1987, it availed MODVAT credit with respect to inputs purchased by it with effect from 01.03.1987. This ultimately gave rise to the dispute of Rs. 41,872.68/- which the manufacturer refused to reverse, despite notice by the revenue. According to the manufacturer, that demand had been made beyond of limitation (one year) under Section 11A of the Act.

22. Upon consideration of the provisions of Section 11A of the Act as also Rule 57-I of the Rules, both prior to the amendment and after the amendment made on 05.10.1988, the Supreme Court held - the provisions of Section 11A of the Act were not an omnibus provision and that the situation arising before it had to be dealt with according to the unamended Rule 57-I of the Rules because section 11A was the law to provide for recoveries of excise duty not-levied or not-paid or short-levied or short-paid while Rule 57-I was the law for availment of MODVAT credit, a completely separate or different contingency, not covered under section 11A of the Act. Insofar as the Rule 57-I did not provide for any period of limitation and did not borrow the rule of limitation from Section 11A of the Act, by way of first reason, the Supreme Court rejected the defence set up by the manufacturer and held the recovery sought by the revenue to be within time.

23. However, the above was not the only reason given the Supreme Court to reject the defence set up by the manufacturer. By way of an alternative but equally binding reasoning contained in paragraph no.14 of the report, it was held, even if the first reasoning were not to operate or be applicable, then, applying the rule - special law would prevail over a general law. It was held the MODVAT scheme was a special scheme while the rule of limitation contained in Section 11A was a general law. The scheme of MODVAT was found to be a special scheme with self-contained procedure, manner and method for its implementation, providing for its own remedies to undo any mischief

committed by the manufacturer and any abuses thereof.

24. In such facts the provisions of the scheme (special law), alone were found to govern the situation. It was held - there was no scope to read the stipulations (of limitation) contained in the general provision of law (Section 11A of the Act), in the special law. Then, by way of third reasoning, it was further held, in any case, the MODVAT scheme underwent an amendment on 06.10.1988 whereby period of limitation of six months was introduced to Rule 57-I. That amendment being purely prospective in nature, it was held that it did not apply to past transactions.

25. The above decision of the Supreme Court was followed by the division bench of this Court in the case of **Ram Swarup Electricals Ltd. (supra)**, though in that case, the question was different (from the one involved here), being whether short availed MODVAT credit would constitute refund claim and accordingly be subject to the rule of limitation contained in Section 11B of the Act. The division bench, after taking note of the reasoning of the Supreme Court in the case of the **Raghuvar (India) Ltd. (supra)** in paragraph nos. 13, 14 and 15, held as below:

"7. In view of the principle laid down by the Apex Court in Raghuvar (India) Ltd. (supra) provisions of Section 11A of the Act is not attracted and cannot be imparted in respect of the Rules framed for availing of the Modvat, the same principle would apply for the purpose of Section 11B of the Act also. In view of the decision of the Apex Court in Raghuvar (India) Ltd. (supra) the law laid down by the Gujarat High Court in the case of Wipro Ltd. (supra) cannot be said to be a good law any more. We are, therefore, of the considered opinion that provisions of Section 11B of the Act is not attracted in the case of Modvat which is governed by Rules 57A to 57P. Further, during the relevant period no limitation had been provided for availing of the Modvat credit and the amendment in Rule 57G prescribing the limit of six months was introduced on 29th June, 1995 which has prospective effect. Thus, the respondents were within their right to avail the short fall in the Modvat credit at any time."

26. Thus, it was held that the claim of the MODVAT would remain governed by Rule 57A to Rule 57B of the old Rules and Section 11B of the Act would have no application.

27. The Bombay High Court in the case of **Everest Flavours Ltd. (supra)** was considering a case of rebate from payment of duty under the same notification which falls for consideration in the present case. Again, an objection had been taken by the revenue that the claim was time barred, it having been filed beyond one year from the relevant date, The decision of the Supreme Court in **Raghuvar (India) Ltd. (supra)** and the single judge decision of the Madras High Court in **Dorcas Market Makers Pvt. Ltd (supra)** were cited. Plainly, the division bench of the Bombay High Court negated the challenge raised on the reasoning that the claim for rebate was time barred. It held the reasoning in **Raghuvar (India) Ltd. (supra)** was not applicable to the claim for rebate from duty made in view of the fact that a claim for rebate from duty had been brought

within the purview of Section 11B of the Act, under Explanation (A) thereto. It was held, since the application for rebate from excise duty had been specifically included within the ambit of refund, therefore, the ratio in the case of **Raghuvar (India) Ltd. (supra)** was inapplicable.

28. Thereafter, the division bench of the Bombay High Court considered the ratio of **Dorcas Market Makers Pvt. Ltd (supra)** of the Madras High Court and distinguished it for the reason noted above. However, it clearly appears (from plain reading of its decision), that the second and the third limb of reasoning in the decision of the Supreme Court in the case of **Raghuvar (India) Ltd. (supra)** had not been relied before the Bombay High Court. For that reason, it does not appear to have been considered or dealt with.

29. On the other hand, the decision of learned single judge of the Madras High Court in **Dorcas Market Makers Pvt. Ltd (supra)** became a subject matter on intra-court appeal before that court wherein division bench decision of the Bombay High Court in **Everest Flavours Ltd. (supra)** was relied by the revenue. The decision in the case of **Dorcas Market Makers Pvt. Ltd (supra)** was also a case of rebate from excise duty, claimed under the same notification as is under consideration in the present case. The division bench of the Madras High Court took note of Rule 12 of the old Rules governing rebate, which provisions are reflected and are pari materia to Rule 18 of the Rules under consideration in the present case. Also, the distinction between the rebate claimed and a refund claim with reference to the judgement, decree or order of the Court had also been taken note of and relied upon to bring out a distinction as to the start of period of limitation for the purpose of Section 11B of the Act.

30. Further, it had been noted, prior to introduction of notification dated 06.09.2004, under the pre-existing notification, there was a time period prescribed for making a claim. The same was done away by the notification under consideration. Therefore, an intendment of the delegate of the legislature had been inferred, to not prescribe any period of limitation to make a rebate claim. That period was however re-introduced by the subsequent amendment vide notification dated 01.03.2016. The decision of the Bombay High Court was thus distinguished. Similar view has been taken by the Punjab & Haryana High Court in the case **of JSL Lifestyle Ltd. Vs. UOI (supra)** where again the revenue sought to rely upon the decision of the Bombay High Court in **Everest Flavours Ltd. (supra)**. Again, the Punjab & Haryana High Court considered the ratio laid down by the Supreme Court in **Raghuvar (India) Ltd. (supra)**. **Everest Flavours Ltd. (supra)** was distinguished on count of the second and third limb of the reasoning contained in paragraph nos. 14 and 15 of the decision of the Supreme Court having not been considered by the Bombay High Court. It may be a fact that the special leave petitions filed against the decision of the Madras and the Bombay High Courts may have been dismissed. However, it may not be decisive of the issue as it is not the case of either party that either of those special leave petitions were decided by any detailed order.

31. First, there can be no doubt that the reasoning of the Supreme Court in the

case of **Raghuvar (India) Ltd. (supra)** does not apply with all force, inasmuch as the first reasoning contained in that case arose on account of a complete difference between a claim for recovery of duty not-levied or not-paid or short-levied or short-paid and recovery of MODVAT wrongly availed. There was no provision under Section 11A of the Act whereby recovery for MODVAT wrongly availed could be considered the same or treated at parity with duty not-levied or not-paid or short-levied or short-paid. To that extent, the decision of the Supreme Court is wholly distinguishable, in view of the clear intendment of the statute where under by virtue of Explanation (A) to section 11B of the Act, a claim for rebate of duty has been specifically included in a claim for refund of duty.

32. However, it still falls for consideration whether in view of the further reasoning of the Supreme Court there exists any special law governing the claims for rebate from excise duty and whether the amendment made introduces the rule of limitation, only prospectively. Looking into the clear language of the notification, it appears that in the first place, the delegate of the legislature i.e. Central Government, in exercise of the powers under Rule 18 of the Rules read with Section 37 of the Act provided that the claim for rebate from excise duty shall be subject to the conditions, limitations and procedures specified in the notification itself.

33. The notification, read in its entirety, does not, in any way or manner suggest that it adopts the rule of limitation contained in Section 11B of the Act or that the conditions and limitations imposed under the notifications are in addition to those contained under the general provisions of the Act. It is also not the case of the revenue that other than the Section 11B of the Act, there existed any other provision of law as may have expressed an intendment of the legislature to restrict the claims for rebate from duty, in any other manner. In fact, under the scheme of the Act, the rebate provisions are not provided for by any Act of principal legislation but only through delegate legislation.

34. Even otherwise, the scheme for rebate under Rule 18 of the Rules read with Notification No. 19 of 2004 dated 06.09.2004 is a special law granting rebate from excise duty to exporters. It is not a scheme for general rebate (under section Explanation A to 11B of the Act). The rebate is not a general rebate from excise duty (that may be otherwise available under the Act). The scheme to grant rebate from excise duty on goods exported by the petitioner was a special beneficial scheme provided under Section 37 of the Act read with Rule 18 of the Rules and notification No. 19 of 2004 dated 06.09.2004, to provide incentive to manufacturers to export their manufactured goods. It was a self contained scheme. The conditions, limitations and procedures for grant of such rebate were (under the scheme of the Act) governed especially by the procedures and conditions stipulated under the notification dated 06.09.2004. The Central Government while issuing that notification, acted on its wisdom and provided for only such conditions and limitations as were considered fit and necessary for the purpose of granting the rebate.

35. None of the conditions and limitations provided under the aforesaid notification were such as may be read to

contain a stipulation of limitation of one year from the relevant time or from the date of shipment etc. for the purpose of making a claim for rebate. There is no room to add to those conditions and limitations by reading the general provisions of section 11B of the Act into it.

36. Looked from that perspective, it does appear, all the conditions and limitations the legislature wanted to introduce for grant of special rebate from excise duty (in the case of export of excisable goods), were stipulated in the notification itself. It was self contained. Even for the purposes of the presentation of a claim for rebate, the manner and mode had been prescribed under clauses 3(b) and 3(c) of the notification alone. Again there was no suggestion to limit those claims by the general prescription of time contained in section 11B of the Act.

37. Further, in that background, the amendment notification is relevant. Thereby under Clause 3(b), sub-paragraph (I), the words "before the expiry of the period specified in Section 11B of Central Excise Act, 1944 (1 of 1944)" have been introduced for the first time. Clearly, that amendment has been made prospectively from 01.03.2016 and there is no intendment either explicit or implied to make it retrospective. As discussed by the Madras High Court in **Dorcas Market Makers Pvt. Ltd (supra)**, with which I find myself in agreement, the pre-existing law and the post amendment law would clearly bring out that the amendment to the notification in question was wholly amendatory and not clarificatory.

38. The division bench decision of this Court in the case of **Ram Swarup Electricals Ltd. (supra)** had adopted the reasoning of the Supreme Court in R**aghuvar (India) Ltd. (supra)** in entirety and no distinction has been made thereto. To that extent the view of the Bombay High Court is found not consistent with that of the division bench of this Court. For that reason also, it looses its persuasive value.

39. It is also relevant to note that the Supreme Court had itself clarified that the rule of special law prevailing over the general law may not be ignored even if that special law be contained in the Rule i.e. a delegated legislation while the general law may be found contained in a principal legislation. To that extent, it is relevant to extract the observation made by the Supreme Court in **Raghuvar (India) Ltd. (supra):**

"The question as to the relative nature of the provisions general or special has to be determined, with reference to the area and extent of their application either generally in all circumstances or specially in particular situations and not on the ground that one is a mere provision in the Act and the other is a provision in the Rule. We are not also concerned in this case with any challenge to the inconsistency of a rule with any statutory provision in the Act."

40. Thus, in view of the reasoning offered by the Supreme Court in **Raghuvar (India) Ltd. (supra)** that special law even though contained in the Rule may govern the special situation covered by it and be not governed by the general rule of limitation contained in the principal legislation and in view of the further reasoning contained in paragraph no. 15 of that report that the subsequent

introduction of rule of limitation (by amendment) would not be clarificatory but amendatory, the present writ petition deserves to be allowed. The decision of the Bombay High Court in **Everest Flavours Ltd. (supra)** is found to be distinguished in view of the reasoning given above. Thus, I find myself bound by the view taken by the division bench of this Court in **Ram Swarup Electricals Ltd. (supra)** and in agreement with the view taken by the Madras High Court in **Dorcas Market Makers Pvt. Ltd. (supra)** as well as the **Punjab & Haryana High Court in JSL Lifestyle Ltd.(supra).**

41. Accordingly, the present writ petition is allowed. The matter is remitted to the original authority to pass necessary order within a period of three months from today.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

COMMERCIAL TAX REVISION No..255 of 2018

M/S Rohtash Sweets and Fast Foods, Meerut ...Petitioner
Versus
Commissioner Commercial Tax, U.P. Lucknow ...Respondents

Counsel for the Petitioner:
Sri Suyash Agarwal, Sri Rakesh Ranjan Agarwal.

Counsel for the Respondents:
C.S.C..

A. Section 27 U.P. Value Added Tax Act, 2008 read with Rules 45(13)(a) and (b) - Legal fiction – cannot be extended or applied beyond the purpose for which it is created. Deemed assessment in case the original return is accepted in entirety or a self-assessment, if a revised return is accepted, arises only to provide for payment of tax demand. No assessment order comes into existence.

B. Power to make regular assessment u/s 28 is exercisable independent of Secttion 27. Rule 45(13)(c) does not and cannot override or restrict the plain applicability of the provisions of Section 28(1)(a). Subordinate legislation i.e. the Rules cannot be read so as to override the statute itself. Rule 45(13)(c) does not and cannot override or restrict the plain applicability of the provisions of S.28(1)(a) and (b) i.e. the principal legislation. (Para 25)

Assessment u/s 28 has been confirmed in first appeal as well as by Tribunal. According to assessee an assessment on deemed basis had arisen on 31.03.2017, in absence of any prior notice so as to allow him 15 days' time to submit his revised return in terms of Rule 45(13)(a), therefore, assessing authority had no jurisdiction for assessment u/s 28. Dismissing the present revision, the High Court

C. The limitation of two years provided u/s 29(3) is referable only to an order of assessment made after examination of records u/s 28 or an order of assessment on turnover that may have escaped assessment u/s 29. The period of limitation therefore remained unaffected by proceedings u/s 27. (Para 22)

D. Notice u/s 27 issued within 15 days before legal fiction of deemed assessment arose. Notice was invalid. S.27 would remain "subject to" the provisions of Section 28. Regular assessment to follow (Para 30, 34, 35, 37)

Precedent followed: -
1. Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, (2009) 315 ITR 449 (SC) (Para 9, 23)

2. Commissioner of Income-tax, Kanpur Vs. Mohd. Farooq, (2009) 317 ITR 305 (Para 9, 23)

3. Babaji Kondaji Garad Vs. Nasik Merchants Coop. Bank Ltd., (1984) 2 SCC 50 (Para 25) Kailash Vs. Nankhu, (2005) 4 SCC 480 (Para 27)

4. The Commissioner, Commercial Tax U.P. Vs. S/S Purwar Trading Co., Sales/Trade Tax Revision No. 232 of 2019, decided on 24.07.2019 (Para 12, 18)

5. M/s Sheo Prasad Vinod Kumar, Jhansi Vs. Union of India& Others, 2001 U.P.T.C. 329 (Para 9)

6. Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur& Others, (2008) 3 SCC 70 (Para 9)

Revision against order dated 14.08. 2018 by CCT, Meerut for AY 2014-2015 (E-4)

(Delivered by Hon'ble Saumitra Dayal Singh J.)

1. The present revision has been filed by the assessee against the order dated 14.08.2018 passed by the Commercial Tax Tribunal, Meerut in Second Appeal No.141 of 2018 for A.Y. 2014-15 arising from an assessment made under Section 28(2)(ii) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the Act). By that order, the Tribunal rejected the second appeal filed by the assessee and affirmed the first appellate order and the assessment order whereby the assessee was subjected to assessment to tax on a total turnover of Rs. 2,25,00,000/-. A total demand of tax Rs. 21,56,000/- was created of which Rs.19,42,326/- is the demand of disputed tax.

2. During the assessment year in question, the assessee - a registered dealer was engaged in the business of manufacture and sale of sweetmeats and bakery items. It filed its periodic returns for the relevant tax periods. Also, it filed its annual return on 28.12.2015, in the prescribed manner. In that regard, it has been clarified, though the last date for filing the annual return prescribed under Rule 45(7) of the U.P. Value Added Tax Rules, 2008 (hereinafter referred to as the Rules) was 30.10.2015, the same had been extended up to 31.12.2015. On 19.03.2017, a notice was issued to the assessee under Rule 45(13)(a) of the Rules. It alleged that the annual return filed by the assessee was incomplete. Other defects had also been noted in that notice. The assessee was directed to file its revised return within a period of 15 days, as contemplated under that Rule.

3. The assessee did not file reply to the said notice. In fact, since the notice dated 19 March, 2017 had been first served on the assessee on 20 March, 2017, it was claimed to be an invalid exercise of power since the period contemplated under Section 27(2)(b) of the Act expired on 31 March 2017, before the end of 15 days mandatory time period (that was also granted by the assessing authority to the assessee to file its revised return). In other words, before expiry of 15 days time under the notice dated 19.03.2017, an order of deemed assessment was claimed to have into existence, on 31 March, 2017. Later, on 27.02.2018 another notice was issued by the assessing authority of the assessee under Section 28 of the Act, stating that the return filed by the assessee for the A.Y. 2014-15 was incomplete and that the assessee had not filed its revised return despite service of notice under Rule 45(13) of the Rules. Accordingly, the

assessee was required to participate in those assessment proceedings. The assessee filed a specific objection as to the jurisdiction of the Assessing Authority to proceed under Section 28 of the Act. The assessee also appears to have furnished reply on merits. Further notices were also issued to him, thereafter. However, it is a fact that the assessee did not fully participate in the assessment proceedings. Finally, an ex parte assessment order was passed against him on 31 March, 2018. In the first appeal filed by the assessee therefrom, the assessee appears to have only raised the issue of lack of jurisdiction with the Assessing Authority to pass an assessment under Section 28 of the Act. That objection was rejected. In the further appeal to the Tribunal, again, the assessee appears to have raised solitary issue of lack of jurisdiction of the Assessing Authority. It was again rejected by the Tribunal, by the impugned order.

4. According to the Tribunal, the assessee's assessment proceedings had been taken up under the self assessment procedure prior to 31 March 2017, inasmuch as, undisputedly, the Assessing Authority had issued the notice under Rule 45(13)(a) of the Rules on 19 March, 2017. Then, the fact that the Assessing Authority did not allow for 15 days time to the assessee to file a revised return before the date 31.03.2017 was merely a technical defect, in view of the fact that despite sufficient time of 11 days granted or being available to the assessee, it did not make use of the same and did not file its revised return, before 31 March, 2017. Revised return being not filed, the deemed/self assessment proceedings under section 27 of the Act came to an end and the regular assessment proceedings were validly initiated. Thus, according to the Tribunal, there was no defect in the assessment order.

5. The present revision was entertained on the following questions of law. It is being decided at the stage of admission itself with consent of parties.

"(i) Whether an assessment on deemed basis had arisen on 31.03.2017 by virtue of Section 27(2)(b) of the U.P. VAT Act, 2008 in absence of any prior notice having been issued to the assessee so as to allow him 15 days' time to submit his revised return in terms of Rule 45(13)(a) of the Rules framed under the aforesaid Act though the Assessing Officer had issued such notice to the assessee on 19.03.2017 served on 20.03.2017 ?

(ii) Whether in the alternative the Tribunal was right in not deciding the appeal of the applicant on merits ?"

6. Heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate, assisted by Sri Suyash Agarwal, learned counsel for the applicant-assessee and Sri B.K. Pandey, learned Standing Counsel for the revenue.

7. Learned Senior Counsel would submit, the time limit provided under Rule 45(13)(a) of the Rules is mandatory and the same could not be cut short in absence of any enabling provision either under the Act or the Rules. Relying on the provisions of Section 27(1) read with Section 27(2)(b) of the Act, he submits, an order of deemed assessment would come into existence upon lapse of one year from the end of the assessment year in which the last date of filing of return

for the relevant assessment year fell, unless that process had been lawfully interjected by the Assessing Authority.

8. Therefore, first, the notice requiring the assessee to file a revised return should have been issued and served on the assessee on such date, and in such manner, as may necessarily have allowed the assessee 15 days time to file its revised return or reply or object before the last date mentioned under Section 27(2)(b) of the Act arrived. That notice should have therefore been served not later than 16 March, 2017. Since, the notice was issued on 19 March, 2017 and it was served on 20th March, 2017, the Assessing Authority did not allow the assessee mandatory minimum 15 days time to file its revised return. The notice was invalid. Consequently, a deemed order of assessment came into existence on 13 March, 2017. Also, for that reason, the Assessing Officer could not have assessed the assessee under Section 28 of the Act.

9. As to the prescription of time under Rule 45(13)(a) of the Rules, it has been submitted the legislature has not provided or permitted for curtailment or alteration of that period. A fixed period of limitation to do an Act having been prescribed, it was not for the Assessing Officer to curtail the same or to change the same. Reliance has been placed on the Division Bench decision of this Court in ***M/s. Sheo Prasad Vinod Kumar, Jhansi Vs Union of Inda & Others, 2001 U.P.T.C.-329;*** decision of the Supreme Court in ***Commissioner of Customs And Central Excise Vs. Hongo India (P) Ltd. And Another, (2009) 315 ITR 449 (SC);*** a full Bench decision of this Court in the case of ***Commissioner of Income-tax, Kanpur Vs. Mohd. Farooq, (2009) 317 ITR 305*** and; another decision of the Supreme Court in the case of ***Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur & Others, 2008 (3) SCC 70.***

10. By way of a further submission, learned Senior Counsel, would state, though in view of the opening words of Section 27 of the Act, the scheme of deemed assessment under Section 27 of the Act is "subject to" provisions of Section 28 of the Act, yet, that consequence in law may arise only when the mandatory time limit of 15 days contained in Rule 45(13)(a) of the Rules is strictly adhered to. Otherwise, that Rule would become redundant. Thus the Assessing Authority is bound to act in conformity with the provisions of Section 27 of the Act read with Rule 45 of the Rules before he may render the deemed assessment procedure (under section 27) subject to or subservient to the regular assessment procedure (under section 28).

11. In other words, the Assessing Authority cannot circumvent the procedure by first issuing a notice contrary to the statutory provisions, and thus, prejudice the assessee by not allowing him sufficient time to revise his return, and thereafter, take benefit of such notice by drawing up regular assessment proceedings. Further emphasis has been laid on the use of the words "stipulated time" under Rule 45(13)(c) of the Rules. Since Rule 45(13)(a) of the Rules contemplates only a single period of time being 15 days, the "stipulated time" referred to in sub-Rule(c) cannot be any different from that period. In any case, it cannot be lesser than 15 days.

12. Opposing the revision, the learned Standing Counsel would submit, under Section 27 of the Act, no order is

required to or may be passed by the Assessing Officer. That provision only creates a legal fiction as to the effect of filing of tax return, on the liability of tax and entitlement to Input Tax Credit (I.T.C.) which may otherwise arise upon passing of a regular assessment order. He has placed reliance on a recent decision of this court in ***Sales/Trade Tax Revision No. 232 of 2019 (The Commissioner, Commercial Tax U.P. Vs. S/S Purwar Trading Co.)*** decided on 24.07.2019. Thus, it has been submitted, Section 28 of the Act is an independent provision and in its operation, the jurisdiction of the Assessing Officer is not governed or conditioned or restricted by the proceedings that may have been drawn up, concluded or dropped under Section 27 of the Act.

13. Referring to Section 29(3) of the Act, it has been submitted, the period of limitation prescribed for the Assessing Authority to pass an assessment is three years from the end of the relevant assessment year. However, for the legal fiction of deemed assessment to come into play, a shorter period of two years is prescribed. It is therefore his submission, irrespective of the fate of the proceedings under Section 27 of the Act i.e. whether those were valid or not, the Assessing Authority would retain to itself full jurisdiction to make an assessment under Section 28 of the Act.

14. In the above regard, he has also referred to Rule 45(13)(a) of the Rules to submit, under that provision of law, the Assessing Officer has a very limited jurisdiction to examine the annual returns to see whether such return is incomplete or incorrect or contains wrong particulars or whether net tax had not been paid in accordance with law. Contrasting those provisions with Section 28 of the Act, it has been submitted, the power to make a regular assessment, is not limited or governed or controlled by Section 27 of the Act. In fact Rule 45(13)(c) only specifies a contingency when a regular assessment may follow. However, it is not a general pre-condition to make a regular assessment under Section 28 of the Act.

15. Sections 27 and 28 of the Act read as below:

"27. Self assessment-

(1) Subject to provisions of section 28, every dealer, who has submitted the return of last tax period as well as the prescribed Annexures of Consolidated Details in the prescribed form and manner, shall be deemed to have been assessed to an amount of tax admittedly payable on the turnover of purchase or sale or both, as the case may be, disclosed in such Annexures and to an amount of input tax credit shown admissible in such Annexures.

(2) For all purposes under this Act and rules made thereunder-

(a) Annexures of Consolidated Details submitted by a dealer, shall be deemed to be an assessment order and facts disclosed or figures mentioned in such Annexures shall be deemed part of such assessment order; and

(b) last date of the assessment year, succeeding the assessment year in which the date prescribed for submission of such Annexures of Consolidated Details falls, shall be deemed to be the date of such assessment order.

28. Assessment of tax after examination of Records-

(1) In following types of cases or dealers, the assessing authority, after detailed examination of books, accounts and documents kept by the dealer in relation to his business and other relevant records, if any, and after making such inquiry as it may deem fit, subject to provision of sub-section (9), shall pass an assessment order for an assessment year in the manner provided in this section:-

(a) in cases of such dealers as are specified or selected for tax audit by the Commissioner or any other officer, not below the rank of a Joint Commissioner, authorized by the Commissioner in this behalf; in such manner and within such time as may be prescribed. [See Rule 43]

(b) in case of a dealer falling in any of the categories below,

(i) dealer who has not submitted Annexures of Consolidated Details or revised Annexures of Consolidated Details of turnover and tax, within the time prescribed or extended; or such Annexures of Consolidated Details contain wrong or incorrect particulars or do not accompany declaration or certificate for exemption or reduction in the rate of tax, or

(ii) dealer by whom tax return for one or more tax periods of the assessment year have not been submitted; or

(iii) dealer in whose case assessing authority has passed provisional assessment order under section 25 in respect of one or more tax periods to the best of its judgment; or

(iv) dealer in whose case, on the basis of material available on records, if the assessing authority is satisfied that the turnover of sales or purchases or both, as the case may be, and amount of tax shown payable as disclosed by the dealer in Annexures of Consolidated Details are not worthy of credence or tax shown payable in these Annexures has not been deposited by the dealer, or the amount of input tax credit claimed is wrong or the amount of tax payable shown is incorrect; or

(v) dealer who has prevented or obstructed an officer empowered to make audit, survey, inspection, search or seizure under the provisions of this Act; or

[(vi) .....] omitted

Provided that where the aggregate turnover of any dealer, does not exceed rupees twenty five lakh or such larger amount as may be determined by the State Government from time to time, in any assessment year, the Commissioner shall determine the parameters and modalities to select the dealers for the annual assessment after examining the books of accounts or records of such dealers:

Provided further that notwithstanding anything contained in section 26, the dealer not selected under the first proviso shall be deemed to have been assessed, on the last date of assessment year succeeding the assessment year in which the date of filing of annexures of consolidated details of the assessment year falls.

(2) Where after examination of books, accounts, documents and other records referred to in sub-section (1), -

(i) the assessing authority is satisfied about correctness of turnover of

sale or purchase or both, as the case may be, disclosed by the dealer, it may assess the amount of tax payable by the dealer on such turnover and determine the amount of input tax credit admissible to the dealer or amount of reverse input tax credit payable by the dealer; and

(ii) where assessing authority is of the opinion that turnover of sale or purchase or both, as the case may be, disclosed by the dealer is not worthy of credence, it may determine to the best of its judgment the turnover of sale or purchase or both, as the case may be, and assess the tax payable on such turnover and determine admissible amount of input tax credit and reverse input tax credit payable by the dealer.

(3) Before making an assessment under sub-section (2), dealer shall -

(i) be required to furnish Annexures of Consolidated Details if he has not already submitted such Annexures;

(ii) be given reasonable opportunity of being heard; and

(iii) be served with a notice to show cause, where determination of turnover, input tax credit or reverse input tax credit, or assessment of tax, all or any one of them, as the case may be, are to be made to the best of the judgment of the assessing authority.

(4) The show cause notice referred to in sub-section (3) shall contain all such reasons on which the assessing authority has formed its opinion about incorrectness of the turnover of sale or purchase or both, as the case may be, amount of tax, amount of input tax credit or amount of reverse input tax credit.

(5) Order of assessment shall be in writing and copy of assessment order along with prescribed notice of demand of the balance amount of tax, if any, to be deposited by the dealer, shall be served on the dealer.

(6) Dealer shall deposit amount of tax assessed in excess of amount of tax deposited by him for the assessment year, within a period of thirty days after the date of service of the assessment order and notice of demand.

(7) Where the amount of tax deposited by the dealer is found in excess of tax assessed, the same shall be refunded to the dealer according to the provisions of this Act.

(8) Assessing authority shall not be precluded from making assessment order under this section on the ground of passing of any provisional assessment order in respect of any tax period under section 25 and such provisional assessment order, if any, shall stand merged in the assessment order passed under this section.

(9) Notwithstanding anything to the contrary in any other provision of this Act, where an unregistered dealer brings any taxable goods from outside the State more than once during an assessment year, separate assessment relating to goods brought on each occasion may be made for the same assessment year.

(10) The provisions of this Act shall apply to each assessment order passed under sub-section (9) as they apply to an order passed under sub-section (2).

(11) Dealers under sub-section (9) shall not be required to furnish

Annexures of Consolidated Details and in cases of such dealers assessment under sub-section (9) may be made even before the expiry of the assessment year.

(12) Provisions of sub-sections (5), (6) and (7) shall, mutatis mutandis, apply to every assessment order passed under any provisions of this Act."

16. Also, Rule 45(13) of the Rules reads as below:

*"**45. Submission of returns.-***

(1) .....

.....

(13)(a) Where, on examination of the annual return, it is found that the return is incomplete or correct or contains wrong particulars or net tax has not been paid according to the provisions of the Act and in these rules or not accompanied by required Forms of declaration or certificate, the assessing authority shall serve to the dealer a notice to submit the revised return within 15 days from the date of service of notice.

(b) If the assessing authority is satisfied that revised annual return is complete and correct he shall accept the annual return for self assessment and shall inform the dealer accordingly.

(c) If dealer fails to submit the revised return within stipulated time, the assessing authority shall proceed for assessment in accordance with provision of section 28."

17. Having heard learned counsel for the parties and having perused the record, under Section 24 of the Act, a taxable dealer is obliged to submit its tax return for different tax periods, as also its annual return. Section 25 of the Act provides for assessment of tax for a tax period i.e. a provisional assessment. Tax period has been defined under Section 2(ak) of the Act, as a period for which a dealer is liable to submit tax return under Section 24 of the Act. Section 26 of the Act provides, every taxable dealer, for each assessment year shall be assessed to tax payable by him and to amount of Input Tax Credit (I.T.C.) admissible to him. Thus, it fixes the scope and purpose of an assessment to be made. It is in the above statutory context, provisions of Sections 27, 28 and 29 of the Act appear and they provide for self-assessment; assessment of tax after examination of record and; assessment of tax of turnover escaped from assessment year appear.

18. The scope of Section 27 of the Act has been dealt with by this court in the case of **S/s Purwar Trading Co. (supra),** where it has been held as below:

"12. Perusal of sub-section 1 of Section 27 of the Act, makes it clear that a deemed assessment arises by operation of law to the amount of tax admittedly payable on the disclosed turnover of sale or purchase or both, as the case may be, disclosed by the assessee. Thus, the Act does not contemplate any order to be passed by the assessing authority but it only contemplates the effect or consequence of a disclosure made by the assessee in manner prescribed. Thus, by deeming fiction the act of disclosure made by a n assessee has been placed on parity with an assessment order that may otherwise be passed. The purpose and effect of the deeming fiction is that notwithstanding any order passed by the assessing authority, the assessee who may have filed a return, would become bound to pay admitted tax and to avail Input Tax Credit (ITC) as he otherwise

would be, had he been regularly assessed to tax.

13. That intent has been further made clear by Section 27(2)(b) of the Act. It provides for the date on which such deemed order of assessment may come into existence or deeming fiction may come to life. That date has been defined or prescribed by the Act as the last date of the assessment year following the assessment year during which the last date to file the return for the relevant assessment year expired.

14. Thus, Section 27 of the Act does not contemplate coming into existence of any order, in any manner, neither by conscious exercise of power nor upon application of mind by the assessing authority. In fact neither an order is required to nor can be passed by the assessing authority and no order ever comes into existence. Rather, it is a pure legal fiction created by the legislature. Only the imagination in law gives birth to two effects or consequences of an assessment order. The imagination is driven, solely by the self-act of the assessee of filing his return of turnover. That solitary act needs no contribution or any corresponding or consequential or other act to be performed by the assessing authority. It gestates for one year from the end of the assessment year in which the last date to file that return expired. Upon completion of that period of time the imagination in law springs forth.

15. Thus, by way of first effect or consequence, the assessee becomes bound to discharge the admitted tax liability. Second, he earns a right to claim ITC. Both effects or consequences arise due to passage of prescribed time, solely on account of the return filed by him. That being done, no other or further consequence can ever arise as the legislature did not contemplate or provide for a third effect or consequence of the event of filing return by an assessee. The settled rule of interpretation prohibits any extension beyond the clearly visible legislative field, noted above. Reliance may be placed on that expression of law made by Justice S.R. Das (as his lordship then was), in his dissenting opinion in the Constitution bench decision of the Supreme Court in State of Travancore-Cochin & Ors Vs. Shanmugha Vilas Cashewnut Factory, Quilon; AIR 1953 SC 333 (para 38), which principle was reiterated and applied by another Constitution bench of the Supreme Court in Bengal Immunity Co. Vs. State of Bihar; AIR 1953 SC 661 (para 31). Consequently, no assessment order can be assumed or imagined to exist in law, for any other purpose such as rectification of mistake etc.

16. Also, the powers of the assessing authority to pass any assessment order are contained in the later provisions being Sections 28 and 29 of the Act. A regular assessment order may be passed by the assessing officer under Section 28 of the Act. Also, in the event of any escapement of the turnover from assessment, the assessing authority has been given the power to make a re-assessment under Section 29 of the Act. While a regular assessment may be made in the normal period of limitation, that is prescribed as three years, under Section 29(3) of the Act, the re-assessment order may be passed even thereafter subject to the stipulations contained under Section 29 of the Act".

19. Section 28 of the Act provides for a full-fledged or regular assessment to

be made. However, it departs from its predecessor enactment i.e. U.P. Trade Tax Act, 1948. The Act contemplates a regular assessment upon examination of records be made only in certain cases specified in sub-section (1) of Section 28 of the Act. Thus, though section 26 of the Act requires an assessment to be made in each case, as to tax payable and I.T.C. entitlement available, besides the legal fiction under section 27 of the Act the same may also arise as a consequence of an assessment after examination of records or upon reassessment order made under section 29 of the Act i.e. as a result of conscious application of mind by the assessing authority to the books of account, return of annual turnover, prescribed statements and replies etc. that may collectively form the record of the assessment case.

20. First, under section 28(1)(a) of the Act an assessment may be made after examination of records in case(s) of such dealers, who may be specified or selected for tax audit. Second, under section 28(1)(b) of the Act, any other dealer who may not have been subjected to tax audit may yet be subjected to assessment upon examination of record, if he falls in any one of the five categories mentioned in sub-clause (b) of sub-section (1) of Section 28 of the Act. Those are cases where: the dealer may not have submitted his annexures of consolidated details or revised annexures of consolidated details of turnover and tax within the time prescribed or extended time or; if such annexures of consolidated details contain wrong or incorrect particulars or do not accompany the declaration or certificate for exemption or reduction in the rate of tax or; if a dealer has not submitted one or more returns for any tax period during the assessment year or; a provisional assessment order may have been passed in his case under Section 25 of the Act, for any tax period on best judgement basis or; the assessing officer is satisfied that the turnover of sale or purchase or both, as disclosed is not worthy of credence or admitted tax has not been deposited or Input Tax Credit (I.T.C.) has been wrongly claimed or tax payable has been incorrectly shown or; the dealer had prevented or obstructed the conduct of audit, survey, inspection, search or seizure under the Act, he may be subjected to assessment upon examination of record.

21. On the other hand, the assessment of tax of turnover escaped from assessment may arise under Section 29 of the Act, if the assessing officer has reason to believe that the whole or any part of the turnover of the dealer has escaped the assessment. Those again are provisions, with which presently we are not concerned. At the same time, Section 29(3) of the Act clearly prescribes the normal period of limitation for making an assessment or reassessment as three years from the end of the assessment year in question.

22. Thus, in view of the first conclusion drawn, there never came into existence any order of deemed assessment. That legal fiction came into existence upon passage of two years time from the end of the relevant assessment year. Therefore, the limitation to pass an assessment order contained in Section 29(3) of the Act is referable only to an order of assessment of tax made after examination of records, under Section 28 of the Act or an order of assessment of tax on turnover that may have escaped assessment, under Section 29 of the Act.

That period of limitation therefore remained unaffected by proceedings under Section 27 of the Act.

23. At the same time, in the event, an assessing officer, upon examination of the annual return finds that the return is incomplete or incorrect or contains wrong particulars or net tax, has not been paid according to the provision of the Act or the Rule, or if it is not accompanied by required forms of declaration or certificate, he may, even in exercise of powers vested under section 27 of the Act, serve such dealer a notice to submit his revised return within 15 days from the date of service of such notice in terms of the clear legislative stipulation contained in Rule 45(13)(a) of the Rules. Also, that time period is mandatory minimum and there is no legislative intent either express or implied as may allow the assessing officer to curtail that time period. Yet, it may not affect the assessee's act (in a given case) to waive that requirement. To that extent, the submission advanced by learned Senior Counsel relyiing on the principle propounded in ***Hongo India (P) Ltd. (supra)*** and the full Bench decision of this Court in ***Mohd. Farooq (supra)*** has to be accepted.

24. Consequently, in a case where the assessee files its revised return in response to a notice issued under Rule 45(13)(a) of the Rules, and the assessing officer feels satisfied, as to its completeness and correctness, he may accept the same in exercise of power conferred under Rule 45(13)(b) of the Rules. In that case, the annual return would constitute the self-assessment, of which intimation would be given to the assessee. Thus, Section 27 of the Act read with Rule 45(13)(a) and (b) of the Rules provide for a deemed assessment in case the original return is accepted in entirety or a self-assessment if the revised return is accepted. In either case, no order of assessment would come into existence. In both cases, a legal fiction (with twin consequences discussed above) arises.

25. In fact, only in the event, the assessing officer is not satisfied with the revised return as well, that Rule 45(13)(c) of the Rules states, the Assessing Officer shall proceed to make assessment of tax after examination of record under Section 28 of the Act. It does not and cannot override or restrict the plain applicability of the provisions contained in Section 28(1)(a) and (b) of the Act i.e. the principal legislation. In the first place, it is settled principle that the principal legislation would prevail over the delegated legislation. In ***Babaji Kondaji Garad v. Nasik Merchants Coop. Bank Ltd., (1984) 2 SCC 50,*** (paragraph 15 of the report) it was observed - ".....Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law if not in conformity with the statute in order to give effect to the statutory provision the rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with". Thus, as a principle, the subordinate legislation i.e. the Rules cannot be read so as to override the statute itself.

26. More so, in the present case, in view of the clear stipulations contained in Section 28(1)(b)(i) & (iv) of the Act, the assessing officer would remain fully competent and enabled to make an

assessment of tax after examination of records, amongst others if either the dealer had not submitted the annexures of consolidated details or; revised annexures of consolidated details (of turnover and tax within time prescribed or extended) or; if such annexures of consolidated details contain wrong or incorrect particulars or; they do not accompany the declaration or; certificate for exemption or reduction in the rate of tax or; if the assessing officer is satisfied with the turnover of sale or purchase or both as the case may be and the amount of tax shown payable as disclosed by the dealer in the annexures of consolidated details are not worthy of credence etc. Thus, in part, these conditions overlap with the provisions of Rule 45(13)(a) of the Rules, inasmuch as, that Rule also allows the assessing officer to examine whether the return is incomplete or incorrect or contains wrong particulars or net tax has not been paid or the return is not accompanied by required forms of declaration or certificate.

27. In that regard, it is equally well settled in law, in case of conflict being claimed between a principal statute and delegated legislation, effort should first be made to harmonize the two and the principal statute may be made to prevail over the delegated legislation only if conflict is irreconcilable. In ***Kailash v. Nanhku, (2005) 4 SCC 480***, in the context of a conflict claimed between the provisions of Representation of Peoples Act, 1951 on one hand and the Allahabad High Rules framed under Article 225 of the Constitution of India read with the rules of procedure framed under the Civil Procedure Code, on the other, it was held in para 12 of that report - *"..... Suffice it to observe that in case of conflict, the provisions of the Act and the provisions of the High Court Rules shall, as far as may be, be harmoniously construed avoiding the conflict, if any, and if the conflict be irreconcilable the provisions contained in the Act being primary legislation shall prevail over the provisions contained in the High Court Rules framed in exercise of delegated power to legislate. No such conflict is noticeable, so far as the present case is concerned.*

28. As a result, though the provisions of Section 28(1)(b)(i) and (iv) of the Act and Rule 45(13)(a) of the Rules, do over lap and in either case regular assessment after examination of records may be passed and further in either case that resort may be had upon a detection being made by the assessing officer that the return filed is incomplete or incorrect or contains wrong particulars, the immediate consequence arising upon such detection would be different, depending upon the time when such defect is noticed and/or acted upon by the assessing authority.

29. If that defect or deficiency is noted by the assessing officer within the period prescribed under Section 27(2)(a) of the Act i.e. before commencement of last 15 days before the legal fiction (of deemed assessment) arises, the assessing officer shall first require the assessee to file a revised return to make necessary rectification. For that purpose, the asssessing authority must provide minimum 15 days time to the assessee to revise his return. In case, he files a revised return to the satisfaction of the assessing officer, the legal fiction of deemed assessment would arise. However, if despite time so granted, the assesee fails to file his revised return, he shall

necessarily be visited with a regular assessment in terms of section 28 of the Act.

30. By virtue of section 28 of the Act, to which section 27 proceedings are "subject to", it does not mean - unless a valid notice under Rule 45 of the Rules is first issued and unless the assessee fails to file a revised return in response thereto, the assessing officer would be restrained or debarred from initiating proceedings under Section 28 of the Act. It only implies, by way of first consequence, that the legal fiction of deemed assessment may not arise in every case, by way of a necessary and automatic consequence of an annual return being filed. Even before end of two years from the end of the relevant assessment year the assessing authority would have a limited right to look into the final return to satisfy itself as to correctness and completeness of that return and to see whether net tax has been paid according to the provisions of the Act and the Rules and whether such return is accompanied by required Forms of declaration or certificate.

31. Second, if within the prescribed period of two years from the end of the relevant assessment year, the concerned assessing authority notices a simple defect in any annual return (as specified above), received by it, the same would not lead to an automatic assessment after examination of records (under section 28 of the Act). The assessing authority would first issue a notice to the assessee and grant him 15 days time to rectify the same. The assessee may act on such notice and rectify the mistake pointed out. Then, a legal fiction or effect of self assessment would arise in favour of the assessee.

32. However, even in that situation there would not arise any assessment order. The entire exercise would remain in the realm of the Section 27 of the Act i.e. of deemed assessment. Thus, a limited intervention has been allowed to be made by the assessing officer, to protect the interest of the revenue to compel the assessee to pay correct taxes, without being subjected to full fledged assessment after examination of records.

33. If, an assessee fails to file a revised return in response to a valid notice issued under Rule 45(13)(a) of the Rules, then, by way of a mandatory consequence of its own conduct, such an assessee would invite assessment after examination of records under section 28 of the Act. That position is unambiguously clear from the language of Rule 45(13)(c) of the Rules. Thus no deemed assessment may arise in that case.

34. Also, there may arise cases, where no notice may have been issued by the assessing authority to the assessee to file a revised return or such notice, if issued was invalid, as in this case. Such eventualities would give rise to the legal fiction of deemed assessment at the end of the time period contemplated under section 27(2)(b) of the Act. However, it would remain "subject to" section 28 of the Act for reason of plain statutory intent expressed by use of words "subject to" used in opening part of section 27 as also for reason of larger period of limitation of three years provided under section 29(3) of the Act, for making an assessment under section 28 of the Act.

35. Therefore, the fate of such deemed assessment, if any, would be governed by proceedings undertaken under section 28 of the Act. In that case, the legal fiction of deemed assessment,

would not operate as an embargo or restraint on the power of the assessing authority to proceed to assess the assessee after examination of records. That power is found to exist, and may be exercised independent of section 27 of the Act. Hence, the fact that the assessing officer had not issued any earlier notice or had issued an invalid notice under Rule 45(13)(a) of the Rules, would be of no consequence. That notice and that time stipulation would remain relevant only for the purpose of a deemed/self-assessment. Initiation of those proceedings would not be mandatory pre-condition to be satisfied to initiate assessment upon examination of records.

36. The stipulation contained in Rule 45(13)(c) of the Rules, is only an exception when a deemed assessment order may not arise i.e. in case an assessee fails to respond to a valid notice issued under Rule 45(13)(a) of the Rules, he would necessarily be visited with a regular assessment proceeding. However, that interpretation does not obstruct the exercise of powers that are found to be otherwise existing with the assessing officer under Section 28 of the Act.

37. Since the self/deemed assessment under section 27 of the Act is a legal fiction, it comes into existence and survives only for the limited purposes for which it is created i.e. for raising a demand of admitted tax and claim of ITC. Even on its own, it always remains subject to an assessment made upon examination of records, under section 28 of the Act. That is the clear intent and effect of the opening words - "Subject to provisions of section 28", used in section 27 of the Act. Thus, even otherwise that legal fiction remains subservient to and gets subsumed in the proceedings for regular assessment whenever those proceedings get initiated on the basis of examination of records. Hence, the legal fiction, never added a fetter to the otherwise existing powers of an assessing authority to pass an assessment order upon examination of records.

38. Thus, in absence of Rule 45(13)(c) of the Rules being complied, the validity of assessment proceedings initiated under section 28 of the Act must be tested on its own strength i.e. the test of section 28(1)(a) and (b) (i) to (v) of the Act. Seen in that light, the initial notice issued by the assessing officer dated 19.03.2017 is found to be invalid, inasmuch as, the same had been issued without allowing the assessee the mandatory minimum 15 days time period to file its revised return. That time limit was for the benefit of the assessee. Had it filed the revised return within the reduced time, the same would have been a valid revised return and the ground of invalidity in the notice would have stood waived. However, that was not done.

39. Perusal of the notice dated 27.02.2018 reveals it was a fresh notice issued under section 28 of the Act. At that stage, the assessing officer was not satisfied as to the completeness of the disclosure made by the assessee and in that regard, he had observed that the assessee had not complied with the notice issued under Rule 45(13) of the Rules. Even if that recital is considered to be relevant in view of the notice dated 19.03.2017 being found to be invalid, yet, it would not dilute the observation of the assessing officer or his satisfaction with the assessee's return being incomplete. That observation and that satisfaction

reflect independent existence of the conditions mentioned under Section 28(1)(b)(i) and (iv) of the Act. Therefore, the assessment proceedings under Section 28 of the Act were validly initiated.

40. The further submission advanced by learned Senior Counsel, since "stipulated time" mentioned in clause (c) of sub-rule (13) of Rule 45 of the Rules was not available of 19.3.2017 therefore no notice could have been issued under Rule 45(13)(a) of the Rules and consequently the deemed assessment arising under section 27 of the Act could never be made "subject to" section 28 of the Act, is found to be untenable in view of the reasoning given above. Once the power to make an assessment upon examination of the records is found to be exercisable independent of section 27 of the Act, the argument advanced by learned senior counsel does not survive.

41. Thus, in the first place, there never arose an order under Section 27 of the Act. Only a legal fiction of deemed assessment arose on 31.3.2017, for the limited purpose of creating a demand of admitted tax and entitlement of Input Tax Credit (ITC). No third purpose or inference arose. Then provisions of Section 28 of the Act being independent of Section 27 of the Act, upon the satisfaction of the assessing officer being found existing in terms of Section 28(1)(b) of the Act, that power could be exercised irrespective of the fact whether any proceedings had been conducted under Section 27 of the Act and irrespective of the fate of those proceedings. The initiation of proceedings under section 28 of the Act, vide notice dated 27.2.2018 did not suffer from any infirmity.

42. In view of the above, question of law no. 1 is answered thus: though a deemed assessment for A.Y. 2014-15 had come into existence on 31.03.2017, yet, it did not preclude the assessing officer to make an assessment upon examination of record under Section 28 of the Act, which order is found to have been passed in accordance with law, upon a valid notice dated 27.02.2018.

43. Insofar as question of law no.2 is concerned, though it is a tough case inasmuch as the assessment order was passed ex parte and none of the appeal authorities have considered the merits of assessment order, yet, this Court in exercise of its revision jurisdiction is constrained to answer the question in the affirmative i.e. against the assessee and in favour of the revenue in view of the fact that the assessee never raised such challenge on merits, before the appellate authorities.

44. Accordingly, the present revision is **dismissed.** No order as to costs.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2019

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

CRIMINAL APPEAL No. 2312 OF 1987

Nankoo and Ors. ...Appellants (In Jail)
Versus
State ...Respondent

Counsel for the Appellants:
Sri P.N. Misra, Sri Raghvansh Misra, Sri Rahul Misra, Sri Saurabh Yadav

Counsel for the Respondent:
A.G.A.

A. Section 302, 147, 148 and 149 I.P.C.- Relevance of motive - Motive is not a sine qua non for commission of crime. Moreover, takes a back seat in a case of direct ocular account. Failure to prove motive or absence of motive would not be fatal to the prosecution where other reliable evidence available on record unerringly establishes the guilt of accused. (Para 9)

B. Relevance of difference in age, cast etc in promiscuous relationship. There is age difference between the wife of appellant and the deceased. Promiscuity does not see any barriers of age, caste, relationship or religion. (Para 10)

C. Interested witness - It is well settled that a related witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. They are natural witnesses and their testimony cannot be rejected only on the ground that they are related to deceased.(Para 11)

D. Evidence. The weapon of assault and empty cartridges - not recovered. Serological report not obtained by the prosecution. No doubt there are lapses in the investigation but it cannot be a ground to reject the entire prosecution case.(Para 19)

Appeal dismissed.

Chronological list of Cases Cited: -

1.State of U.P vs. Krishnapal (2008) 16 SCC 73

2.Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484, (E-2)

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

This criminal appeal is preferred against the judgment and order dated 03.09.1987, passed by the VI Additional Sessions Judge, Bareilly in S.T. No. 559 of 1985 *(State Vs. Nankoo & Others)*, convicting the appellants Nankoo, Mukhtar, Rajendra and Ram Niwas under Section 302 149 I.P.C, to life as also under Section 148 I.P.C. to two years rigorous imprisonment. Appellant, Ram Niwas, is further convicted/sentenced to one year R.I under Section 147 I.P.C. All the sentences to run concurrently.

1. The case of prosecution in brief is as under:-

A) P.W-1, the informant alleged that his son Suraj Pal (deceased) had developed illicit relationship with the wife of accused-appellant Nankoo who also used to stay together, relatives of Nankoo had taken a serious offence to this infidelity. On 20.8.1985 at around 6.30 P.M, Suraj Pal had gone to ease himself towards north of the village. Accused Nankoo and Mukhtar armed with kanta (sharp weapon) his cousin Ram Nivas with lathi, Jawahar and Rajendra with tamancha (country made pistol), Rajeshwar with bhala (spear) gheraoed Suraj Pal on the exhortation of Nankoo that Suraj Pal be not spared, Rajendra fired two shots at Suraj Pal/ deceased who fell down to be then assaulted with lathi and kanta blows. On cries for help P.W-1, nephew Raj Murari, Nathoo (P.W-2) and others reached the scene to witness the occurrence. With the arrival of witnesses and on their shouting accused fled towards west of the village, witnesses also attempted to chase but accused managed good their escape. The body of the deceased lay in the fields of Naushey.

B. On above allegations, an F.I.R. (Ex. Ka-1) as Case Crime No. 133 of 1985 initially registered against accused Nankoo, Ram Niwas, Rajeshwar,

Mukhtar and Rajendra under Sections 147, 148, 149, 302 I.P.C. on 21.08.1985 at 3:10 a.m. at Police Station Fatehganj (East), District Bareilly at a distance of 20 kilometers to the west.

C. PW-4, A.K. Gaur the Investigating Officer reached the spot around 5.30 A.M and commenced investigation. On his direction A.S.I. Teja Singh prepared site plan (Ex. Ka-12), Inquest Report (Ex. Ka-5) and after completion of paper work dead body of the deceased was sent to district hospital for autopsy at 7.30 A.M in presence of 2 constables.

D. PW-3/Dr. P.K. Shrotriya, conducted the autopsy of the deceased and prepared the autopsy report (Ex. Ka-2) on 21.08.1985 at 4:00 P.M The autopsy indicated following injuries on the body of the deceased:-

i. Lacerated wound 5 cm X 1 cm X skull deep on the centre of head 9 cm above right eye brow.

ii. Lacerated wound 3 cm X 5 cm X skull deep on right side head 10 cm above right ear.

iii. Incised wound 3.5 cm X 5 cm X skull deep on right side head 5 cm above right ear.

iv. Incised wound 5 cm X 1 cm X skull deep on back of scull 10 cm behind and above left ear.

v. Incised wound 4 cm X 1 cm X skull deep on back of head 9 cm above left ear.

vi. Incised wound 4 cm X 1 cm X skull deep on back of head 9 cm above left ear.

vii. Lacerated wound 2.5 cm X 1 cm on the back of skull 1 cm below injury no. 6.

viii. Lacerated wound 2 cm X 5 cm X muscle deep 1 cm. Behind and below injury no. 7.

ix. Lacerated wound 2 cm X 1/2 cm X muscle deep 1 cm below injury no. 8.

x. Incised wound 2.54 cm X 1 cm X skull deep 1 cm below injury no. 9.

xi. Incised wound 7 cm X 1.5 cm X muscle deep on the right side abdomen 4 cm above right inguinal region transversely placed.

xii. Abrasion 1 cm. X 5 cm on left side chest 4 cm below left nipple.

xiii. Abrasion contusion 5 cm X 2 cm on back of left arm in middle.

xiv. Incised wound 1 cm X 5 cm X skin deep on iliac crest.

xv. Incised wound 2 cm X 1 cm X cavity deep on right side back of chest 14 cm below right lower angle of scapula.

xvi. Incised wound 2 cm X 1 cm X muscle deep in central line of bank at the lable of thoracic 8th vertebrae.

Xvii. Incised wound 1 cm X 1 cm X on left side back of chest 3 cm lateral of central line at the lable of thoracic 8th vertebrae.

Xviii. Incised wound 2 cm X 1 cm X muscle deep in central line of back at the lable of 3rd lumber vertebrae.

xix. Gun shot wound 3.5 cm X 2 cm on right lateral aspect of abdomen 6 cm. Above right iliac crest surrounded by blackening and tattooing in an area of 14 cm.

xx. Abrasion 4 cm X 3 cm on middle aspect of left elbow.

PW-3 opined that death was due to shock and haemorrhage as a result of ante mortem injury which had occurred a day ago.

E. P.W-4, the I.O, recorded the statement of eye-witnesses and that of

formal witnesses, carried out other investigational formalities. After completion of investigation charge-sheet (Ex. Ka-13) was submitted against abovementioned appellants including accused, Rajeshwar, case committed to Sessions, charges framed under aforementioned sections against the appellants. All the appellants denied the charges and claimed to be tried.

F. The prosecution examined PW-1, Ram Das and PW-2, Nathoo as eye witnesses, rest as formal witnesses.

G. The accused in their statements under Section 313 Cr.P.C, denied the prosecution version and stated that they have been falsely implicated due to enmity and completely denied their participation in the occurrence. No defence evidence was led.

2. The trial court vide judgment/order dated 03.09.1987 while convicting the appellants as above, acquitted accused Rajeshwar and as per record no appeal/revision against the acquittal. During pendency of the appeal, appellant no.3/ Mukhtar, died, appeal qua him stood abated on 09.07.2018.

3. We have heard Shri Saurabh Yadav for appellant no.1, Sri Rahul Mishra assisted by Sri Raghuvansh Mishra for appellant nos. 2 and 4 and Shri V.S.Rajbhar, the learned A.G.A, for the State and perused the record.

4. Learned counsel for the appellants raised following contentions:-

i. F.I.R. is delayed and lodged with due deliberation and after consultation.

ii. Motive is absent.

iii. Manipulation and interpolation in written report (Ex. Ka-1) and Ex. Ka-6 (R.I. Letter). In Ex. (Ka-1), one date mentioned is 20.08.1983 and second is 21.08.1983 while in R.I, letter (Ex. Ka-6) overwriting is apparent in the time of occurrence.

iv. Written report (Ex. Ka-1) as per statement of PW-1 was procured from the place of occurrence meaning thereby after preparation of Ex. (Ka-1) this written report was kept by PW-1 in his pocket, yet it did not have any folds.

v. PW-1 & PW-2 are interested witnesses.

vi. PW-1 father of deceased is an interested witness and PW-2 an alleged eye-witness was an accomplice with the deceased in several criminal cases.

vii. Presence of PW-1 and 2 at the spot is highly doubtful as in site plan (Ex. Ka-12), fields of PW-1 and 2 are not shown by the Investigating Officer as well as their fields are also not in the near vicinity.

viii. Prosecution failed to fix the place of occurrence i.e, fields of Naushey which was not located enroute to the fields of PW-1 & 2.

ix. The manner of assault as described by PW-1/2, is contradictory to the medical evidence. These witnesses failed to explain the injuries on the front portion of the deceased.

x. Eye-witnesses demonstrated unnatural conduct as despite being closely related to the deceased, no effort was made by them to check whether the deceased was alive or not.

xi. Statement of PW-2 was recorded by P.W-4/ the I.O, after three days of the occurrence which dents the prosecution case.

5. The learned A.G.A. opposed the contentions by submitting that presence of

PW-1 & PW-2 is natural, there are no material contradictions or omissions in the entire testimony. He further submitted that witnesses cannot be disbelieved only on the basis that they are related/interested, PW-1 and 2 are wholly reliable. He further submitted that there was motive on the part of accused persons to commit the murder of Suraj Pal, as the deceased was involved with the wife of the accused Nankoo while other accused are his close relatives.

6. The occurrence took place on 20.8.1985 at about 6.30 P.M, whereas the FIR came to be registered on 21.8.1985 at 3.10 AM. The distance between the scene and the P.S, concerned is 20 Kms. P.W-1 was stating that after the occurrence he was in a state of shock and trauma on account of the death of his son. After regaining composure he got a report scribed at the scene itself by one Kunwar Pal. He along with Kunwar Pal left for the police station in a tractor at around 11-12 midnight. We on above evidence are of the view that the prosecution has satisfactorily explained the alleged delay of about 9 hours.

7. The occurrence took place in open agricultural fields, at the fields of one Naushey whose dimensions according to P.W-1 one of the two eye-witnesses was 40-50 x 39-40 steps. P.W-1 claims to have witnessed the occurrence, while on way to his fields towards the west of his house to guard his fields from stray animals as it had standing crops of bajra (1-1.5 feet). P.W-1 believed that the deceased (son) had gone to ease himself towards a pond half a Km. away. The defence argued that once it has come in evidence that there was a pond behind the house of P.W-1, it is highly improbable that the deceased would traverse a longer distance to ease himself. The submission has no impact as it was only an assumption and not a certainty on the part of P.W-1 that the deceased had gone to ease himself. This assumes further credence when P.W-1 states that the deceased had no fix place/area to ease himself. It is not uncommon in a rural scenario for a rural folk to wander here and there in the evening. Although the prosecution did not disclose either in the site plan or in the evidence the point from where P.W-1 witnessed the assault and that of the place of assault but what is clear from the evidence of P.W-1 is the mode and manner of the assault and the identity of assailants including the weapon possessed by them was clearly visible. P.W-1 is challenged on the ground that the purpose for which he left his house i.e, to guard the fields was being alleged for the first time in the court as both the FIR/161 were silent, could not in itself be the reason to doubt his presence as the house of P.W-1 and the place of occurrence are all situate at a distance of one furlong. Learned counsel for the appellants pointed out certain features of the case to doubt the F.I.R and the credibility of P.W-1 such as the written report was in 4 folds, prosecution was not explaining that if P.W-1 had gone to P.S to lodge a report along with Kunwar Pal in a tractor at around 11-12 midnight but P.W-1 returned in a police jeep along with P.W-4 then who drove the tractor back home? Coming to the first issue that the written report not being in 4 folds which otherwise the prosecution is claiming it was scribed at the scene by Kunwar Pal at the dictates of P.W-1 who then kept it in his pocket in 4 folds, the court finds that the possibility of report being scribed at the police station cannot be ruled out but

this could not be a ground in itself to doubt the FIR as P.W-1 proved the contents of the report. In so far the issue as to who brought the tractor back from the P.S, it's a post occurrence lapse which would have no effect on the prosecution case.

8. P.W-2 is the neighbour of P.W-1. His field is at a distance of 15 steps from that of the fields of Naushey where occurrence took place. He claims to have witnessed the occurrence from the fields of Naushe from a distance of 20 steps. He further established the mode and manner of the occurrence, the identify of assailants as also the weapons used by them. Merely because his statement was recorded by the I.O after 3 days of the occurrence could not be a ground to doubt his presence at the scene as the F.I.R itself enlist him as one of the witness and the said lapse was on the part of I.O which cannot enure to the benefit of appellants.

9. Learned counsel for the appellants argued that prosecution utterly failed to prove the motive. Motive is not a *sine qua non* for commission of crime. Moreover, takes a back seat in a case of direct ocular account. If eye-witness account is trustworthy motive may not be of much relevance. Failure to prove motive or absence of motive would not be fatal to the prosecution where other reliable evidence available on record unerringly establishes the guilt of accused.

10. The prosecution alleged that the deceased, Suraj Pal, was in illicit relationship with the wife of appellant, Nankoo, due to vengeance Nankoo along with his cohorts committed the murder of Suraj Pal. Although, there is age difference between the wife of appellant and the deceased, but promiscuity does not see any barriers of age, caste, relationship or religion. PW-1 admits that his deceased son was in a relationship with the wife of accused Nankoo, but on his castigation relationship had ended around six months prior to the incident.

11. One of the argument of learned counsel for the appellants is that only related and interested witnesses were produced by the prosecution because there are only two eye-witnesses. PW-1 is the father of the deceased and PW-2 a neighbour and also a co-accused with deceased in a previous criminal case. It is well settled that a related witness may not be labeled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. Once it is established that witnesses were present at the scene, to witness the occurrence, they cannot be discarded merely on the ground of being closely related to the victim. The Apex Court in **State of U.P vs. Krishnapal (2008) 16 SCC 73** held as under:

18. The plea of defence that it would not be safe to accept the evidence of the eye witnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good

and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. The testimony of related witnesses, if after deep scrutiny, found to be credible cannot be discarded.

19. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible. The witness could be a relative but that does not mean his statement should be rejected. In such a case, it is the duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested witness.

20. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible.

Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person. Thus in view of above legal position, we after carefully scrutinizing the evidence of P.W-1 and 2, are of the considered opinion that they are natural witnesses and their testimony cannot be rejected only on the ground that they are related to deceased.

12. Although fields of PW-1 and PW-2 are not depicted in the site plan, but after perusing this statement it is clear that fields of PW-1 & 2 are situate in the vicinity of the fields of Naushey where the incident took place. Thus the explanation of P.W, 1 and 2 that around evening they were on their way to guard their fields of a standing crop of bajara cannot be rejected.

13. One of the argument of appellants-defence is that the manner of assault described by eye-witnesses is contradictory to the medical evidence. As per PW-1 and 2 after being shot twice by Rajendra, deceased fell down on the slush, as it had rained, his face touching the ground, was then assaulted by all other accused by their respective weapons. Thus in such a scenario, it was not possible to sustain an injury on the front side of the body of the deceased. Injury nos. 11, 12 & 14 are on the front part of the body of the deceased. PW-3, the doctor in cross-examination admitted that apart from abrasion, injury no. 12 is present on the left side of the nipple of the deceased. In ***Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983***

SC 484, the Hon'ble Supreme Court observed as under:

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

14. Thus in view of above dicta in the event of conflict between the oral and the medical testimony former would take the precedence. In the present case once 4-5 assailants surrounded the deceased, started assaulting him with their respective weapons it is difficult to ascertain as to who assaulted where. Out of 21 injuries, only 4 are on the frontal side, that alone in view of above could not be a ground to discard oral account.

15. Learned counsel for the appellants argued that there is doubt as to the time of occurrence as there is an interpolation in time, from 7:30 P.M. to 6.30 P.M. in the challan lash and the doctor who conducted the autopsy was not ruling out the time of death between 8.00 P.M. to 12.00 mid night so as to generate a probability that the deceased, who had criminal antecedents with several enemies was done to death in darkness by unknown assailants. On perusal of challan lash, it is clear that although there is overwriting as to the time of death, admitted by P.W-4, but as the difference is of only an hour it is negligible.

16. PW-1 is the father of deceased yet, no effort was made by him to ascertain whether the deceased was alive or not. The above conduct of P.W-1 cannot be said to be unnatural as he was stating that after the assault he along with others chased the accused unsuccessfully, then came back at the scene to find that his son lay dead. Although this witness was cross-examined intensely but he was not cross-examined as to the time when he ascertained the death of his son.

17. Suraj Pal, is alleged to have been murdered in the fields of Naushey. However, location of said field is not fixed by prosecution. Learned counsel for appellants argued that PW-1 stated that the fields of Naushey is in Kadarganj while PW-2 stated that it was in village Padera. As per site plan (Ex. Ka-12), village Padera is a km away from the place of occurrence. But this submission is liable to be rejected as both these villages are adjoining and no evidence was produced by defence to demonstrate that field of Naushey is also in village Padera. P.W-1 and the I.O clearly stated that field of Naushey i.e, place of occurrence is in village Kadarganj, thus prosecution has established the place of occurrence.

18. Learned counsel for the appellant-Rajendra argued that address of appellant-Rajendra is not mentioned in the F.I.R. as he was not a resident of the

same village rather of the village Jhanjhana, Bareilly and was falsely implicated. Submission is not acceptable as the identity of Rajendra was already known to the eye-witnesses. Moreover he was also identified in the court.

19. The argument that as the weapon of assault and empty cartridges have not been recovered and serological report not obtained by the prosecution, suffice to mention that recoveries and the serologist report would have further strengthen the prosecution case. No doubt there are lapses in the investigation but it cannot be a ground to reject the entire prosecution case.

20. The testimonies of ocular witnesses are reliable and trustworthy corroborated by medical evidence. We do not find any material contradictions or discrepancies in their evidence which raises any doubt. The Learned trial court rightly convicted the appellants. The appeal is bereft of merit and is liable to be dismissed.

21. The appeal is **dismissed.** Appellants are on bail. Their bail bonds are cancelled, they be taken into custody forthwith to serve out the remaining sentence.

22. The office is directed to transmit back lower court records with a copy of judgment and order of this Court for immediate compliance under the intimation to this court within 2 months.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2019

BEFORE

THE HON'BLE BACHCHOO LAL, J.

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 89 OF 1994

Mahanta Bhar ...Appellant (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri Shiv Shankar Pandey, Sri Kamal Krishna, Sri Pradeep Kumar Rai, Sri Vinay Saran.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code sections 302,299,300,304 - recognizes three degrees of culpable homicide namely, (1) culpable homicide of the first degree, a gravest form of culpable homicide which is defined under section 300 as murder, (2) culpable homicide of the second degree, a lower or lessor form of homicide not amounting to murder as defined in section 299, punishable under the first part of section 304 and (3) culpable homicide of the third degree,a lowest type of culpable homicide, punishable under the second part of section 304. (Para35)

B. Distinction between section 299 and section 300 - Distinction has been based on the the degree of probability of the consequence of the criminal act. Where death is the most probable result and is caused with intention to cause death, the offence is murder, and where it is probable result, it is culpable homicide.

Murder may become culpable homicide not amounting to murder if circumstances exist to bring the murder within any of the five exceptions to section 300 IPC. Academically, the distinction appears to be easy, but, when comes to factual matrix and is required to be determined on the basis of objective assessment of fact and evidence, the task is hard and a lot depends upon the sixth sense

of the presiding judge who has been asked to give a decision. (Para-28)

Held:- The above classification is based on factors such as the degree of intention, surrounding circumstances in which death was caused, weapon used, influence of apprehension from severe beating from which the accused wanted to escape, causing injury exceeding the right of private defence, presence of premeditation and the like. A person has a right to defend himself and his own person and for that purpose he can use and cause injury as much as it is necessary. But if he exceeds his right and causes more injury than necessary and if death of such person results, the same is culpable homicide not amounting to murder (Para-36)

C. Section 102 IPC - Provides for commencement and continuance of private defence of the body 'as soon as a reasonable apprehension of danger to the body arises from an attempt or threat' and it continues 'as long as apprehension of danger to the body continues. (Para 44)

CHRONOLOGICAL LIST OF CASES CITED: -

1: - AIR 1977 SC 45, State of AP vs Rayavarapu Punnayya

2: - (2006) 7 SCC 391, Pappu vs State of MP

3: - (2009) 14 SCC 771, Jagriti Devi vs State of HP

4: - (2013) 12 SCC 10, Chenda alias Chanda Ram vs State of Chhatisgarh

5: - (2018) 4 SCC 329, Lavghanbha Devjibhai Vasava vs State of Gujarat

6: - AIR 2019 SC 2120, Govind singh vs State of Chhattisgarh

7: - AIR 2019 SC 2264, Rambir vs State of NCT

8: - AIR 1951 Punjab& Haryana 137, Kirpal Singh vs State

9: - (1973) 1 SCC 347, Deo Narain vs State of UP (E-7)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. This criminal appeal has been preferred against the judgment and order dated 22.11.1993 passed by Ist Additional Sessions Judge, Ballia in Sessions Trial No. 157 of 1992, State Vs. Mahanta Bhar, arising out of crime no. 252 of 1992, under section 302 IPC, PS Sikandarpur, District Ballia convicting and awarding the appellant life imprisonment under Section 302 IPC.

2. Brief facts of the case are that the informant Bijuli Yadav lodged an FIR in respect of incident dated 23.4.1992 stating that his elder brother Interdeo Yadav has a daughter namely Chinta who had illicit relationship with accused Mahantha Bhar of the same village for the last some time. The informant and his family asked Chinta and the accused several times to stop this relationship and scolded both of them. This fact was known to all the villagers. On the date of incident informant and other family members were cutting sugarcane crop in the field and about 12.00 AM in the noon while they were returning home with Chandradeo Yadav, nephew Ramawadh, Hari Mohan Yadav and Jagdhari and they reached at 'Soti' locating towards north of their village, they saw Chinta and accused Mahantha Bhar in the sugarcane field of Punchdeo Mishra talking to each other. At this sight all of them reached inside the field and deceased Chandradeo caught hold of accused Mahantha Bhar who took out a knife and stabbed him with intention to kill on the chest and stomach of Chandradeo two or three times.

Consequently, Chandradeo fell down on the spot. Attempt was made to apprehend and arrest the accused Mahantha Bhar, but he ran away towards north. Accused was chased for a distance but could not be apprehended and escaped. Soon after the incident, Chandradeo was being taken to Sikandarpur hospital in an injured condition but on the way he died.

3. The First Information Report was got scribed by one Ashok Rai, and the same was delivered by the informant and eye witness Bijuli Yadav at police station Bansdih on 23.4.1992 at 2 PM, on the basis of which Case Crime No. 252 of 1992 under Section 302 IPC was registered. The dead body was taken into possession by police and inquest report was prepared. Postmortem was conducted on the next day. The Investigating Officer investigated into the offence, prepared site map and recorded the statement of witnesses and submitted charge sheet against the accused for the offence under Section 302 IPC.

4. The learned Sessions Judge framed charge against the accused under Section 302 IPC, who denied the charge and claimed trial.

5. The prosecution examined 8 witnesses in support. PW-1 Chinta (eye witness), PW-2 Bijuli Yadav (informant and eye witness), PW-3 Jagdhari Yadav (eye witness) and PW-4 Hari Mohan Yadav (eye witness) have stated about the incident. PW-5 Dr. G. Kumaria has proved the postmortem report. PW-6 Ashok Rai is scriber of written report. PW-7 Constable Mansukh Yadav is the witness of inquest inquest report. PW-8 SI Suresh Chandra Shukla is IO of this case and who has proved site map and charge sheet.

6. The witnesses have proved the prosecution documents which are written report Ext. Ka-1 postmortem report, Ext. Ka-2 inquest report, Ext. Ka-3 sample seal, Ext Ka-4 sample seal, photo nash Ext. Ka-5, Ext. Ka-7 police form no. 13, and Ext. Ka-6 letter to SP for postmortem, report by police to District Hospital Ext. Ka-8, letter for postmortem examination Ext. Ka-9 and Ext. Ka-10, site plan Ext. Ka-11, memo of blood stained and plain earth Ext. Ka-12, charge sheet Ext. Ka-13, Chick FIR Ext. Ka-14, GD Ext. Ka-15 and report of Serologist Ext. Ka-16.

7. The statement of accused was recorded under Section 313, Criminal Procedure Code who has refused illicit relationship with Chinta and has denied that he was ever scolded by his family members for the same. He has further stated that he was not on spot nor he inflicted any injury to the deceased by knife and caused his death. He has also stated he has been falsely implicated as he belongs to labour class and did not give his service to complainant side. He has not adduced any evidence in defence.

8. After hearing learned counsel for the parties, the learned trial court found the accused-appellant guilty for the offence under Section 302 IPC and passed the impugned judgment convicting and sentencing him for life imprisonment.

9. Aggrieved by the said order, the accused-appellant has filed the present criminal appeal and has challenged the impugned judgment on the ground that the same is against the evidence on record and is not sustainable under law. The learned trial court did not take into consideration the circumstances which falsify the prosecution story. The appellant

was a boy aged about 17 years and was alone, therefore, under the circumstance, the appellant could not inflict the injury to the deceased. It was not possible for the accused-appellant to take Chinta to sugarcane field forcibly in presence of complainant and his family members who were present in nearby field. He was falsely implicated in this case. The sentence awarded is too severe and not sustainable. The same is liable to be set aside and the accused-appellant is entitled for acquittal.

10. Heard Sri Vinay Saran, Senior Advocate, appointed as Amicus Curiae, assisted by Sri Pradeep Kumar, learned counsel for the appellant, Sri L.D. Rajbhar, learned A.G.A. for the State and perused the record.

11. PW-2 Bijuli Yadav (informant and eye witness) has stated on oath about illicit relationship between accused and PW-1 Chinta for which both were scolded by him and family members. He has further stated that on the date and time of incident, he along with Chandradeo Yadav, Hari Mohan Yadav and Jagdhari were present on the spot when they saw both accused and Chinta talking to each other in sugarcane field. When they reached there, the accused stabbed and caused injuries by his knife on the chest and abdomen of the deceased. While Chandradeo was being taken to the hospital, he died on the way. He and other witnesses tried to apprehend the accused after he caused injury to Chandraeo, but he succeeded in running away from the place. He got the written report scribed by one Ashok Rai and the same was delivered at the police station on the same day.

13. PW-1 Chinta, has admitted the fact of relationship with the accused and has stated that because of this relationship, the family members were having bitter feelings for her and the accused. She has also admitted that on the date and time of incident, she was with the accused in the sugarcane field and Chandradeo Yadav, Hari Mohan Yadav, Jagdhari and Bijuli Yadav came there. Chandradeo Yadav caught hold of the accused whereupon he gave him two-three blows by his knife on his chest and stomach. He sustained injuries and fell down and the accused ran away from the place.

14. PW-3 Jagdhari Yadav (independent witness) who was present on the spot, has also supported the prosecution version that at the time of incident, he was there and he saw the accused and Chinta in the sugarcane field and when they reached there, accused caused injury to Chandradeo Yadav on his chest and stomach by his knife because of which he died while taking to the hospital.

15. PW-4 Hari Mohan Yadav is another eye witness who has also supported the prosecution version and has said that he was present on the spot and they found Chinta and accused in the sugarcane field alone and when Chadradeo Yadav caught hold of the accused, the accused inflicted injury by his knife and because of the injuries sustained, Chandradeo Yadav died.

16. P.W. 5- Dr. G. Kumaria, who had conducted postmortem on 24.4.1992 at about 3 PM, found followin ante mortem injuries on the dead body of the deceased:

(I) Incised penetrating wound not opened 1.5 c.m. X 1 c.m. Cavity deep

on left side chest, doliquily placed 14 c.m. From mid line chest and 16 c.m. From left clavical bone. Edge of wound clean cut. Clotted blood present around wound. Outer angle of wound is sharp and inner angle towards mid line is slightly curved.

(II) Incised penetrating wound 1.5 c.m. X 1 c.m. Abdominal cavity deep, on left side upper abdomen, obliquely placed, 8 c.m. From mid line abdomen and 29 c.m. From left clavicle edge of wound situated clean cut. Clotted blood present around wound. Outer angle of wound is sharp and inner angle of mid line is slightly curved. The cause of death was due to shock and hemorrhage.

Internal Examination

Below injury no 1 on chest, internal mussel between 6 and 7 ribs incised and 7th rib on left side incised below injury no 1. Left pleura was incised below injury no 1 and left lung was punctured below injury no 1, in the left side of chest, blood clots found with 750 ml fluid. Walls in the left side of abdomen was incised below injury no 2 and spleen was punctured. The cause of death was shock and hemorrhage due to ante mortem injuries. According to doctor, injuries might have been caused by knife and the injuries were sufficient to cause death in ordinary course. The death was possible on 23.4.1992 at about 1 PM. Nothing has come in the cross-examination in favour of defence.

17. PW-6 Ashok Rai, who is inscriber of written report has proved that he inscribed the written report about the incident.

18. PW-7 Constable Mansukh Yadav has proved the chick FIR and GD Report.

19. PW-8 SI Suresh Chnadra Shukla narrated the process of investigation and has proved the site map and the charge sheet.

20. The learned counsel Sri Vinay Saran, Senior Advocate, appointed as Amicus Curiae has submitted that even if the fact witnesses are totally believed, the case does not come in the purview of the offence of murder and the maximum offence for which the appellant could be convicted was for simple culpable homicide or culpable homicide not amounting to murder. Learned AGA has submitted that accused-appellant was having knife with him and that shows his intention to cause death and by knife he stabbed on the chest and abdomen of the deceased which are vital part of the body and consequently while he was taken to the hospital, he died. He has further submitted that death of deceased has occurred because of injuries caused by the accused-appellant.

21. In the backdrop of rival arguments, the evidence leveled on record needs to be analyzed in order to determine whether the offence was committed by the accused and whether the offence which was committed by the accused-appellant was culpable homicide or murder.

22. From the perusal of record, it is clear that the incident took place on 23.4.1992 at 12 PM and on the same day at 2 PM, FIR was lodged by informant by giving a written report in police station by Bijuli who is real brother of deceased and an eye-witness. The police station is 4 km away from place of occurrence. Considering the fact that the deceased was injured and died on the way while being taken to hospital and the FIR was lodged

in two hours on the same day from the time of incident, the learned Sessions Judge correctly concluded that there was no delay in lodging FIR.

23. The dead body was taken into possession by police and inquest report was duly prepared after appointing five witnesses to the inquest proceeding. Thereafter, the dead body was duly sealed and, along with necessary papers, was taken to DistrictHospital for postmortem where postmortem was conducted by the doctor who has proved the report as prosecution witness. The postmortem report shows that the deceased died due to two incised wound, one on chest and other on abdomen of the deceased and according to doctor the death of deceased must have occurred on 23.4.1992 at about 1 PM because of injuries caused by knife which were sufficient to cause death in ordinary course.

24. Three prosecution witnesses have stated that the incident took place in their presence in the sugarcane field of one Panchdev Misra. IO prepared site map during investigation and the place of occurrence has been shown in that sugarcane field. All the eye witnesses have affirmed on oath that the accused-appellant caused the injuries to the deceased by knife which he was having at the time of incident. The witnesses were cross-examined, but the defence has not been able to bring out anything adverse to prosecution or favourable to the defence. Clearly, the prosecution succeeded in bringing home the charge leveled against the accused and it has been fully established that the accused on the date, time and place caused injuries to the deceased by knife and consequently he died.

25. Submission of learned counsel for the accused-appellant is that there was no intention of accused-appellant to cause death of the deceased and from the fact and evidence available on record, it appears that he was caught with Chinta in the sugarcane field and finding himself suddenly surrounded by the witnesses and also because the deceased caught hold of him, the accused-appellant having knife stabbed the deceased and because of that injuries, he died. He has also submitted that this case does not come within the purview of murder and the fact shows that it comes within the purview of culpable homicide and culpable homicide not amount to murder.

26. Section 299 of the Indian Penal Code defines culpable homicide as follows:

*"**Culpable homicide.**-Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

Explanation 1.-A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.-Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.-The causing of the death of child in the mother's womb is

not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."

27. Section 300 of the Indian Penal Code defines murder and culpable homicide not amounting to murder as follows:

*"**Murder.**-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-*

2ndly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.-When culpable homicide is not murder.-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First. - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Exception 2.-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.-Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Exception 5.-Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

28. Several times the courts in India has outlined the distinction between the two offences and the thrust of the distinction has been based on the the degree of probability of the consequence of the criminal act. Where death is the most probable result and is caused with intention to cause death, the offence is murder, and where it is probable result, it is culpable homicide. The murder may become culpable homicide not amounting to murder if circumstances exist to bring the murder within any of the five exceptions to section 300 IPC. Academically, the distinction appears to be easy, but, when comes to factual matrix and is required to be determined on the basis of objective assessment of fact and evidence, the task is hard and a lot depends upon the sixth sense of the presiding judge who has been asked to give a decision.

29. In **State of AP vs Rayavarapu Punnayya, AIR 1977 SC 45,** the Supreme Court made following observation:

" .... whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of section 300, Penal Code is reached. This is the stage at which the court should determine whether the facts proved by the prosecution brings the case within the ambit of any of the four clauses of the definition of "murder"contained in section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder" punishable under the first or the second part of section 304, depending, respectively,on whether the second or the third clause of section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in section 300, the offence would still be "culpable homicide not amounting to murder," punishable under the first part of section 304, Penal Code."

30. The above observation has been referred in subsequent decisions and the same holds the field as a guideline in order to appreciate and understand the distinguishing features of the offence of 'murder,' 'culpable homicide' and 'culpable homicide not amounting to murder.' In every murder there is culpable homicide and on existence of certain facts as mentioned in five exceptions to section 300 IPC, a murder may become culpable homicide not amounting to murder, and the difference between the two is the degree of probability and certainty. Where death is the likely result, it is culpable homicide and where it is most obvious and certain result, the offence is murder and if such murder is covered by any of the exceptions to section 300, the same is punishable under section 304 and not under section 302 of the Indian Penal Code.

31. In **Pappu vs State of MP, (2006) 7 SCC 391,** the Supreme Court almost exhaustively dealt with the

parameters of Exception 4 to section 300 and held that the same can be invoked if death is caused 1. without premeditation; 2. in a sudden fight; 3. without the offender having taken undue advantage or acting in a cruel or unusual manner; and 4. the fight must have been with the person killed. It was remarked,

"It cannot be laid down as a rule of universal application that whenever one blow is given, section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factOrs."

31. In **Jagriti Devi vs State of HP, (2009) 14 SCC 771,** it was held that the expression 'intention' and 'knowledge' postulate the existence of a positive mental attitude. It was further held that when and if there is intent and knowledge, then the same would be a case under first part of section 304 and if it is only a case of knowledge and not intention to cause death by bodily injury, then the same would be a case of second part of section 304.

32. In **Chenda alias Chanda Ram vs State of Chhatisgarh, (2013) 12 SCC 10,** pointing out that 'culpability depends on the knowledge, motive and the manner of the act of the accused,' the Supreme Court referring to **Rayavarapu Punnayya (supra),** converted the conviction of accused from section 302 IPC to section 304 IPC taking into consideration the following circumstances:

"There is no evidence or previous enmity. The incident has taken place on the spur of the moment. There is no evidence regarding the intention behind the fatal consequence of the blow. There was only one blow. The accused is young. There was no premeditation. The evolution of the incident would show that it was in the midst of a sudden fight. There is no criminal background or adverse history of the appellant. It was a trivial quarrel among the villagers on account of a simple issue. The fatal blow was in the course of a scuffle between two persons. There has been no other act of cruelty or unusual conduct on the part of the appellant. The deceased was involved in the scuffle in the presence of his wife and he had been actually been called upon by her to the spot.... ."

33. In **Lavghanbha Devjibhai Vasava vs State of Gujarat, (2018) 4 SCC 329,** the Supreme Court summarized the parameters to be taken into consideration while deciding the question as to whether a case falls under section 302 or section 304 IPC as follows:

"(a) the circumstance in which the incident took place; (b) the nature of weapon used; (c) whether the weapon was carried or taken from spot; (d) whether the assault was aimed on vital part of body; (e) the amount of the force used; (f) whether the deceased participated in the sudden fight; (g) whether there was any previous enmity; (h) whether there was any sudden provocation; (I) whether the attack was in the heat of passion; and (whether the person inflicting injury took any undue advantage or acted in the cruel or unusual manner.)"

34. In **Govind singh vs State of Chhattisgarh, AIR 2019 SC 2120 and Rambir vs State of NCT, Delhi, AIR 2019 SC 2264,** where the appellant was convicted for the offence under section

302 IPC, the Supreme Court, finding that there was no premeditation on the part of the accused and the incident took place in sudden quarrel, modified the offence into that of section 304 IPC and reduced the sentence was accordingly.

35. On the basis of above discussion, to put it in simple terms, as outlined in **Rayavarapu Punnayya (supra),** it is clear that the Indian Penal Code recognizes three degrees of culpable homicide namely, (1) culpable homicide of the first degree, a gravest form of culpable homicide which is defined under section 300 as murder, (2) culpable homicide of the second degree, a lower or lessor form of homicide not amounting to murder as defined in section 299, punishable under the first part of section 304 and (3) culpable homicide of the third degree, a lowest type of culpable homicide, punishable under the second part of section 304.

36. It is held that the above classification is based on factors such as the degree of intention, surrounding circumstances in which death was caused, weapon used, influence of apprehension from severe beating from which the accused wanted to escape, causing injury exceeding the right of private defence, presence of premeditation and the like. A person has a right to defend himself and his own person and for that purpose he can use and cause injury as much as it is necessary. But if he exceeds his right and causes more injury than necessary and if death of such person results, the same is culpable homicide not amounting to murder.

37. Now coming to the facts of present case where the accused was having affairs and sexual relation with a daughter of complainant family for which both were scolded by family members but it did not create any impact on them. Naturally, as per evidence on record, the whole family must have bitterness for accused and have been annoyed with him, as both had no intention to withdraw from each other's company and they continued in relationship. On the date of incident both were seen and found alone in the sugarcane field by deceased and other family members.

38. The daughter of the deceased has been examined as PW-1 who has admitted in her statement before court about her relationship with the accused and that she was with the accused on the date of incident in the sugarcane field where the incident took place. She has also admitted that before they were seen by family members, both had sex and soon after that the family members reached there. She has stated that the deceased caught hold of the accused by one hand and gave beating to her by other hand. The accused was surrounded by Jagdhari, Bijuli, Dharmdeo, Indradeo, Chandradeo, Ramawadh and Harimohan, all carrying lathi (bamboo) in their hands. She has also stated that her mother, father, uncles and all family members used to prevent her from meeting and having any sort of relationship with accused, but she continued meeting with him. She has said that prior to incident, the family members did not see her in physical relationship with the accused. The deceased raised his hand to hit the accused and then the accused stabbed him by his knife.

39. PW-2 Bijuli has stated that while coming back from their field, near the sugarcane field of Panchdeo Misra, they heard voice of both Chinta and accused. Chandradeo entered in the field first and behind him they all rushed in the

sugarcane field. They all rushed into the field together. They gave two to four slaps to Chinta. PW-3 Jagdhari has stated that they entered silently into the sugarcane field where both Chinta and accused were present and thereafter made noise. Both were trying to keep there wearings in order and then Chandradeo caught hold of the accused. PW-4 Harimohan has stated that they all rushed into the field and Chandradeo caught hold of accused and scolded him for spoiling their reputation.

40. Thus, from the statement of all the four witnesses, it is clear that both Chinta and accused were caught red handed in the sugarcane field if not during, immediately after they had sex with each other. Chinta was slapped and deceased Chandradeo caught hold of accused and tried to slap him. All were carrying lathi and rushed into the field together. All were family members and naturally in that situation they all must have been enough furious causing alarm in the mind of the accused that he has been caught red handed with a daughter of family and he would be given good beat by them.

41. Since the accused had sex with her love-mate soon before they were caught, the passionate impact thereof must have been present in him and before him she was being slapped and he was likely to be beaten. Both the factors if taken together must have influenced the mind of the accused to a great deal. That his love-mate was being slapped before him certainly has a provoking impact whereas the fact that he was surrounded by the family members with lathi in their hands and they were shouting and scolding must have created a natural apprehension in his mind that he has been caught red handed by family members with the daughter of the family in objectionable condition and they will not leave him easily and they will cause bodily harm in terms of injuries. Therefore, his endeavor must have been to get rid of situation anyhow. He was having a knife and therefore he caused injuries to Chandradeo who had caught hold of him and had raised his hand to hit him and he was enough close in terms of distance to accused. Thereafter, he did not stay to see the result and escaped away so quickly that despite the complainant side was 6 in numbers, they could not get him.

42. In **Kirpal Singh vs State, AIR 1951 Punjab & Haryana 137,** it has been observed:

"To constitute a premeditated killing, it is necessary that the accused should have reflected with a view to determine whether he would kill or not; and that he should have determined to kill as the result of that reflection; that is to say, the killing should be a premeditated killing upon consideration and not a sudden killing under the sudden excitement and under impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection. Such premeditation may be established by direct or circumstantial evidence, such as previous threats, expression of ill feelings, acts of preparation to kill; such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed. For example, repeated shots, blows or other acts of violence are sufficient evidence of premeditation. Premeditation is not proved from the mere fact of a killing by the use of a deadly weapon but must be

shown by the manner of the killing and the circumstances, under which it was done or from the other facts in evidence."

43. It is pertinent to mention that it was not a case of that kind that after being beaten, the accused came prepared with knife and caused injuries. There is no evidence on record to show that the accused ever gave any threatening on earlier occasion to the complainant side to cause any harm to them. Thus, there appears to be no premeditation on the part of accused. Death has not been caused in unusual or cruel manner. There appears to be no enmity on the part of accused, whereas, for the complainant side, there appears to be every possibility to catch him red handed and to give him good lesson for the misdeed of having relationship with the daughter of the family.

43. There appears to be no criminal back ground of the accused and at the time of incident he was enough young, a boy of 17 to 18 years in age as alleged in the memo of appeal. The facts and circumstances of the case reveals that the murder was caused without premeditation and at the spur of the moment without any criminal intent to commit murder. Moreover, in the circumstances where the accused was surrounded by 6 family members of complainant side, each carrying lathi in hand, naturally angry finding the accused in the sugarcane field in objectionable condition and prepared to give lesson to accused. In such situation, a right of private defence also accrued to the accused against the possible bodily harm which was likely to be caused to him by the complainant side.

44. Section 102 IPC provides for commencement and continuance of private defence of the body *'as soon as a reasonable apprehension of danger to the body arises from an attempt or threat' and it continues 'as long as apprehension of danger to the body continues.'* At the cost of repetition, it is mentioned that the accused was alone surrounded by six persons and deceased had caught hold of him and has raised his hands to hit him after slapping his love mate before him. Therefore, a reasonable apprehension of bodily harm to accused was existing. It cannot be countered by saying that no such harm was caused to him. It has been remarked by the Supreme Court in **Deo Narain vs State of UP, (1973) 1 SCC 347** that *'to say that a person can only claim the right to use force after he has sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in section 102, IPC.'*

45. On the basis of above discussion, we are of the view that on facts, the present case was covered under the Exceptions 1, 2 and 4 to section 300, IPC as the death was caused by accused under grave and sudden provocation, in excess of the right of private defence of his person without premeditation and in the heat of passion upon a sudden quarrel and without the accused taking undue advantage or acting in a cruel or unusual manner without premeditation. As such the learned trial court committed illegality in convicting the accused for the offence of murder under section 302, IPC instead of convicting him for the offence of culpable homicide not amounting to murder under Part I of section 304, IPC.

46. In view of the above, we convert the conviction from section 302, IPC to section 304, IPC part I and accordingly modify the sentence awarded to the accused-appellan **Mhantat Dhar** from life imprisonment to a sentence of rigorous imprisonment of 12 years and

fine of Rs. 25000/- and in default, for an additional imprisonment of six months.

47. With the above modification, this criminal appeal is finally disposed of.

48. The accused-appellant **Mhanta Dhar,** if on bail shall surrender forthwith before the learned trial court to be sent to jail to undergo the sentence.

49. The office is directed to transmit back the lower court record to the learned trial court along with the copy of this judgment for information and necessary compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

JAIL APPEAL No. 2210 OF 2011

Moti ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Sita Ram Sharma (A.C.)

Counsel for the Opposite Party:
Sri M.C. Joshi

A. Delayed FIR - Nowhere in any statute either in Evidence Act or in Code of Criminal Procedure, 1973 or in IPC any particular time has been specified for lodging of F.I.R. Even, in Section 154 of Code of Criminal Procedure, 1973 which deals with lodging of the F.I.R., no particular time has been prescribed for lodging F.I.R. Sometimes an inordinate delay, caused in lodging the F.I.R. If justified and natural, it does not affect credibility of prosecution and sometimes even a prompt F.I.R. may affect credibility of prosecution. (Para 23)

B. Interested witness. Only on the ground that witnesses are relative or kith and kins of deceased, their evidence cannot be disbelieved.(Para 28)

C. Criminal jurisprudence - if prosecution case has been found trustworthy and reliable wherein involvement of accused has been proved beyond reasonable doubt, the burden shifts on accused to prove the plea of general exception insanity, taken by him.(Para 32)

D. It is settled principle of sentencing and penology that undue sympathy, in awarding the sentence, with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. (Para 37**)**

Appeal dismissed.

Chronological list of Cases Cited: -
1. Masalti and others Vs. State of U.P., 1965 SC 202,

2. Mohabbat Vs. State of M.P., (2009) 13 SCC 630,

3. State of Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996 (E-2)

(Delivered by Hon'ble Virendra Kumar Srivastava, J.)

1. This jail appeal under Section 383 Code of Criminal Procedure, 1973, (hereinafter referred to as "Code") has been filed against judgment and order dated 20.1.2011 passed by Additional Session Judge, Court No. 2, Bareilly in S.T. No. 37 of 2009 (State Vs. Moti) arising out of Case Crime No. 597 of

2008, under Section 302 I.P.C., P.S. Faridpur, District Bareilly, whereby appellant-accused Moti (hereinafter referred to as "appellant") has been convicted under Section 302 IPC for a sentence of life imprisonment along with fine of Rs. 1000/-. In case of default in payment of fine, he has further been directed to undergo rigorous imprisonment for 3 months.

2. Brief facts, arising out of this appeal, are that appellant, Informant- Ram Sharan (PW-1) and deceased Kuwar Sen, all are residents of village Ausadh, P.S. Faridpur, District- Bareilly. Ram Swaroop, father of appellant, had leased out his agricultural land to Kuwar Sen (deceased). Due to that reason appellant and his real brother Om Prakash were inimical with deceased Kuwar Sen. On 13.6.2008, at about 2:30 p.m., Kuwar Sen (deceased) was taking rest beneath Pakad tree, situated in front of his house. Appellant and his real brother Om Prakash, armed with *lathi*/*danda*, came to Kuwar Sen. Om Prakash exhorted that as deceased Kuwar Sen poses himself as superior; kill him. Thereafter appellant attacked on Kuwar Sen by *lathi* and caused grievous injuries to him. Informant Ram Sharan (PW-1) raised alarm. On his alarm and scream made by deceased Kuwar Sen, Brijesh Kumar (PW-2) and Praveen Kumar (PW-3) rushed towards the place of occurrence, saw the incident and they also raised alarm. Meanwhile, appellant and Om Prakash fled away from place of occurrence by hurling abuses. Ram Sharan (PW-1) was carrying his brother Kuwar Sen (deceased) for treatment but Kuwar Sen died on the way.

3. First Information Report, Ex.ka-1 (hereinafter referred to as "F.I.R.") of the said incident was lodged by Ram Sharan (PW-1) at P.S. Faridpur, District Bareilly on 14.6.2008 at 00:20 a.m. Case Crime No. 597 of 2008 under Section 304 IPC was registered and said information was entered in General Diary (Ex.ka-10) by Constable Gajendra Singh, Chik F.I.R. (Ex.ka-9) was prepared by him on same day and time. The investigation of case was handed over to S.I. Tejveer Singh (PW-5) who rushed to place of occurrence, visited the same and prepared site plan (Ex.Ka-7). He took the sample of blood stained and plain earth from place of occurrence and also took a stick (*danda*), weapon used in offence and prepared recovery memo (Ex.Ka-5 and Ka-6). He rushed to Community Health Centre, Faridpur (hereinafter referred to as "C.H.C.") where dead body of deceased was lying, prepared inquest report (Ex.Ka-3) and sent dead body of deceased Kuwar Sen for post mortem to DistrictHospital, Bareilly with relevant papers.

4. Dr. Lok Nath Deepak (PW-6) conducted autopsy on dead body of deceased on 14.6.2008 at 2:45 p.m. According to him deceased had died one day before; Post mortem staining was present at the back of deceased; rigor mortis was also present on lower and upper limb of the body excluding neck; blood clot was found in the nostril and mouth of deceased. At the time of post mortem following ante mortem injuries were found:-

(I) ***lacerated wound*** *7 cm x 3 cm on the right side forehead upper part 3 cm above mid of right eyebrow, margin irregular clot blood present, brain deep, brain coming out of wound.*

(ii) ***Lacerated wound*** *5 cm x 1½ cm on the left side forehead upper part, 4 cm above mid of eyebrow irregular clot blood present, bone deep.*

5. During investigation PW-5, S.I. Tejveer Singh recorded statement of witnesses and upon conclusion of investigation, involvement of Om Prakash was not found hence charge sheet (Ex.ka-8) was submitted only against appellant Moti, before C.J.M. Bareilly, who took cognizance of offence. As offence was exclusively triable by Court of Session, he, after providing copies of relevant documents, as required by Section 207 of Code, committed the case for trial to Court of Session, Bareilly.

6. The case was transferred for trial to Additional Session Judge, Bareilly who framed charges against appellant as under:-

*"मैं रीता कौशिक, अपर सत्र न्यायाधीश (फ़ास्ट ट्रैक) कक्ष सं. 4, बरेली आप **अभियुक्त मोती** पर निम्न आरोप आरोपित करती हूँ :-*

1 . यह कि दिनांक 13.6.2008 को समय करीब 2:30 पी. एम. बहद स्थान ग्राम औसढ अंतर्गत थानाक्षेत्र फरीदपुर जिला बरेली में आपने वादी मुकदमा राम सरन के भाई कुंवरसेन को लाठी डंडों से मारपीटकर सिर में गंभीर उपहति कारित किया जिससे उसकी मृत्यु हो गई और इस प्रकार आपने ऐसा कार्य किया जो कि भा.द.सं. की धारा 302 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में हैं.

अतः आपको निर्देशित किया जाता हैं कि उक्त आरोप के लिए आपका विचरण इस न्यायालय द्वारा किया जाये.

आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया जिससे उसने इनकार किया और विचरण कि माँग किया."

"I Reeta Kaushik, Additional Session Judge, (Fast Track) Court no. 4, Bareilly hereby charge you Moti as follows:-

That you, on or about 13.6.2008 at 2:30 p.m. Within the area of village Ausar, P.S. Faridpur, Bareilly caused death of Kuwar Sen, brother of Ram Sharan by causing grievous injury at head by lathi/danda and thereby committed an offence punishable under Section 302 IPC and within the cognizance of this Court.

I hereby direct you that you be tried by this Court on the said charge.

Charges were read with and explained to the accused who pleaded not guilty and claimed to be tried."
(translated by Court)

7. In order to prove its case, prosecution has examined six witnesses wherein Ram Sharan (PW-1), Brijesh (PW-2), Praveen Kumar (PW-3) are eye witnesses whereas Roop Singh (PW-4), S.I. Tejveer (PW-5) and Dr. Lok Nath Deepak (PW-6) are formal witness.

8. After the prosecution evidence, statement of appellant was recorded under Section 313 of Code wherein he denied prosecution case and evidence and alleged that he had been implicated due to enmity and village party bandi. He was given an opportunity to lead evidence in his defence but no evidence was produced by him before Trial Court. Thereafter, learned Additional Session Judge, after hearing counsel for both parties found accused-appellant guilty of offence under Section 302 I.P.C. and, accordingly, convicted and sentenced as above.

9. Aggrieved by impugned judgment and order, appellant has preferred this appeal.

10. We have heard Sri Sita Ram Sharma, Advocate (Amicus Curiae) for appellant and Sri M.C. Joshi, learned A.G.A. for State.

11. It has been contended by learned Amicus Curiae that accused appellant is innocent and has falsely been implicated; F.I.R. has been lodged after 10 hours by due deliberation and consultation; Inquest report is not supported by statement of eye witnesses; in the inquest report it has been

mentioned that deceased had died due to injury caused by *lathi/danda* and stone whereas use of stone in the occurrence has not been stated. Learned counsel further contended that statement of PW-1 is self-contradictory in regard of time of recovery and also as to how dead body of deceased was sent to hospital. Appellant was not mentally fit at the time of occurrence. It is further submitted that at the time of occurrence so many people were present, according to prosecution, but prosecution has examined only interested witnesses and has not examined independent witness.

12. Per contra learned A.G.A. has submitted that prosecution case is fully proved by reliable evidence; delay caused in lodging F.I.R. is self-explanatory, natural and justified; there is no contradiction in the statement of eye witnesses; presence of eye witness is natural at the place of occurrence, their statements are reliable and trustworthy; prosecution has succeeded to prove its case beyond any reasonable doubt hence impugned judgement and order passed by Trial Judge requires no interference and appeal is liable to be dismissed.

13. We have considered rival submissions of learned counsel for parties and have gone through entire record.

14. Ram Saran (PW-1) is the real brother of deceased Kuwar Sen. He has been examined before Trial Court on 11.12.2009. According to him, appellant and his brother Om Prakash are sons of Ram Swaroop and residents of his village. Ram Swaroop had let out his land for cultivation to his brother Kuwar Sen. On that account, Om Prakash and appellant used to remain annoyed with deceased Kuwar Sen. He has further stated that 1½ years ago, at about half past two in afternoon, his brother Kuwar Sen was lying beneath Pakad tree, out side his house. At that time, appellant came with thick wooden stick in his hand and another accused Om Prakash came with *lathi* and as they arrived, appellant Moti assaulted Kuwar Sen with wooden stick as a result whereof serious injury was caused on the head of Kuwar Sen. He has further stated that on hearing noise, he, Brijesh (PW-2) and Praveen (PW-3) rushed towards place of occurrence and challenged them; both, accused Om Prakash and appellant Moti fled away. He has further stated that he took his brother Kuwar Sen in wounded state to Faridpur by bullock cart but Kuwar Sen died on the way. Thereafter, he took deceased Kuwar Sen's body to P.S. Faridpur where he dictated report (Ex.Ka-1) to unknown person and got it written, and after signing it, he lodged the same at P.S. Faridpur. This witness has verified and proved F.I.R. (Ex.K-1).

15. Brijesh (PW-2) has stated that on 13.6.2008 he was present at his house and on that day at about 2:30 p.m., he heard a noise. On the said noise he came out and saw that Kuwar Sen was lying on a cot, beneath Pakad tree, situated in front of his house and also saw that appellant assaulted at Kuwar Sen by *lathi* whereupon Kuwar Sen got injured. He has further stated that at the time of occurrence Om Prakash (another accused) was not present and only appellant was present who had caused injury by *lathi* to Kuwar Sen. Verifying an affidavit dated 23.6.2008 (Ex.K-2), he has further stated that he had given that affidavit, signed by him at Police Station. According to him Kuwar Sen died due to injury caused by appellant. He has further stated that on 14.6.2008, inquest of deceased Kuwar Sen was conducted before him and his dead body was sealed by Police and sent

for post mortem. He has also proved the inquest report (Ex.K-3).

16. Praveen Kumar (PW-3) has stated that Kuwar Sen was known to him, who was resident of his village. According to him, it was June, 2008 at about 2:30 p.m., he was sitting at house of Brijesh (PW-2). He has further stated that upon hearing alarm, he and Brijesh (PW-2) rushed and saw that deceased Kuwar Sen was lying on a cot, beneath Pakad tree, and appellant Moti was causing injury on the head of Kuwar Sen by a thick wooden stick. According to him, at the place of occurrence, family members of Kuwar Sen, his mother and his brother Ram Saran (PW-1) also had come. He has further stated that as he rushed to place of occurrence appellant Moti fled away by throwing *korhi* (thick wooden stick) and thereafter Kuwar Sen was taken for treatment by his family members but he died. He has also stated that death of Kuwar Sen was caused due to injuries, caused by appellant on the head of Kuwar Sen.

17. Roop Singh (PW-4) is witness of recovery memo (Ex.Ka-5) of blood stained and plain earth, taken into custody by Investigating Officer (hereinafter referred to as "I.O.") during investigation. He has stated that during investigation of case, I.O. had taken sample of plain and blood stained earth, from place of occurrence, before him and one Rishi Pal of his village; I.O. has also recovered and taken into custody *Korhi* (thick wooden stick), weapon of offence, from place of occurrence, who had prepared recovery memo (Ex.K-5) and (Ex.K-6); and at the time of recovery, he had also put his signature on those documents.

18. S.I. Tejveer Singh (PW-5), I.O. of the case, has stated that on 13.6.2008 he was posted as S.S.I. at P.S. Faridpur, District Bareilly. On that day he under took investigation of Case Crime No. 597 of 2008 under Section 304 IPC. During investigation he had perused and copied the relevant Police papers, inspected place of occurrence on pointing out of Informant and prepared site plan (Ex.K-7). He has further stated that inquest report (Ex.K-3), recovery memo of sample of blood stained and plain earth (Ex.K-5) and recovery memo of wooden stick (Ex.ka-6), were prepared by him. According to him, he had prepared inquest report at C.H.C. Faridpur because at that time dead body of deceased was in that hospital. He has further stated that upon investigation, he had filed a charge sheet (Ex.ka-8) only against appellant because involvement of another accused Om Prakash @ Chet Ram was not found. Constable Gajendra Singh was posted with him. He is well acquainted with his hand writing. Chik FIR (Ex.Ka-9) and G.D. Report No.5, 00:20 a.m. dated 14.6.2008 (Ex.Ka-10) had been prepared and signed by Constable Gajendra Singh. This witness has also proved G.D. Report No. 24, (Ex.Ka-11) dated 14.6.2008, report regarding depositing of wooden stick, sample of plain and blood stained earth and arrest of appellant. He has also identified recovered wooden stick, weapon of offence, (material Ex.1)

19. Dr. Lok Nath Deepak (PW-6) has stated that on 14.6.2008 he was posted as Senior Consultant at DistrictHospital, Bareilly. On that day at about 2:45 p.m. he had conducted autopsy on corpse of Kuwar Sen s/o Ahvaran Singh age about 35 years r/o Ausadh, P.S. Faridpur, District Bareilly who was sent by S.O. Faridpur with nine relevant Police papers. The corpse was identified by Constable Brahma Pal Singh and Constable Girish Kumar, P.S. Faridpur.

(the condition of corpse and details of ante mortem injuries, found at the time of post mortem examination, has been mentioned in preceding paragraph of the judgment). According to him deceased had died one day before; in internal examination of the dead body, frontal, temporal and parietal bones of both left and right side of head were fractured; membranes of brain and brain were lacerated; base of brain was fractured; stomach and heart were empty; death was caused due to coma (shock) caused by ante mortem head injury; and at the time of post mortem; he had prepared post mortem report (Ex.Ka 12) in his own hand writing and signature.

20. In this case appellant Moti, in his statement under Section 313 of Code, has denied his involvement in the said occurrence as alleged by prosecution witnesses but has not produced any evidence in his defence. Thus it has to be seen whether prosecution has succeeded to establish its case against appellant accused beyond reasonable doubt or not.

21. So far as submission of learned Amicus Curiae, that FIR has been lodged after 10 hours after due deliberation and consultation, is concerned, record shows that alleged occurrence had taken place on 13.6.2008 at 2:30 p.m. and F.I.R. was lodged on 14.6.2008 at 00:20 a.m. In Chik FIR (Ex.Ka-9) the distance of place of occurrence from P.S. Faridpur has been shown as 4-5 km. It has been specifically stated by PW-1 in his cross-examination that he had proceeded just after occurrence with Kuwar Sen from the place of occurrence; reached at Police Station at about 3:00 p.m. and lodged F.I.R. According to him, at that time Kuwar Sen was alive; he had rushed, with Kuwar Sen, to Bareilly at about 3:00 p.m. from Faridpur, and reached at GangaCharanHospital, Bareilly but before admission, Kuwar Sen had died. According to him, thereafter, he returned with deceased Kuwar Sen to Police Station and reached there at about 4:00 p.m.; when he reached at Police Station, *Daroga Ji* (Police Inspector) directed him to keep the dead body at Godam and report was lodged at 11:00 p.m. Thus it is clear that Ram Saran (PW-1), after occurrence, firstly had carried his injured brother Kuwar Sen to hospital, in order to save his life, but when he could not succeed to save his life, after his death, he had gone to Police Station to lodge F.I.R. S.I. Tejveer Singh (PW-5) has also stated that he had conducted inquest of deceased Kuwar Sen at C.H.C. because at that time dead body of deceased was lying there.

22. Record shows that this witness is rustic and illiterate; he got the F.I.R. written by unknown person on his dictation and filed the same. Thus it is clear that after occurrence, PW-1, Informant, firstly, had gone to Police Station where his report was not lodged and it appears that he was given advice to provide medical treatment to Kuwar Sen, who was alive at that time and on such advice he had proceeded to hospital for treatment but after death of Kuwar Sen he again returned to Police Station.

23. In such situation we are of view that there is no inordinate delay and the delay, if any caused, has been self-explained and justified in view of peculiar facts and circumstances of the case. Nowhere in any statute either in Evidence Act or in Code or in IPC any particular time has been specified for lodging of F.I.R. Even, in Section 154 of Code

which deals with lodging of the F.I.R., no particular time has been prescribed for lodging F.I.R. Sometimes an inordinate delay, caused in lodging the F.I.R., if justified and natural, does not affect credibility of prosecution and sometimes even a prompt F.I.R. may affect credibility of prosecution. It depends upon facts and circumstances of each case. It is settled principle of law that if a plea is raised by defence to shake credibility of prosecution case, on account of delay in lodging F.I.R., it has to be shown by defence counsel that due to such delay in lodging F.I.R. as to what manipulation in evidence of prosecution case had been committed by prosecution witnesses. If defence counsel fails to prove any fact as to what inherent laches or loopholes in prosecution case was cured due to delay caused in lodging F.I.R., delay in lodging same, will not be treated material. In this case no such fact has been alleged by defence counsel before Trial Court during examination of PW-1. Thus delay in lodging F.I.R. is just and natural. Hence submission of learned Amicus Curiae has no force.

24. So far as submission of learned Amicus Curiae that there is contradiction between inquest report and statement of eye witnesses regarding nature of weapons and injury is concerned, inquest report (Ex.ka-3) shows that inquest proceeding was conducted on 14.6.2008 between 6:00 a.m. to 8:00 a.m. In this report, it has been mentioned that several blood stained injuries were present on head and face of deceased; blood was oozing out from right nostril; head was drenched with blood. According to opinion of *panch* (five persons present at the time of inquest), death of deceased would have been caused due to injuries by *lathi*/*danda* and stones. These members of inquest report, except PW-2, Brijesh, are not eye witnesses. In our view, if they had estimated regarding weapons used in occurrence, stone also in addition to *lathi*/*danda* (wooden stick), it would not affect the statement of eye witnesses. According to eye witnesses (Ram Saran, PW-1, Brijesh, PW-2 and Praveen, PW-3) death of deceased was caused due to injuries caused by appellant by *lathi*. This fact is also corroborated by Dr. Lok Nath Deepak (PW-6) who in cross-examination has stated that injuries of deceased would have been caused by a blunt object, for example, *lathi* of 3' Inches diameter. According to this witness it may also be caused by a weapon (*lathi*) of 6-7' Inches diameter.

25. It is settled principle of law that any opinion, regarding cause of death or nature of injury expressed in inquest report, has no preferential evidentiary value on the statement of eye witnesses or medical evidence. The purpose of inquest report is only to send the dead body for post mortem examination, to ascertain cause of death. Thus the submission of learned Amicus Curiae has no force.

26. So far as submission of learned Amicus Curiae that statement of Ram Saran (PW-1) is contradictory as to how the dead body of deceased was sent to hospital is concerned, record shows that PW-1 in examination-in-chief has stated that he had taken away his brother deceased Kuwar Sen, in injured condition, to Faridpur by bullock cart and on the way to Faridpur, he died. In cross-examination he has stated that he had reached at 3:00 p.m. at Police Station and at that time Kuwar Sen was alive; from Faridpur he proceeded to Bareilly with

Kuwar Sen to GangaCharanHospital but before admitting him for treatment, Kuwar Sen had died. He has further stated that he had returned with dead body of Kuwar Sen by D.C.M. (mini truck) to P.S. Faridpur. Although this witness, in examination-in-chief, has stated that Kuwar Sen had died on the way to Faridpur, later on, in cross-examination he stated that he (deceased) had died at Bareilly. Thus in cross-examination, he clarified the place where deceased had breathed last. We are of view that there is no contradiction in statement of this witness because it might be that when he reached at Faridpur, someone had advised or good sense had prevailed to Ram Saran (PW-1) to take his brother Kuwar Sen to hospital for treatment as he might alive at that time. Thus taking away by bullock cart to Faridpur and thereafter by D.C.M. (mini truck) for hospital, is natural conduct of this witness. Thus submission of learned Amicus Curiae in this regard has no force.

27. So far as submission of learned Amicus Curiae that there is contradiction between statement of witnesses regarding time of recovery of weapons is concerned, from perusal of recovery memo of wooden stick (weapon of offence) (Ex.Ka-6), it appears that weapon of crime was recovered by Police on 14.6.2008. In this recovery memo exact time of recovery has not been mentioned. PW-5, S.I. Tejveer Singh (I.O.) has also not stated exact time of recovery of weapon. In cross-examination he has stated that he had reached at the place of occurrence and inspected it at 2:30 a.m. and recovered blood stained and plain earth and also wooden stick (*danda*) in presence of Rishi Pal and Roop Singh. Roop Singh (PW-4) who is witness of recovery memos Ex.ka-5 and Ka-6, has stated that Police had recovered blood stained and plain earth on next day of the occurrence. This witness has also not stated the exact time of recovery of weapon used in offence (wooden stick). Learned counsel for defence has also not put any question to this witness during his cross-examination regarding exact time of recovery of weapon, used in offence. As per prosecution case, as stated by witnesses, alleged occurrence was happened on 13.6.2008 and recovery of weapon, used in offence, was made on 14.6.2008. Thus in our view there is no contradiction on timing of recovery of weapons which may affect either recovery of weapon of offence or veracity of prosecution case. The submission, made by learned Amicus Curiae, has no force.

28. So far as submission of learned Amicus Curiae that prosecution has produced only interested witnesses and has not produced independent witness, is concerned, it is well settled principle of criminal jurisprudence that only on the ground that witnesses are relative or kith and kins of deceased, their evidence cannot be disbelieved. In such type of cases, only requirement is that evidence of such witnesses be dealt with much care and caution.

29. In **Masalti and others Vs. State of U.P., 1965 SC 202,** while dealing with the evidence of reliability and admissibility of interested witnesses, Court has held as under :-

".....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested

witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct....."

30. Similarly, in **Mohabbat Vs. State of M.P., (2009) 13 SCC 630,** Court held as under:-

".....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible....."

31. In this case prosecution has produced Ram Saran (PW-1), Brijesh (PW-2) and Praveen Kumar (PW-3). Only PW-1 is brother of deceased. PW-2 and PW-3 are neighbours of deceased. PW-2 has stated in cross-examination that at the time of occurrence he was at his house and his house is situated just 1 meter away from place of occurrence whereas PW-3, in cross-examination has stated that he was present at the house of Brijesh (PW-2), at the time of occurrence. Thus the presence of these witnesses nearby place of occurrence, at the time of occurrence, is quite natural. The statement of these witnesses cannot be discarded only on the ground that either they are relative or neighbours of deceased. Learned Amicus Curiae has not shown any reason or justification as to why these witnesses, whose presence has been found natural, at the place of occurrence, are giving false evidence leaving aside the real culprit. In absence of such justification or explanation, evidence of these witnesses cannot be discarded in the facts and circumstances of this case. Hence submission of the learned Amicus Curiae has no force.

32. So far as submission of learned Amicus Curiae that appellant was mentally sick at the time of occurrence, hence, lenient view is required to be taken against him as he has not caused alleged incident intentionally, is concerned, in this regard it is settled principle of criminal jurisprudence that if prosecution case has been found trustworthy and reliable wherein involvement of accused has been proved beyond reasonable doubt, the burden shifts on accused to prove the plea of insanity, taken by him. Record shows that, after occurrence, appellant had fled away from place of occurrence. In the statement under Section 313 of Code, he has not taken any plea regarding his insanity. No evidence has been produced by him in his defence to prove the plea of insanity. Thus the plea raised by learned Amicus Curiae, regarding insanity of appellant, has no force.

33. In this case occurrence had taken place in front of house of Kuwar Sen when he was taking rest beneath tree, situated in front of his house. PW-1 is his real brother whereas PW-2 and PW-3 are neighbours of deceased. They have reached the place of occurrence just after hearing alarm raised by deceased. It is day light occurrence. Presence

of these witnesses at the place of occurrence has been found natural. They were put to lengthy cross-examination by learned counsel for defence before Trial Court but nothing could be extracted by way of cross-examination so as to create any doubt in their testimony. Their statements are reliable and trustworthy. F.I.R. has been lodged without any delay. Delay if any, has been explained and found natural. F.I.R. and post mortem examination report of deceased are in consonance and in corroboration of statement of the witnesses produced by the prosecution. According to statement and examination of all witnesses, each and every circumstance of case, proved by prosecution, leads to only conclusion that this offence has been caused by appellant Moti. There is nothing on record to show that prosecution witnesses had any animus with appellant so as to implicate him falsely, absolving actual assailant. Trial Court has elaborately discussed prosecution evidence in the light of arguments advanced by learned counsel for prosecution as well as defence. The impugned judgement and order requires no interference and is liable to be affirmed.

34. Now the question arises, whether sentence awarded by Trial Court is just and proper or not.

35. Learned Amicus Curiae has submitted that according to prosecution witness, injuries have been caused only by *lathi* and not by any deadly weapon, hence, accused-appellant may be convicted under Section 304 I.P.C. and not under Section 302 I.P.C.

36. From perusal of post mortem report, it is clear that all injuries were caused only on the head of deceased Kuwar Sen. Injuries were so grievous that bones of head were so fractured that brain was coming out. No other injury except head injuries was found on the body of deceased. At the time of occurrence deceased was unarmed. In our opinion causing grievous injuries only on vital part (head) of deceased amounts that appellant had caused injuries with intention to cause death of deceased. Looking into facts and circumstance of this case as well as nature of injuries caused by appellant, we are of the view that conclusion of Trial Court that appellant-accused is liable for offence of murder, punishable under Section 302 I.P.C., requires no interference.

37. It is settled principle of sentencing and penology that undue sympathy, in awarding the sentence, with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard in **State of Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996** Court has said as under:-

"The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should ""respond to the society's cry for justice against the criminal"."

38. Accused-appellant has been convicted only for life imprisonment and fine of Rs. 1000/-. For offence under Section 302 I.P.C. an accused may be

punished either with death sentence or with imprisonment for life and also with fine. Thus appellant has been convicted for minimum sentence which requires no interference.

39. In the light of above discussion. This jail appeal is hereby **dismissed.** Impugned judgment and order dated 20.1.2011 passed by Additional Session Judge, Court No. 2, Bareilly in S.T. No. 37 of 2009 (State Vs. Moti) is maintained and affirmed.

37. Sri Sita Ram Sharma, learned Amicus Curiae has assisted the Court very diligently. We provide that he shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrance posted in office of Advocate General at Allahabad, to Sri Sita Ram Sharma, Amicus Curiae without any delay and, in any case, within 15 days from the date of receipt of copy of this judgment.

38. Let a copy of this judgment along with lower court record be sent to Additional Session Judge, Court No. 2, Bareilly for necessary information and compliance.

39. Compliance report be sent to this Court. Copy of this judgment be also supplied to accused-appellant through Superintendent of Jail, concerned.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

CRIMINAL APPEAL No. 5206 OF 2018

Arvind Parmar @ Bunty and Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Datt Dauholia, Sri Nanhe Lal Tripathi

Counsel for the Opposite Party:
A.G.A.

A. IPC - Sections 457, 380, 411, 413 and 511 of IPC. Not an iota of evidence regarding commission of offence punishable under Section 380 IPC or 457 IPC, except their alleged confessions, that too, when they were apprehended by the Police. Not admissible in evidence (Para17)

B. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking.
That charge must be substantiated by evidence. It cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass.(Para19)

B. Evidence Act – Section 114 – Presumption can be drawn only when the accused, when asked, is unable to explain his possession. That in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. (Para-20)

C. Under Section 380 IPC - Essential ingredient for offence, punishable under

Section 380 IPC, is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and thatsuch building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved. (Para22)

Learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.Criminal Appeal succeeds and is allowed. (Para 24,25,26)

CHRONOLOGICAL LIST OF CASES CITED: -
41 Cr.L. J, 623 (Allahabad),Chhadami v. Emperor (E-7)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as "Cr.P.C.'), has been filed by the convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra, and Raheem Khan, against the judgment of conviction, dated 20.07.2018 and sentences awarded therein, by the Court of Additional Sessions Judge/Special Judge (U.P. Dacoity Affected Area), Lalitpur, in Sessions Trial No. 26 of 2013 (State vs. Arvind Parmar @ Bunty and others), arising out of Case Crime No. 1613 of 2012, under Sections 457, 380, 411, 413 and 511 of Indian Penal Code (Hereinafter in short referred to as "IPC'), Police Station- Kotwali Lalitpur, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunty, Rajan @ Rajendra and Rahim Khan have been sentenced with five years' rigorous imprisonment and fine of Rs.5,000/-, each, under Section 380 IPC, and Ten years' rigorous imprisonment, with fine of Rs.10,000/-, each, under Section 457 IPC. In case of default of deposit of fine of Rs.10,000, they will have to serve one year's simple imprisonment and in default of deposit of fine of Rs.5,000/-, they will have to serve six months' simple imprisonment, with further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjunctures.

2. The occurrence had been said to have taken place in the night of 8.8.2012 and a first information report was lodged on 9.8.2012 as Case Crime No.1613 of 2012, under Sections 457, and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Bunty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Raheem Khan, appellant no.3, said to have fled from the spot. Recovery of golden ornaments and Rs.27,00/-, in cash, was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred 8.8.2012, and first information report was lodged on 9.8.2012. PW-4, Subhash Chandra, had stated that the arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery was

said to have been made from them, while appellant no.3 was said to be absconded, whereas it was a false recovery and false implication. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-2, dated 9.8.2012, was got lodged by the informant, Smt. Gita, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that in the evening of 8.8.2012, after putting lock on her Beauty Parlour, she went to her home and next day, i.e., 9.8.2019, she got an information that lock of the shop was broken. After reaching on the shop, she had seen broken lock of the door of the shop and when she entered into the shop, she found that Rs.27,00/-, cash, kept in her Gullak (Piggy Bank), has been stolen. She got the report written by her husband and presented the same at Police Station Kotwali, Lalitpur, which has been registered. Case Crime No.1613 of 2012, under Sections 457 & 380 IPC was got registered against unknown thieves on 9.8.2012.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team was on surveillance duty, informer gave information about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, ChandiMataTemple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and was called to Varni Four-way Junction. A Police Team led by him, with the Inspector, proceeded for ChandiMataTemple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, Resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, Resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, Resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar (informant), Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others reached on the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the

house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak, Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 and 413 was made.

6. On the basis of investigation, chargesheet was filed and after hearing learned Public Prosecutor as well as learned counsel for defence. Charges for offence, punishable under Section 380, 457, 411 and 413 and 511 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Smt. Gita, informant, PW-2, Kamlesh, PW-3, Constable-Sushil Kumar, PW-4, S.I. Subhash Chand and PW-5, Sub Inspector, Varun Pratap Singh.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and IPC and judgment of acquittal, under Sections 411 and 413/511 IPC was passed.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. No appeal, by the State, against judgement of acquittal for offence, under Sections 411 and 413/511 IPC, is there.

11. First Information Report, Exhibit Ka-1 (Paper No. 5Ka), was formally proved by PW-1, informant-Smt. Gita, and it has specifically been lodged against unknown thieves, because this witness was not present at the place of occurrence, i.e., her Beauty Parlour, at the time of alleged occurrence of theft. In examination-in-chief, this witness has said that in the evening of 8.8.2012, after putting lock on her Beauty Parlour, she went to her home and next day, i.e., 9.8.2019, she got an information that lock of the shop was broken. After reaching on the shop, she had seen broken lock of the door of the shop and when she entered into the shop, she found that Rs.27,00/-, cash, kept in her Gullak (Piggy Bank), had been stolen. Hence, a report, written by her husband, under her signature, was lodged, against unknown thieves on 9.8.2012, whereas in her examination in chief, she has said that she has not seen any one while committing theft nor has

identified any accused nor any identification parade was conducted. At what time, locks of shop were broken, she did not have any knowledge. Police did not enquire any thing from her, but went on the spot. Meaning thereby, informant neither has seen anyone, while committing theft in her shop nor was there at the time when locks of her shops were broken nor has named any accused person nor any accused was produced before her for identification. Neither any recovery was before this witness nor any specific mark of identification/denomination of alleged recovered article/currency was there nor any recovery memo was prepared on the spot nor the same were produced before the court during trial nor this witness was previously acquainted with accused persons. Thus, this witness does not support prosecution case at all and the case set up by the prosecution falls flat, so far as testimony of this witness is concerned.

12. PW-2 is Kamlesh, husband of informant, Gita, who written the report of occurrence of theft, which has been signed by the informant and was presented in the Police Station for registration of the first information report. He in his examination-in-chief has stated that in the evening of 8.8.2012, his wife, after locking her shop, came to home. In the morning of next day, residents of the locality informed that the locks of the shop were broken. After reaching on the spot, it was found that Rs.2,700/-, kept in Saving Box (Gullak), was stolen. Report of occurrence of theft was got lodged by his wife in the Police Station. While, in his cross-examination, this witness has stated that he had not seen anyone, committing theft nor identified any accused nor stolen cash was produced before him in the court. Meaning thereby that testimony of this witness neither supports version of the prosecution in any way nor is of any relevance to the case set up by the prosecution.

13. The other witness, PW-3, Constable Sushil Kumar, who is a formal witness, proved registration of first information report, Exhibit Ka-2, Case Crime No.1613/12, scribed in his hand-writing and under his signature. This registration of report was against unknown accused persons for offence, punishable under Sections 457 and 380 IPC. Since the report was against unknown accused persons, cross-examination was not done. The report was against unknown thieves. Thus, testimony of this witness is of relevance to the prosecution and is of no avail to the prosecution.

14. PW-4 is Sub Inspector-Subhash Chand. He is a witness of fact of arrest of accused persons and recovery of stolen articles. In his testimony, this witness has stated that on 14.8.2012, on receiving information, he, accompanied Inspector, Incharge, Police Station, Kotwali, and reached Varni fourway-junction, where they met SOG Incharge, Sumit Kumar Singh. He has been told about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, ChandiMataTemple. Police Team proceeded towards Cremation Ghat and on reaching thereat, Police team seen some persons sitting thereat. On being pointed by the informer towards those persons that they were involved in various incidents of thefts, Police Team apprehended four persons. On being asked to disclose identity, first

one told his name Arvind Parmar @ Bunty Raja, reisdent of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered, however, four other persons managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Sharma, Smt. Gita, Satendra Singh Parmar (informant), Balram Pachauri, Niraj Nayak, Sanjay Tiwari and others reached on the spot, and after seeing those four apprehended persons said that they have committed various occurrences of theft. Prem Lata Jain identified Mangalsutra and one golden ring stolen from her house whereas Balram Pachauri identified one golden chain and Rs.2,000/-, in cash, stolen from his house, Akhilesh Sharma has identified two golden rings, with cash of Rs.20,000/-, stolen from his house, two ear rings stolen from the house of Sanjay Tiwari was also identified by him and Niraj Nayak identified golden Pendent stolen from his house. He prepared recovery memo on dictation of Inchaarge, S.O.G., which are Paper Nos. 13Ka/1 and 13Ka/2 and marked as Exhibit Ka-4.

However, in his cross-examination, this witness has said that in the first information report, name of any accused was not mentioned and the report was lodged against unknown persons nor any specific mark of identification of stolen articles was there. Such articles are generally found in every house. Proceeding for identification of recovered articles was not conducted. On whose information, informants of other cases reached on the spot, was not known to him. At what time, recovery memo was written, he could not remember. Whether first information report of each occurrence was there or not, was not under his knowledge. Meaning thereby, there was no specific mark of identification of stolen articles nor denomination of currency notes, stolen from the shop of informant was there, nor any proceeding for identification of recovered articles was conducted nor anyone was named in the first information report. Who wrote the recovery memo and at what time was also not known to this witness. Thus, testimony of this witness appears to be shaky and is not worth credit, thereby, does not support prosecution case in any way.

15. PW-5 is Sub Inspector, Varun Pratap Singh Yadav. He, in his testimony, has said that while he was posted at Police Chowki Nehru Nagar, under Police Station Kotwali, Lalitpur, on 8.8.2012, he has been entrusted with investigation of Case Crime No. 1613/12, under Sections 457, 380 and 511 IPC, against unknown persons. In his testimony, this witness has stated that firstly he collected Copies of

Chik, report, written report and got the same entered in the case diary, then after recorded statement of scribe of first information report, Sushil Kumar, statement of informant, Smt. Gita, statement of witness Kamlesh Kushwaha and Bakiram Raikvar. He also got statement of accused persons recorded and found them to be involved in the occurrence of theft and recovered stolen articles, hence Sections 411 and 413 of IPC were added. Statements of Police personnel, who arrested accused persons and recovered stolen articles were recorded by him. He inspected place arrest of accused ahead of ChandiMataTemple, Govind Sagar Dam and Cremation Ghat and prepared Site Map, which is Paper No.15Ka/2, under his signature, which is marked as Exhibit Ka-5. He inspected the shop of the informant (place of occurrence) and prepared site map, which is paper no. 15K, under his signature, marked as Exhibit Ka-6. He submitted chargesheet, Exhibit Ka-7, on 22.8.2012, against Arvind Parmar @ Banty Raja, Rajan Jitu Parihar, Naval Ahirvar and Arvind Pal. Thenafter, again submitted chargesheet, Exhibit Ks-8, against Shivam Tiwari, Raheem and Bunty @ Vinod, on 30.9.2012.

16. This witness, in his testimony, has also stated that being member of the Police team, has witnessed arrest of Shivam Tiwari, 27.8.2012, from Jail Road, upon receipt of an information from the informer and from his personal search Rs.5,000/- in cash, golden ring of about 1.5 Tola and one number white coloured silver box, like of silver metal were recovered. On being investigated, he confessed to have committed various occurrences theft with his other accomplices, namely, Arvind Parihar @ Bunty, Rajan, Jitu, Naval, Arvind Pal, Banti Dhobi and Rahim. Recovery memo of recovered articles were prepared on the spot, a copy of which has been given to the accused.

However, in cross-examination, this witness has stated that in the first information report, names of accused persons was not mentioned nor any mark of identification of any accused was there nor there was any mark of identification of stolen articles nor there was any eye witness nor any independent public witness of occurrence. He did not get the identification parade of accused persons conducted nor any proceeding for identification of stolen article was conducted.

So far arrest of arrest of Shivam Tiwari is concerned, in the present case Shivam is not under Appeal and present appellants were not apprehended alongwith this witness. Confessional statement of Shivam, that too, made by the present witness, before the Police personnel, with no recovery from appellants, makes his testimony of no relevance.

17. Meaning thereby his examination-in-chief and examination-in-cross is with full of variance. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but

there is neither any specific mark of identification nor there is any corresponding evidence for connecting with above offence of theft was there on record, which was not there and as such in absence of any such evidence, prosecution miserably failed to prove its case.

18. Section 457 of Indian Penal Code (IPC) provides that "whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years'.

19. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

20. Allahabad High Court in ***41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,*** has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

21. In present case, no evidence of house breaking by night or lurking house-trespass by appellants was there, except alleged recovery of cash, but the same was not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above breaking locks of shop or recovery of cash from convict-appellants.

22. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC, is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or

vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

23. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

24. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

25. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

26. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 20.07.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

27. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

28. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 7229 OF 2018

Bachu @ Hira Lal ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ashok Kumar Singh.

Counsel for the Opposite Party:
A.G.A.

A. IPC – section 506 I.P.C- The essential ingredient for offence punishable under this section is offence of criminal intimidation defined under section 503 I.P.C

To bring home an offence punishable u/s 506 I.P.C. the prosecution has to prove that

accused threatened the victim to injure his person, reputation or property or to the person or reputation of any one in whom that person is interested. In the present case PW2-victim, in her testimony, has said that while she protested for rape, the convict-appellant intimidated her by show of knife for killing her in case of opening of lips to anyone or protesting such rape. She was criminally intimidated and assaulted for sexual assault. For this, there is no contradiction or exaggeration or embellishment. Rather full corroboration is there. Hence this too has been fully proved. (Paras 26 &27)

B. POCSO Act, 2012: - u/s 4 of POCSO Act, 2012- aggravated form of offence punishable u/s 376 I.P.C.

C. The cardinal principle of criminal jurisprudence is, unless proved, presumption of innocence is there and prosecution is to prove charge beyond doubt, whereas accused is to prove exceptions, given under the Code, or lack of any essential ingredient of that particular offence to the extent of preponderance of probabilities.

If he succeeds in creating situation of existence of preponderance of probabilities, then benefit of doubt is to be given to him i.e.; the prosecution failed to prove its case beyond reasonable doubt. But in this special legislation, this principle has been done away. Here, if the victim is child, below the age of 16 years, the presumption is in favour of prosecution and the defence is to prove contrary to it. But no evidence in defencehas been laid by accused. (Para 24)

D. Sentencing - question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual case. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. (Para 28 & 29)

CHRONOLOGICAL LIST OF CASES CITED: -

1:-(2014) 7 SCC 323 Sumer Singh Vs.Surajbhan Singh and others

2:-(1990) 4 SCC 731ShamSunder Vs. Puran

3:-(2005) 5 SCC 554 M.P. Vs. Saleem

4:-(1996) 2 SCC 175 Ravji Vs. State of Rajasthan (E-7)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal, under section 374(2) of Code of Criminal Procedure (hereinafter referred to as Cr.P.C.), has been filed by convict appellant Bachu @ Hira Lal, against judgment of conviction and sentence made therein, dated 20.10.2018, passed by Court of VIII Additional Sessions Judge, Aligarh, in S.T. No. 48 of 2015, State Vs. Bachu @ Hira Lal, arising out of Case Crime No. 320 of 2014, u/s 376, 506 I.P.C. read with Section 4 Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as POCSO Act) P.S. Chandaus, District Aligarh, wherein convict appellant has been convicted for offences punishable u/s 376, 506 I.P.C. with offence punishable u/s 4 of POCSO Act, 2012. But as the offence punishable u/s 4 of POCSO Act was aggravated form of offence punishable u/s 376 I.P.C., hence, sentence of 10 years R.I. with fine of Rs. 30,000/- and in default six months' additional imprisonment for offence punishable u/s 4 of POCSO Act with two years R.I. and fine of 10,000/- and in default three months' additional imprisonment for offence punishable u/s 506 I.P.C. with a direction for concurrent running of sentences and adjustment of previous sentence, if any, was awarded. Memo of appeal contains that the trial court failed to appreciate facts and law placed before it. Appellant was engaged

as a contractor at Ganesh brickkiln. He had lent Rs. 35,000/- to informant, as advance, but she and her husband were not working properly. When pressure was exerted, this false concoction was lodged. Dr. Praveen Jahan (PW3), in her testimony, has held that hymen of victim was old torn. She was with no injury nor any spermatozoa was found in Pathological report. Alleged assault was of 30.11.2014, for which report was got lodged by way of presenting an application before the Senior Superintendent of Police, Aligarh, on 8.12.2014 i.e. nine days delayed report, with no explanation, was there. Investigation was not proper. Statement of owner of Ganesh Brickklin was not taken by Investigating Officer. All prosecution witness, examined, were interested witnesses. Impugned judgment of conviction was with no evidence on record and sentence awarded was much severe. Hence, this appeal with a prayer for setting aside the impugned judgment of conviction and sentence therein with a further prayer for acquittal in above trial.

2. Heard Sri Ashok Kumar Singh, learned counsel for appellant, and Sri Munne Lal, learned AGA for the State, and gone through the impugned judgment and record of trial court.

3. Learned counsel for appellant argued that it was a case based on enmity. F.I.R. was lodged at a delay of nine days. Medical evidence was not in support of accusation of rape. There was material contradiction regarding place of occurrence, wherein field of sugarcane and field of wheat was said by prosecution, which was with material contradiction. Statement recorded u/s 164 Cr.P.C., as of victim, was under influence of her parents, who were under debt of convict appellant for which this false accusation was lodged. Detention of four years six months in judicial prison is there. Hence sentence being deterrent and not in consonance with offence, above detention may be deemed to be proper sentence.

4. Learned AGA has vehemently controverted the argument of learned counsel for appellant by arguing that it was a case of rape by convict appellant with a vulnerable girl of 14 years, who was ailing and was taken for giving medical treatment at a clinic of a medical practitioner, where from the convict appellant, who was co-worker at above brickklin and was under acquaintance, took her under deceit and committed rape with her. Victim and her parents being poor vulnerable labourer, reported the matter to brickklin owner, who asked them to be away from brickklin and get the case lodged at their respective police station. Attempt was made by the informant for getting case lodged at Police Station Jalalpur, District Hameerpur, but it was refused to be registered at the police station because of territorial jurisdiction of district Aligarh, where this offence was committed. Then after this victim and her parents appeared before the Senior Superintendent of Police, Aligarh, where her agony was heard and under direction of S.S.P., Aligarh, this case was got lodged at P.S. Women Cell, Aligarh, wherein victim-prosecutrix, her parents along with other witnesses have proved charge beyond doubt. Hence conviction and sentence was with evidence on record. It was a proper sentencing. Hence appeal be dismissed.

5. Prosecution case, as surfaced from record, is that FIR (Ext. Ka1), under thumb impression of informant Smt.

Noorjahan, w/o Rafiq, dated 8.12.2014, was presented before S.S.P., Aligarh, over which an order for registration of case crime number was passed by the S.S.P., Aligarh, on 8.12.2014 itself. This was with contention that informant Smt. Noorjahan, w/o Rafiq, is resident of village Ghauhal Bujurg, P.S. Jalalpur, District Hameerpur. On 30.11.2014 she along with her husband and daughter Km. Fatima, aged about 14 years, was at 'Ganesh Brickklin', situate at Chandaus within the area of P.S. Chandaus, District Aligarh, as labourer. Km. Fatima became ill. Her father Rafiq took her on 30.11.2014 at 5.00 P.M. at a clinic of a medical practitioner situated at Chandaus town. Bachu @ Hira Lal, resident of same village of informant, accompanied them. Rafiq after taking prescription left Fatima at above clinic and went in the town for purchasing medicines and some daily needs. In between Bachu @ Hira Lal apprised Fatima that her father had straight away gone to brickklin and she to accompany him to brickklin. This was refused by her. But under persuasion she was taken. On the way, in a sugarcane field, Bachu @ Hira Lal committed rape with her, by showing knife and he extended threat of dire consequences, in case of opening of lips to anyone. This was instantly complained by Fatima to her mother, after reaching at brickklin. Her mother and father went to brickklin owner and lodged complaint. But he asked them for going to their native place and to lodge report at P.S. Jalalpur. She, along with her husband and victim, went at P.S. Jalalpur, District Hameerpur, to lodge report, but the report was not lodged, because of being territorial jurisdiction of district Aligarh. Hence, on 8.12.2014, an application was filed before the S.S.P., Aligarh. Under his direction Case Crime No. 320 of 2014, u/s 376, 506 I.P.C. read with section 3/ 4 POCSO Act, 2012, was got lodged vide chick F.I.R. (Ext. Ka8) at P.S. Mahila Thana, District Aligarh, which was subsequently transmitted to P.S. Chandaus. This registration of case crime number was vide G.D. entry (Ext. Ka9). Prosecutrix was instantly examined, under medical examination, and medico legal report (Ext. Ka4), supplementary report (Ext. Ka5) was there. Her statement u/s 164 Cr.P.C. (Ext. Ka2) was recorded by Magistrate on 16.12.2014. She was produced before Medical Board for her age determination, wherein she was held to be of 15 years in report (Ext. Ka10). Investigation resulted in submission of charge sheet (Ext. Ka7), against convict Bachu @ Hira Lal, for offences punishable u/s 376, 506 I.P.C. read with section 3/ 4 POCSO Act. The court of Magistrate took cognizance over it, vide order dated 3.6.2015. As offences, punishable under these sections, were exclusively triable by Court of Sessions, hence file was committed to the Court of Sessions, from where it was sent to Special Court, exercising jurisdiction under POCSO Act, 2012.

6. After hearing learned public prosecutor as well learned counsel for accused, Trial Judge levelled charges against accused Bachu @ Hira Lal, vide order dated 16.1.2016 for offences punishable u/s 376, 576 I.P.C. and 3/ 4 POCSO Act, which were read over and explained to accused, who pleaded not guilty and claimed for trial.

7. Prosecution examined PW1- informant Smt. Noorjahan, PW2- victim Km. Fatima, PW3- Dr. Smt. Praveen Jahan, PW4- Investigating Officer Inspector Ramdarash Yadav and PW5- Constable Clerk 1339 Priti.

8. With a view to have explanation, if any, and version of accused over incriminating evidence furnished by prosecution, he was examined and his statement u/s 313 Cr.P.C. was recorded, wherein the accusation was denied with contention of false testimonies of PW1, PW2 and PW4, but testimonies of PW3-Dr. Smt. Praveen Jahan and PW5-Constable Clerk Priti were answered to be not under his knowledge. He stated that he was a contractor at above brickklin and there was money due against informant. With a view to grab the same, this false accusation was got lodged.

9. No evidence in defence was given by convict appellant.

10. Learned trial judge, after hearing learned counsel for both sides, passed the impugned judgment of conviction, as above, and after hearing over quantum of sentence, awarded sentences, as above.

11. PW5 is Constable Clerk Priti, who stated that after receiving original first information report of Smt. Noorjahan, w/o Rafiq, containing order of S.S.P., Aligarh, dated 8.12.2014, she got case crime number registered and this chick F.I.R. was entered in General Diary entry. At that time Noorjahan-informant along with victim Fatima, aged about 14 years, and her brother Imran was present at police station. In cross-examination, she has reiterated her previous statement by saying that she was posted at Mahila Thana, Aligarh, on 8.12.2014 as constable clerk, when this typed F.I.R. with order of S.S.P., Aligarh, was received. She registered it as Case Crime No. NIL of 2014, u/s 376, 506 I.P.C. read with section 3/ 4 POCSO Act at P.S. Mahila Thana, Aligarh, against Bachu @ Hira Lal. Chick F.I.R. No. 137 of 2014, under handwriting and signature of this witness, was proved and exhibited as Exhibit Ka8. This, registration of case crime number, was entered in the G.D. entry at 4.40 P.M. of 8.11.2014; under handwriting and signature of this witness; proved and exhibited as Exhibit Ka9. This G.D. entry was prepared under one and common process, under carbon copy, and it was in accordance with original G.D., brought by the witness, before the court, at the time of recording of her testimony. There is no contradiction, exaggeration and embellishment in her testimony. Not only this, when asked about this testimony, under statement recorded u/s 313 Cr.P.C., it was neither disputed nor admitted by accused. Rather ignorance of same was answered.

12. Occurrence was of 30.11.2014 and this was a case registered under direction of S.S.P., Aligarh, passed over Exhibit Ka1, submitted by informant, before him. The reason of delay has been said in this report itself that informant and victim being poor, downtrodden labourer, made a complaint to brickklin owner, who asked them to get the case lodged at their police station. They went there at P.S. Jalalpur, district Hameerpur. But owing to territorial jurisdiction, they again came back at Aligarh and then after this case could be got lodged under the direction of S.S.P., Aligarh. Thus, reason of delay has been properly explained. This informant (PW1), though not being an eyewitness account of the occurrence, is the witness of getting FIR lodged. She, in her statement on oath under examination in chief, has categorically stated that her daughter Fatima, aged about 14 years, was suffering under ailment. Her husband Rafiq took her at a clinic at Chandaus for getting medicine for her. Bachu @ Hira Lal, who was resident of village of informant and was at work at above brickklin, accompanied them. When her

husband went to have medicine from Medical Store in the Town, Bachu @ Hira Lal, under deceit, took her daughter with him and on the way, he committed rape with her. This was under threat of dire consequences and by show of knife. She came at brickklin and instantly complained to her. They went to brickklin owner, who asked them to lodge FIR at P.S. Jalalpur, District Hameerpur. They went there and again came back to Aligarh and got the case lodged. Statement of her daughter was recorded by the Magistrate and she was examined by Medical Officer. Though, in cross-examination, she has categorically said that she was not eyewitness of occurrence. Whatever was narrated by the victim, was under her knowledge. As the victim herself has been examined, this hearsay witness is of no avail. Regarding her testimony recorded under examination in chief, there is no contradiction, exaggeration or embellishment in examination in cross. She is fully intact.

13. PW3- Dr. Praveen Jahan, in her examination in chief, has said that while being posted as E.M.O. at M.L.G.DistrictWomanHospital, Aligarh, on 8.12.2014, she had examined Km. Fatima, D/o Rafiq, R/o Ghauhal Bujurg, P.S. Jalalpur, District Hameerpur, at 3.40 P.M., brought by police personnel Constable Suman Sharma of Police Women Cell, Aligarh. She was of average body built; with height of 152 cm and weight of 36 Kg. There was no mark of external injury over her person. Hymen was old torn and intact. Vaginal smear slide, for checking spermatozoa, was prepared and she was referred to C.M.O., Aligarh, for her age determination, with request for D.N.A. examination. Medico legal report, under thumb impression of victim; under handwriting and signature of this witness, was got prepared at the time of examination, which is on record as Exhibit Ka3. In accordance with pathological report (Ext. Ka4) supplementary report was prepared by this witness. There was no spermatozoa seen and prosecutrix was of 15 years of age. Exhibit Ka5 has been formally proved by this witness. In cross-examination, she reiterated the victim to be of 15 years of age and not being major. Regarding her testimony, while put u/s 313 Cr.P.C., no dispute was made by accused or his counsel. She is fully intact formal witness.

14. PW2- Fatima, victim, in her examination in chief, has categorically stated that she was of 13 years. When at about one and half years back from the date of evidence, at 5.00 P.M., she, along with her father, was at a clinic at Chandaus for taking medicine. Her father was brickklin labour. Accused Bachu @ Hira Lal was also a labour at that brickklin. She was left by her father at the clinic, till he comes back after taking medicine and some daily need things from town. She was there when Bachu @ Hira Lal came and asked her to be with him, which was denied. Again he persuaded by saying that her father had gone straight way to brickklin and she was to accompany him. Under belief, she went with him. But he committed rape with her in a sugarcane field, while being on way to brickklin. When she protested, threat of dire consequences by show of knife was extended. She complained the occurrence to her mother, after reaching at brickklin, who got this case lodged. She was medically examined and got her statement recorded before Magistrate, which was opened in Court at the time of her testimony and was with her photograph and thumb impression over it. The

contents were admitted and this was exhibited as Exhibit Ka2. In cross-examination she has said that accused Bachu is resident of same village and he had come at above brickklin together to them for doing work of labour. There had been no quarrel or any dispute previously amongst them. Though, she could not raise rescue call because her mouth was shut by him and threat by show of knife was given by him. She complained to her mother at brickklin. Though, no one met, while on the way, nor she complained to anyone, otherwise she would have faced consequences by Bachu. This was complained to brickklin owner, but he did not help them and asked them to go to Hameerpur. Though, this witness has been cross-examined at length, but in over all appreciation of her testimony, there is no contradiction, exaggeration or embellishment, which be treated to be material one. Rather minor discrepancies and variance establishes her to be a natural witness.

15. Learned counsel for appellant has vehemently argued about crop of wheat and crop of sugarcane, as was shown in site map (Ext. Ka6), wherein '*Khet Gehun*' has been written by Investigating Officer. But this court takes notice that occurrence was of 30.11.2014 and in the month of November there remains showing of wheat. It can never be a crop of wheat. Moreso, such type of variance was not a material variance at all. Rather a variation, owing to perception of a child witness, who had suffered mental agony of sexual assault by one, who was under belief, because of being native of same village, that too in the evening at about 5-6 P.M. of the month of November, which results in sunset and such variance under above facts and circumstances is natural variance.

16. Learned counsel for appellants has vehemently argued by way of hair splitting of fact. Whereas there is catena of judgment of this court as well as of Apex Court that illiterate, rustic and vulnerable witnesses, put under fatigue cross-examination, are bound to say with variations and those variations are natural variations proving them to be natural witness.

17. PW4 is Ram Darash Yadav, Investigating Officer. He, in his examination in chief, has said about registration of case crime number, investigation deputed to him and investigation performed by him. He has formally proved preparation of site map (Ext. Ka6), under his handwriting and signature filed on record, and filing of charge sheet (Ext. Ka7), for above offence under his handwriting and signature. In cross-examination, no question regarding investigation made by him or preparation of Exhibits Ka6 and Ka7, under his handwriting and signature, has been put to this witness nor any question regarding 'wheat crop' or 'sugarcane crop' or previous statement recorded u/s 161 Cr.P.C. as of witnesses have been put to this witness. He has proved his investigation as formal witness.

18. The purpose for legislation of a special Act for protection of children from sexual offences has been given by Legislature itself in the POCSO Act, 2012.

"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for

trial of such offences and for matters connected therewith or incidental thereto." This object is with reference and context given by Legislature itself.

"WHEREAS clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent-

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

BE it enacted by Parliament in the Sixty-third Year of the Republic of India as follows."

Meaning thereby for the best interest and for ensuring healthy physical, emotional, intellectual and social development of the child and preventing them from being exploited sexually or otherwise this Act has been legislated in furtherance of responsibility owned vide International covenants and this enactment came in operation on 14.11.2002 vide S.O. 2705(E), dated 9th November, 2012, published in the Gazette of India, Extra, Pt. II, Sec. 3(ii), No. 2250, dated 9th November, 2012. In the present case, the occurrence is of 30.11.2014 i.e. after operation of this enactment.

19. Section 2(d) of this Act provides definition of child. "Child" means any person below the age of eighteen years". In medical examination, as per Exhibits Ka3, Ka4 and Ka5, prosecutrix, in the present case, has been held to be of 15 years of age. Though, her mother and she herself had narrated her age to be of 13 years and there are catena of citations about two years either way in medical age, hence this medico legal determination of age of 15 years may be two years either way. But towards lesser side i.e. 13 years is supported by testimonies of PW1 and PW2, who are mother of the victim and victim herself. But even if it is not being accepted, adding two years in positive way comes to 17 years, which is below 18 years of age. Hence this poor vulnerable victim PW2 was a child on the date of occurrence.

20. Chapter II of POCSO Act, 2012, provides for penetrative sexual assault and punishment therefor.

"3. Penetrative sexual assault.-

A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

21. Section 4 of POCSO Act, 2012, provides:

"4. Punishment for penetrative sexual assault.- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

Meaning thereby, this section provides for punishment for penetrative sexual assault, which provides that whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term, which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

22. Learned counsel for appellant vehemently argued that there was no injury over the person of victim or her private organ and no spermatozoa was there. These injuries or presence of spermatozoa are not the condition precedent or *sine qua non* for constituting offence of penetrative sexual assault, written as above. It constitutes offence even by applying mouth to private organs, which never causes any injury or ejaculation. Hence the argument of learned counsel for appellant is of no avail.

23. Section 29 of the Act provides as under:

"29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

Meaning thereby, this section provides for presumption as to certain offences. It provides that where a person is prosecuted for violating any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

24. The cardinal principle of criminal jurisprudence is, unless proved,

presumption of innocence is there and prosecution is to prove charge beyond doubt, whereas accused is to prove exceptions, given under the Code, or lack of any essential ingredient of that particular offence to the extent of preponderance of probabilities. If he succeeds in creating situation of existence of preponderance of probabilities, then benefit of doubt is to be given to him i.e.; the prosecution failed to prove its case beyond reasonable doubt. But in this special legislation, this principle has been done away. Here, if the victim is child, below the age of 16 years, the presumption is in favour of prosecution and the defence is to prove contrary to it. But no evidence in defence has been laid by accused. Except a statement of false concoction, that owing to advance of Rs. 35000/- lent to informant has been said in statement recorded u/s 313 Cr.P.C. Whereas PW1 and PW2 both have proved that this accused is resident of same village of informant and he too is a labourer at brickklin, situated at Chandaus, District Aligarh, where he along with informant and other labourers had gone from district Hameerpur to do work of labour. Moreso, this plea was taken by convict-appellant and he was required to prove it that he had advanced money. He was a banker or money lender or was not a poor downtrodden labourer category and he had been running business of money lending. There was dues of Rs. 35000/- against informant for which she got this case registered. But not even a single iota of evidence has been given by convict-appellant. Whereas victim- prosecutrix, a child witness, has proved charge, levelled against convict-appellant, and this was substantiated and corroborated by formal witnesses.

25. Section 506 I.P.C. provides that whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.-And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

26. The essential ingredient for offence punishable under this section is offence of criminal intimidation defined under section 503 I.P.C. Section 506 I.P.C. provides punishment for it and essential ingredients for offence punishable u/s 506 I.P.C. i.e. criminal intimidation - (1) threatening a person (i) with any injury to his person, reputation or property; or (ii) to the person or reputation of any one in whom that person is interested. (2) the threat must be with intent; (i) to cause alarm to that person, (ii) or to cause that person to do any act which he is not legally bound to do, as the means of avoiding the execution of such threat; (iii) or to omit to do any act which that person is legally entitled to do, as the means of execution of such threat.

27. To bring home an offence punishable u/s 506 I.P.C. the prosecution has to prove that accused threatened the victim to injure his person, reputation or property or to the person or reputation of any one in whom that person is interested. In the present case PW2- victim, in her testimony, has said that while she protested for rape, the convict-appellant intimidated her by show of knife

for killing her in case of opening of lips to anyone or protesting such rape. She was criminally intimidated and assaulted for sexual assault. For this, there is no contradiction or exaggeration or embellishment. Rather full corroboration is there. Hence this too has been fully proved.

28. So far as sentence regarding appellants is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual case.

29. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of Court to constantly remind itself that right of victim, and be it said, on certain occasions persons aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that Courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to society's cry for justice against the criminal'. [Vice ***Sumer Singh Vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder Vs. Puran, (1990) 4 SCC 731, M.P. Vs. Saleem, (2005) 5 SCC 554, Ravji Vs. State of Rajasthan, (1996) 2 SCC 175***].

30. Hence, applying the principles laid down by the Apex Court in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, I find that punishment imposed upon the appellant by Trial Court in impugned judgment and order is not excessive or exorbitant and no question arises to interfere in the mater on the point of punishment imposed upon them.

31. In view of the above facts and circumstances, impugned judgment and order dated 20.10.2018 deserves to be affirmed and appeal is liable to be dismissed.

32. In the result, the Criminal Appeal is **dismissed.** Impugned judgment and order dated 20.10.2018, detailed above, is hereby confirmed/affirmed. The appellant, who is in jail, shall serve out the sentence awarded to him by the Trial Court.

33. Copy of this order along with lower Court record be sent to Court concerned forthwith.

34. A copy of this order be also sent to appellant through concerned Jail Superintendent.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 6648 OF 2017

Inayatullah ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Ms. Abida Syed (A.C.)

Counsel for the Opposite Party:
A.G.A.

A. Evidence Act - merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness. More so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence. (Para35)

B. No prosecution case is fool proof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to beignored. (Para 45)

C. Section 313 Cr.P.C- Power to examine the accused-Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self-contradictory as to make it untrustworthy. Minor variations or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution. (Para 46)

Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. Go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. (Para -47)

D. Recovery – No independent witness. Held:- prosecution not obliged to produce independent witness in support

of recovery involving police. Presumption that every person acts honestly applies as much in favour of a Police Official as any other person. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. (Para 37)

CHRONOLOGICAL LIST OF CASES CITED: -

1:-(2012) 3 SCC 196Lokesh Shivakumar v. State of Karnataka,

2:- AIR,1953, SC 364 Dalip Singh v. State of Punjab, AIR,1953, SC 364

3:- (2010) 7 SCC 759 Dharnidhar v. State of UP

4:- (2010) 1 SCC 1999 Jayabalan v. U.T. of Pondicherry

5:-,2013(15) SCC 298 Ganga Bhawani v. Rayapati Venkat Reddy and Others

6:- AIR 2011SC 2292Bhagalool Lodh &Anr. v. State of UP,
; and AIR 2013SC 308)Dhari &Ors. v. State of U. P.,

7:- 1995(4) SCC 255 Pradeep Narayan Madqaonkar & others vs. State of Maharashtra

8:- 1996 (11) SCC 139 Balbir Singh vs. State

9:- 1992(4) SCC 662 Paras Ram vs. State of Haryana, 1996 (1)SCC 427 Sama Alana Abdulla vs. State of Gujarat, 1996 (2) SCC 589 Anil alias Andya Sadashiv Nandoskar vs. State of Maharashtra

10:- 1998 Cri. L.J. 863 State of U.P. v. Zakaullah

11:-. (2007) 7 SCC 625 Girja Prasad Vs.State of M.P

12:-, (2012) 4 SCC 124, Sampath Kumar v. Inspector of Police, Krishnagiri

13:- Sachin Kumar Singhraha v. State of Madhya Pradesh

14:- Smt. Shamim v. State of (NCT of Delhi)

15:-AIR 2009 SC 152 State Represented by Inspector of Police v.Saravanan & AIR 2009 SC 331 Anr.; Arumugam v. State,; (2009) 11SCC 334 Mahendra Pratap Singh v. State of Uttar Pradesh,; and JT 2010 (12) SC 287 Dr. Sunil Kumar Sambhudayal Gupta &Ors. v. State of Maharashtra,

16:- Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan,**(1996) 2 SCC 175**]. (E-7)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This jail appeal under Section 383 Cr.P.C. has been filed by accused-appellant Inayatullah through Senior Superintendent of Jail, Gorakhpur against judgment and order dated 08.01.2015 passed by Sri P.K. Srivastava, Additional Sessions Judge, Court No. 03, Gorakhpur in Session Trial No. 178 of 2012, under Section 302 IPC. By the impugned judgment accused-appellant has been convicted under Section 302 IPC and sentenced him with Rigorous Imprisonment (hereinafter referred to as 'RI') for life imprisonment and fine of Rs. 10,000/-. In the event of default in payment of fine, he has to undergo further two year's Simple Imprisonment.

2. The facts emanating from First Information Report (hereinafter referred to as "FIR") and the material available on record may briefly be stated as under for adjudication of this appeal: -

3. A written report Ex. Ka-1 was presented before Station Officer of Police Station Gorakhnath, District Gorakhpur by Informant PW-1 Ranjeet stating that he is resident of Village Manbela (Bangla), Post Office Jhungiya Bazar, Police Station Chiluatal, District Gorakhpur. He had a fruits shop near Fertilizer Gate, Jhungiya, and adjacent to it there was fruit shop of accused-appellant Inayatullah also. Father of Informant Shri Lal Ji Nishad used to sit on the Fruit shop. Few days earlier, an altercation had taken place between father of Informant and accused-appellant Inayatullah @ Bhonu for the reason that sale in the shop of the informant was much more, on account of which, accused-appellant bore jealousy with his father, which often resulted in altercation. Accused-appellant used to threaten Informant's father to settle the score. On 03.10.2011, in the morning, when Informant's father along-with informant was going to Fal-mandi (fruit

market), Gorakhpur for purchase of fruits and they hardly reached Kaurihawa by tempo at about 08:30 A.M., accused-appellant Inayatullah @ Bhonu met and stopped tempo. After stopping the tempo, he called Informant's father for conversation. Informant's father alighted from tempo and went to him, and indulged in conversation. All of sudden accused-appellant took out a knife and started stabbing his father. As a result thereof he fell down. Thereafter, Informant got down from tempo, ran towards his father but by that time, accused-appellant had fled away from the place of occurrence along-with knife. Informant sent message of the incident at his home. In the meantime, police reached the place of occurrence and with their help, Informant took his father to DistrictHospital, where he breathed his last. Dead body of deceased was lying in the hospital.

4. On the basis of written report, Ex.Ka-1, PW-3 Head Moharrir Pramod Kumar registered a case at Case Crime no. 475 of 2011, under Section 302 IPC at Police Station Gorakhnath, District Gorakhpur and prepared Chick FIR Ex.Ka-3. Simultaneously, he also made entry of the incident in General Diary (hereinafter referred to as "GD"), a copy of which is Ex.Ka-4.

5. After registration of Case, Investigation was initiated by PW-4, Anand Kumar Shahi, the then Station Officer (hereinafter referred to as 'SO') of Police Station Gorakhnath, District Gorakhpur. He visited the place of occurrence; prepared site plan Ex.Ka-5 on pointing out of Informant; recorded statement of witness Dharamveer; collected blood stained and simple soil of place of occurrence and prepared recovery memo Ex.Ka-6 in respect thereof. He arrested accused-appellant and recovered weapon used in the murder, he prepared recovery memo Ex.Ka-2 in respect of knife. He also prepared site plan Ex.Ka-7 of the place of recovery of knife. Investigating Officer (hereinafter referred to as "IO") prepared inquest Ex.Ka-13 as also necessary documents i.e. letter to R.I.; document form 33; letter of C.M.O.; Photo Nash and Chalan Nash etc. are marked as Ex.Ka-8 to 12 on record.

6. Autopsy on the dead body of Lal Ji Nishad was conducted by Dr. A.N. Trigun, PW-5, on 30.10.2011 at 3:30 P.M. According to him, deceased was aged about 50 years and his body was average built, *rigor mortis* was present, eyes and mouth were closed. He found following ante-mortem injuries on his person which reads as under :-

1. Incised wound of size 2½ cm x 0.8 cm, bone deep, present on left side of face 3½ cm below left lower eyelid. Blood clot present.

2. Incised wound of size 2½ cm x 0.8 cm x muscle deep, present on left face. 0.6 cm lateral to left angle of mouth.

3. Incised wound of size 5 cm x 2½ cm into bone deep, present on left side of neck just below left ear.

4. Incised wound of size 4 cm x 1.5 cm x cavity deep present on left side of chest, 12 cm below left axilla. On opening cavity underlying lung was found punctured and about 1 liter blood and clotted blood present in chest cavity.

5. Incised wound of size 3 cm x 1 ½ cm into muscle deep present on left side of lower abdomen just above left iliac crest.

7. On internal examination, heart weighed 50 gms. and was empty; stomach

contained 100 gms. matter; small intestine was empty; large intestine contained faecal matter and gases; liver weighed 1250 gms. with gall bladder half filled; kidney weighed 200 gms.

8. Doctor opined that duration of death was about half a day and caused due to shock and hemorrhage as a result of ante-mortem injuries. He prepared post-mortem Ek.Ka-14.

9. In the meantime, first I.O. was transferred and investigation was continued by S.O. Amar Singh who after completion of investigation submitted charge-sheet Ex.Ka-14 in Court against the accused-appellant under Section 302 IPC.

10. Cognizance of the offence was taken by Chief Judicial Magistrate (hereinafter referred to as "CJM"), Gorakhpur on 02.01.2012. Since the case was triable by Court of Sessions, learned CJM committed matter to Sessions Judge, where it was registered as Sessions Trial no. 178 of 2012. Session Trial was transferred to the Court of Additional Sessions Judge, Court No. 03, Gorakhpur who framed charge against the accused-appellant on 28.08.2012. The charge reads as under :-

"मैं अमर नाथ सिंह, अपर सत्र न्यायाधीश कक्ष संख्या 3 गोरखपुर आप इनायतुल्लाह उर्फ भोनू को निम्न आरोप से आरोपित करता हूँः–

प्रथम :– यह कि दिनांक 3/10/11 को समय करीब 8–30 बजे सुबह, बहद स्थान– कौड़िहवा, थाना–गोरखपुर, जिला– गोरखपुर में आप ने वादी मुकदमा रंजीत के पिता लाल जी निषाद की चाकू से मार कर हत्या कर दिये। इस प्रकार आपने मानव बध का अपराध किया जो भा0 दं0 सं0 की धारा–302 के तहत दण्डनीय अपराध किया, जो इस न्यायालय के प्रसंज्ञान में है।

एतद्वारा मैं आप को निर्देशित करता हूँ कि आप का उपरोक्त आरोप के अन्तर्गत परीक्षण इस न्यायालय द्वारा किया जाय।"

"I, Amar Nath Singh, Additional Sessions Judge, Court No. 03, Gorakhpur charge you Inayatullah @ Bhonu as under:-

Firstly - That on 30.10.2011 at about 08:30 A.M. at Kaurihava, Police Station Gorakhnath, District Gorakhpur you committed murder of Lal Ji Nishad father of informant Ranjeet by stabbing knife. Thus you have committed offence of homicide, punishable under Section 302 IPC and within the cognizance of this Court.

*I hereby direct you th*at you be tried by this Court for the aforesaid charge. ***(English Translation by Court)***

11. Accused-appellant pleaded not guilty and claimed trial.

12. In order to prove guilt of accused-appellant, prosecution examined as many as six witnesses, out of whom, PWs-1 and 2 are witnesses of fact. Rest are formal witnesses of Police and Health Department.

13. **PW-1** is son of deceased and an eye witness. **PW-2** Chhote Lal is younger brother of deceased Lal Ji Nishad and Uncle of PW-1 Informant. He had reached the place of occurrence getting on information from his nephew PW-1 Informant. Formal witnesses **PW-3** Constable Pramod Kumar had registered FIR and prepared Chick report Ex.Ka-3. He has also prepared copy of GD entry dated 03.10.2011, copy of which is Ex.Ka-4. **PW-4** is first IO who has appeared to prove site plan Ex.Ka-5; recovery memo Ex.Ka-6 in respect of

sample of blood stained and plain earth; recovery memo Ex.Ka-7 regarding knife; inquest Ex.Ka-13 and documents Ex.Ka-8 to 12 with respect to sending the dead body of deceased Lal Ji Nishad to District Hospital for post-mortem, i.e., letter to RI, document in form 33, Photo Nash, and Chalan Nash. He has also sent recovered items in the docket to Forensic Science Laboratory for chemical examination. **PW-5** Dr. A.N. Trigun had conducted autopsy on the dead body of Lal Ji Nishad and proved post-mortem report Ex.Ka-14. **PW-6** Constable Rajinder Singh has verified signature of SI Amar Singh, the then SO of Police Station Gorakhnath, who has submitted Charge-sheet Ex.Ka-16.

14. After closure of prosecution evidence, accused-appellant was examined under Section 313 Cr.P.C. on 25.11.2014. He has stated prosecution story to be false and concocted and that witnesses were deposing falsely and proceedings taken by police is ex-parte and bears no truth. He has stated to be implicated falsely on account of enmity.

15. On appreciation of evidence available on record and after hearing both the parties, learned Additional Sessions Judge recorded the verdict of conviction and sentence against the accused-appellant as stated above.

16. Feeling aggrieved, accused-appellant has approached this Court through Senior Superintendent of Jail, Gorakhpur assailing the impugned judgement.

17. We have heard Ms. Abida Syed, learned Amicus Curiae for appellant and Sri Ratan Singh, learned AGA for State at length and have gone through the record carefully with the valuable assistance of learned Counsel for parties.

18. Learned Amicus Curiae appearing for appellant, refuting the impugned judgment of conviction, advanced his argument in the following manner :-

i. There is no strong motive to accused-appellant to commit murder of Informant's father.

ii. There is no public witness of incident. PW-1 is real son of the deceased.

iii. No independent witness came forward to support prosecution case.

iv. Medical evidence does not go with ocular evidence.

v. There are major contradictions in the evidence of prosecution, which may render the prosecution case doubtful.

vi. Prosecution has miserably failed to prove its case beyond all shadow of reasonable doubt and Trial Court was wrong in convicting accused-appellant by its judgment, therefore, accused-appellant is liable to be acquitted getting benefit of doubt.

19. Learned AGA opposed submissions made on behalf of accused-appellant and submitted that it is a day-light murder; accused- appellant is named in FIR, which has been promptly lodged in the Police Station concerned; PW-1 was with his father (deceased) at the time of incident, therefore, he is a natural witness; non-examination of independent witness does not help accused-appellant because in the heinous offence, like murder, nobody comes forward to support the prosecution case due to fear of evil; prosecution is not obliged to produce all

witnesses in evidence and prosecution has proved its case beyond reasonable doubt against accused. Lastly, he prayed that appeal must be dismissed confirming the impugned judgment.

20. We have travelled the entire evidence available on file with the valuable assistance of the learned counsel for the parties.

21. Although time, date and place of occurrence and nature of injury found on the person of deceased have not be disputed from the side of the appellant but according to advocate, accused-appellant is not responsible for murder of Informant's father and he has been falsely implicated in the present case. Even otherwise from the evidence of PWs-2, 4 and 5, it is established that at the relevant time, date and place, Informant's father Lalji Nishad was assassinated and his body was found lying on the place, as stated by the prosecution.

22. Only question remains for consideration is "whether accused-appellant caused murder of Informant's father Lalji Nishad by inflicting knife blow on him and he is only responsible for committing murder of Informant's father (Lalji Nishad) or not and Trial Court has rightly convicted accused-appellant for offence of murder punishable under Section 302 IPC or not?"

23. Here it would be appropriate for us to briefly consider the evidence of prosecution.

24. PW-1, happens to be eye witness, has deposed that his father had a fruit shop near fertilizer gate, Jhuggia and adjacent to him, there was a fruit shop of accused-appellant; sale in the shop of his father was much more than that of accused-appellant due to which, accused-appellant bore jealously with his father; on 03.10.2012, at about 8:30 AM, he along with his father was going to fruit market, Gorakhpur by Tempo; when they reached Kaudiyahwa Jamalpur by Temp at about 8:30 AM, accused-appellant-Inayatullah, stopping Tempo, called upon his father for conversation; during the course of conversation accused-appellant started stabbing in the stomach of his father, due to which, he fell down on the earth; while yelling he rushed to his father, accused-appellant ran away towards Bargadwa weaving his knife; he saw that his father got seriously injured by that time; with the help of Police personnel who arrived on spot, he took his father to Sadar Hospital, Gorakhpur by Tempo, where he was declared dead by the doctor; he got scribed a Written Tehrir, Ex.Ka-1, by one Ajay Kumar and put his signature on it and presented it to Police Station concerned; and on the basis of Written Tehrir, case came to be registered. He further deposed that some days prior to incident, during conversation accused-appellant threatened Informant's father to take his life.

25. PW-1 is the only witness of the fact, who has been produced by prosecution in support of its case. He withstood a lengthy cross examination but no adverse material could be brought so as to disbelieve his statement. Certainly some minor contradictions occurred in the statement but they are not of such nature, which might be sufficient to go the root of the case.

26. According to Advocate of accused-appellant, PW-1 is not an eye

witness and his statement inspires no confidence. According to him PW-1 in his cross examination at page no.20 of paper book admitted that he reached on spot, when accused-appellant ran away towards Bargadwa, in this way witness has not seen the incident. We are not impressed with the argument advanced by learned Counsel for accused-appellant and reject the same for the reasons that PW-1 categorically stated in his cross examination at page no.20 of paper book that he had seen the accused-appellant stabbing knife to his father. Accused-appellant stabbed 4 to 5 times in the stomach, when he (accused-appellant) started stabbing knife, he (witness) alighted from Tempo and rushed to spot. Reading of statement will be all together and not in pieces.

27. PW-4, SI Anand Kumar Sahi, the then Station House Officer, Police Station Gorakhnath deposed that he took investigation of Crime No. 475 of 2011, under Section 302 IPC, proceeded to spot, recorded statement of Informant, visited spot at the pointing of Informant, prepared site plan, collected blood stained and simple earth from the spot, arrested accused-appellant near Bargadwa Chauraha and took him into custody, recorded his disclosure statement and on his pointing out recovered a knife with blood allegedly used in the incident, before public witness Ajay Kumar and Chhote Lal (not examined), prepared recovery memo Ex.Ka-7.

28. PW-5 deposed that he was posted as Medical Officer in Paniram, Chargawan Block, District Gorakhpur. On 03.10.2011, he conducted autopsy over the dead body of Lalji Nishad and found five incised wound in his person. He opined that death was possible due to coma and hemorrhage on account of ante-mortem injuries at about 8:30 AM on 03.10.2011 and injuries found on the person of deceased might have been caused by knife. In this way, medical evidence is compatible with the ocular evidence.

29. It has come in statement of PW-1 that accused ran away from the spot weaving his knife and as per statement of PW-4 accused-appellant was arrested and on his pointing out knife with blood, which was used in the commission of offence, was recovered by Investigating Officer before public witness. Accused was arrested by Investigating Officer on the same day, shortly after the incident, and there was a sufficient motive to accused to commit the crime on account of business rivalry. In statement under Section 313 Cr.P.C., accused-appellant stated that PW-1, Ranjeet, has given false evidence against him but he did not suggest anything as to why he was giveing false statement against him. He has not given any single explanation as to why, he has been falsely implicated in this case.

30. So far as argument made by learned Amicus Curiae regarding the motive is concerned, we do not impress with the submission advanced by learned Amicus Curiae for the appellant as it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

31. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

32. So far as the argument of relative witness and non examination of independent witness are concerned, it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364,** wherein Court has held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

33. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

34. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: ***Bhagalool Lodh &Anr. v. State of UP, AIR 2011 SC 2292; and Dhari &Ors. v. State of U. P., AIR 2013 SC 308****)."*

35. It is settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded.

Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

36. Learned Counsel for accused-appellant urged that recovery of knife shown by police is not supported by any independent witness. PW-4 in his statement stated that recovery of knife was made in the presence of public witnesses, namely, Ajay Kumar and Chotey Lal but none of the public witness have been produced by prosecution, therefore, recovery shown by police inspires no confidence.

37. In our view, submission advanced by learned Counsel for accused-appellant is thoroughly misconceived, for the reasons that prosecution is not obliged to produce independent witness in support of recovery involving police. Presumption that every person acts honestly applies as much in favour of a Police Official as any other person. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy.

38. As a matter of rule, there can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of police officer is found acceptable, it would be an erroneous proposition that court must reject prosecution version solely on the ground that no independent witness was examined. In **Pradeep Narayan Madqaonkar &others vs. State of Maharashtra 1995 (4) SCC 255,** it was held:

"Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigation of the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony."

39. In **Balbir Singh vs. State 1996 (11) SCC 139,** Court has repelled a similar contention based on non-examination of independent witnesses. The same legal position has been reiterated time and again by Court vide **Paras Ram vs. State of Haryana 1992 (4) SCC 662, Sama Alana Abdulla vs. State of Gujarat 1996 (1) SCC 427, Anil alias Andya Sadashiv Nandoskar vs. State of Maharashtra 1996 (2) SCC 589.**

40. In **State of U.P. v. Zakaullah 1998 Cri. L.J. 863** in para-10, it is said:

"The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted

person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. ***The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person*** *until it is proved that he was a dependent of the police or other officials for any purpose whatsoever."*

41. Referring to some earlier decisions, Court in **Girja Prasad Vs. State of M.P. (2007) 7 SCC 625** held:

"It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence." (para 25)

42. So far as discrepancies, variation and contradiction in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel's and find that all the witnesses PWs 1, 2 and 3 support prosecution case. All the three witnesses withstood lengthy cross-examination but nothing adverse material could be brought on record so as to disbelieve their statements. There is nothing in cross-examination which may render their statements doubtful. Naturally some minor contradictions and discrepancies have occurred in their cross examination but they do not go to the root of case.

43. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

44. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh*** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that

Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

45. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

46. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

47. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by**

Inspector of Police v. Saravanan &Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta &Ors. v. State of Maharashtra, JT 2010 (12) SC 287].

48. In the entirety of the facts and circumstances and legal preposition discussed herein before, we are satisfied that prosecution has successfully proved its case beyond reasonable doubt against accused-appellants and has rightly convicted him for having committed an offence under Section 302 IPC.

49. So far as sentence of accused-appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

50. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'.

[Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175**].

51. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence, weapon used in commission of murder and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellants by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no ground appears to interfere in the matter on the point of punishment imposed upon him.

52. In view of above discussion, the **appeal lacks merit and is dismissed.** Impugned judgement and order dated 08.01.2015 passed by Additional Session Judge, Court No.3, Gorakhpur in Session Trial No. 178 of 2012 (State v. Inayatullah) under Sections 302 IPC, Police Station Gorakhnath, District Gorakhpur, is maintained and confirmed.

53. Lower Court record alongwith a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action and to apprise the accused-appellant through Jail Authority.

54. Before parting we provide that Sri Abida Syed, learned Amicus Curiae for appellant who assisted the Court very diligently, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad, to him without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.09.2019

BEFORE
THE HON'BLE ANIL KUMAR
THE HON'BLE SAURABH LAVANIA, J.

F.A.F.O. No. 261 of 2015

Pankaj Srivastava And Ors. ...Appellants
Versus
The New India Insurance Company Ltd. &Ors. ...Respondents

Counsel for the Appellants:
Sri Sanjay Tripathi

Counsel for the Respondents:
Sri Anurodh Kumar Srivastava, Sri Babu Ram Shukla, Sri Harpal Singh Chadha, Sri Manish Misra

A. First Appeal From Order- Enhancement of compensation awarded by Motor Accident Claims Tribunal- accident due to rash and negligent driving of truck driver. Claimant's wife a primary schoolteacher-identity card reflects her basic pay-Tribunal ignored the entries made in Passbook regarding her actual pay.

It is settled law that the basis pay would not be counted for the purposes ofgrant of compensation and salary at hand has to be taken note of for granting compensation under the Motor Vehicle Act.

B. Additional Evidence - Application to file additional evidence- salary certificate issued by Block Education Officer, Certificate for information of tax deduction at source under Section 203 of the Income Tax Act, 1961- application allowed- matter remanded to the Tribunal

Chronological List of Cases Cited: -

1.1964 (2) SCR 35 K. Venkataramiah Vs. A. Seetharama Reddy &Ors.

2.1955 (2) SCR 1 Sangram Singh Vs. Election Tribunal

3.(2018) 9 SCC 445 Corporation of Madras and another Vs. M. Parthasarathy and others

4.2009 (2) T.A.C. 677 (S.C.) Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another

5.(2017) 4 TAC 673(SC) National Insurance Co. Ltd. Vs. Pranay Sethi

6.2018 SCC Online SC 1546 Magma General InsuranceCo. Ltd. Vs. Nanu Ram

7.(2013) 1 SCC 731 National Insurance Co. Ltd. Vs. Balakrishnan (E-10)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Sanjay Tripathi, learned counsel for the appellants and Sri Harpal Singh Chadha, learned counsel for the Insurance Company.

2. Under appeal is the judgment and award dated 23.02.2015, passed by the Motor Accidents Tribunal/Additional District Judge, Court No. 10, Lucknow (in short "Tribunal") in the Claim Petition No. 0000638/12 (Pankaj Srivastava and others v. New India Insurance Company Ltd. and others).

3. The present appeal has been filed by the claimants-appellants for enhancement of compensation awarded by the Tribunal vide judgment and award dated 23.02.2015.

4. The facts, in brief, of the present case are that on 03.01.2012, the wife of the appellant No. 1 namely Smt. Sonali Srivastava, when she was going by her Scooty bearing No. U.P.-32D.J.-8842 to discharge her duties as a Teacher in the Primary School at Kamlapur, met with an accident at Roshnabad Yadav Crossing, P.S.- Madiyaon, District- Lucknow with the Truck bearing No. U.P.-84T-0911. It was due to rash and careless driving of the Truck driver. On account of the accident, the wife of the appellant No. 1 namely Smt. Sonali Srivastava expired on spot. Thereafter, an FIR was lodged in regard to the incident at P.S. Madiyaon, Lucknow and post-mortem was also carried out on 03.01.2012. The claimants-appellants filed the claim petition before the Tribunal. In support of the Claim Petition, several documents (documentary evidence) including the photocopy of the Bank Passbook i.e. paper no. C-14/3, Identity Card i.e. paper no. C-14/8, of the deceased Smt. Sonali Srivastava, which are part and parcel of the lower court record, were also filed.

5. A perusal of the Identity Card issued by the Basic Shiksha Parishad, Lucknow, reveals that the deceased Smt. Sonali Srivastava was the Assistant Teacher in the Primary School at Kamlapur. The Identity Card also reflects the basic pay of the deceased i.e. Rs. 5375/-. It is also evident from the copy of the Passbook, which is part and parcel of the lower Court record bearing paper no. C-14/5 that the deceased Smt. Sonali Srivastava was getting Rs. 25,385/- per month towards salary in hand.

6. The Tribunal for the purposes of deciding the claim petition, framed the following issues:-

"पक्षकारों के अभिवचनों के आधार पर निम्नलिखित विवाद्यक दिनांक 31.7.13 को विरचित किये गये–

1. क्या दि0 03.01.2012 को समय सुबह करीब 9.45 बजे व स्थान रोशनाबाद यादव चौराहे के पास थाना मडियांव जनपद, जनपद लखनऊ पर याची सं0–1 की पत्नी याची सं0–2 व 3 की मां श्रीमती सोनाली श्रीवास्तव की ट्रक संख्या– यू0पी084–टी–0911 द्वारा उसकी मृत्यु हो गयी?

2. क्या उपरोक्त दुर्घटना वाहन चालक द्वारा ट्रक लापरवाही व उपेक्षापूर्ण

4. क्या प्रश्नगत वाहन बीमा शर्तों के अनुरूप नहीं चलाया जा रहा था?

5. क्या प्रश्नगत वाहन ट्रक संख्या–यू0पी084–टी–0911 घटना की तिथि पर विपक्षी दि न्यू इण्डिया इंश्योरेंस कम्पनी लि0 द्वारा बीमित थी?

6. क्या मृतका दुर्घटना में स्वयं लापरवाह थी?

7. याचीगण अपने द्वारा वांछित प्रतिकर प्राप्त करने के अधिकारी है, यदि हां तो कितना?

8. क्या अन्य कोई अनुतोष प्राप्त करने के अधिकारी है?"

7. The issue Nos. 1, 2 and 6 relate to place, time of incident and negligence of the drivers of the vehicles involved in the accident. The Tribunal, on the basis of the

evidence, held that Smt. Sonali Srivastava was not negligent rather the driver of the Truck bearing No. U.P.-84T-0911 was negligent. The Tribunal has also held that on 03.01.2012, Smt. Sonali Srivastava expired due to accident with Truck bearing No. U.P.-84T-0911 at Roshnabad Yadav Crossing, P.S.- Madiyaon, District- Lucknow at about 9:45 A.M.

8. The issue Nos. 3 and 4 relate to valid driving licence of the driver of the Truck namely Sri Harimohan and the fulfillment of terms and conditions of the Insurance Policy of the vehicle i.e. Truck. The Tribunal while deciding the issue Nos. 3 and 4 held that the driving licence of the Truck driver namely Sri Harimohan was valid but he failed to follow the terms and conditions of the Insurance Policy, as he was driving the Truck rashly and negligently.

9. The Tribunal while deciding the issue No. 5 held that the Truck bearing No. U.P.-84T-0911, of which the driver was Sri Harimohan, was insured with New India Insurance Company Ltd., Barpur (बड़पुर), District- Farrukhabad.

10. The Issue Nos. 7 and 8 were decided together by the Tribunal. The issue Nos. 7 and 8 relate to award of compensation and any other relief to which the appellants/claimants are entitled. While deciding the issue Nos. 7 and 8, the Tribunal took note of the basic pay i.e. Rs. 5375/- per month of the deceased namely Smt. Sonali Srivastava and accordingly, made the calculation and awarded the compensation to the tune of Rs. 3,46,000/- along with the interest @ 7% per annum.

11. In the light of the above said brief facts, the present appeal has been filed by the appellants/claimants for enhancement of compensation awarded by the Tribunal vide the judgment and award dated 23.02.2015.

12. During the pendency of the present appeal, the appellants moved an application dated 08.01.2019 along with the affidavit for permission to file additional evidence on record. The additional evidence filed by the appellants through the application is the salary certificate issued by the Block Education Officer, Chinhat, Lucknow and Form-16, a certificate for information of tax deducted at source under Section 203 of the Income Tax Act, 1961, for the period commencing from 01.04.2009-31.03.2010 and Assessment Year 2010-2011. After moving the application for permission to file additional evidence, this Court after considering the facts of the case, passed the following order on 31.01.2019: -

"Heard Sri Sanjay Tripathi, learned counsel for the appellants as well as counsel for the New India Insurance Company Ltd.

Additional evidence has been filed before this Court by way of application dated 8.1.2019 by counsel for the appellants, who submitted two documents; the first one is salary certificate issued by Khand Shiksha Adhikari, Chinhat, Lucknow wherein it has been verified that Smt. Sonali Srivastava, Assistant Teacher, Primary School Kamlapur, Region Chinhat, District Lucknow was a permanent Teacher, who died on 3.1.2012 and was being paid total salary of Rs.27612/- and after other deductions of Rs.1867/- she was drawing net salary of Rs.25745/- per month. The other document annexed with

the application is copy of income tax return form 16.

Learned counsel for the respondent-company is at liberty to verify these documents at his own end. At the same time, considering the urgency of the case we direct Sri Manish Mishra, learned counsel for District Basic Education Officer, Lucknow, who is present before the Court, to get these two documents verified from the Basic Education Officer, Lucknow and give his verification report.

Counsel for the appellants will be required to give a copy of the application to Sri Manish Mishra.

The objection filed by the respondent-company to the application for permission to file additional evidence is taken on record.

List this case after two weeks showing the name of Sri Manish Mishra as a counsel. "

13. In compliance of the order of this Court dated 31.01.2019, an affidavit was filed by Dr. Amar Kant Singh, District Basic Education Officer, Lucknow and the perusal thereof would show that the salary of the deceased namely Smt. Sonali Srivastava immediately prior to her death was Rs. 25,745/- per mensem.

14. Learned counsel for the appellants/claimants for the purposes of enhancement of the amount awarded by the Tribunal submitted that the Tribunal completely ignored the salary in hand of the deceased namely Smt. Sonali Srivastava i.e. Rs. 25,385/- per month and in support thereof, the photocopy of the Passbook of the deceased namely Smt. Sonali Srivastava was filed, wherein the salary of the Month of November, 2011 has been specifically mentioned.

15. On the basis of the entry made in the Passbook, which is paper no. C-14/5 of the lower court record and has also been mentioned in the judgment, under appeal, the counsel for the appellant further submitted that the Tribunal erred in not taking/considering the entry in the Passbook and accordingly, the award so far as it relates to award of compensation on the basis of the basic pay of the deceased namely Smt. Sonali Srivastava i.e. Rs. 5375/-, is liable to the modified and amount awarded by the Tribunal is liable to be enhanced.

16. The learned counsel for the appellants on the basis of the additional documents filed in the appeal and the affidavit of Dr. Amar Kant Singh, District Basic Education Officer, submitted that the amount awarded by the Tribunal is liable to be enhanced keeping in view the salary of the deceased at the time of accident.

17. Per contra, learned counsel for the contesting respondents-Insurance Company Sri Harpal Singh Chadda submitted that the Tribunal has not erred in granting the compensation. He further submitted that the Tribunal has granted the compensation keeping in view the basic pay of the deceased namely Smt. Sonali Srivastava mentioned in the Identity Card issued by the Basic Shiksha Parishad, Lucknow, according to which, the basic pay of the deceased was Rs. 5375/-.

18. Learned counsel for the respondents further submitted that before the Tribunal, the appellants/claimants failed to place on record the salary certificate of the deceased and other documents which were required for proving the monthly salary of the deceased namely Smt. Sonali Srivastava and the Tribunal has rightly awarded the

compensation on the basis of the material evidence on record.

19. We have considered the rival submissions of the respective parties and gone through the record including the lower court record carefully.

20. The present appeal is only with regard to the enhancement of compensation and as such, we are only considering the decision on the issue Nos. 7 and 8 in the light of the facts and reasons mentioned hereinabove as well as the documents referred hereinabove.

21. A perusal of the decision on the issue Nos. 7 and 8 shows that the Tribunal only considered the Identity Card of the deceased namely Smt. Sonali Srivastava, which is paper no. C-14/8 of the lower Court record, in which the basic pay of the deceased is Rs. 5375/- per month. The Tribunal did not consider the paper no. C-14/3 and C-14/5 which are also on record i.e. the photocopies of the Bank Passbook, in which the salary of the deceased namely Smt. Sonali Srivastava is mentioned as Rs. 25,385/- of the month of November, 2011.

22. The amount mentioned in the Passbook was required to be considered by the Tribunal while awarding the compensation, as it is settled law that the basic pay would not be counted for the purposes of grant of compensation and the amount i.e. the salary in hand has to be taken note of by the Court concerned/Tribunal for granting/awarding the compensation under the Motor Vehicles Act. The appellants/claimants have also placed on record the salary certificate and the Form-16 i.e. TDS for the assessment year 2010-11, which also reflects that salary in hand of the deceased namely Smt. Sonali Srivastava was much more than that considered by the Tribunal.

23. In view of the above, we are of the opinion that the amount awarded by the Tribunal, keeping in view the basic pay/salary of the deceased namely Smt. Sonali Srivastava, is neither proper nor justified.

24. The documents placed by the appellants along with the application for taking additional evidence on record also requires consideration.

25. The application for seeking permission to produce additional evidence in Appellate Court can be allowed in the circumstances enumerated under Order 47 Rule 27 of C.P.C. Mode of taking additional evidence on record is provided under Order 41 Rule 28.

26. In the case of K. Venkataramiah vs. A. Seetharama Reddy &Ors., 1964 (2) SCR 35, considering the Order 41 Rule 27, the Apex Court observed as under:-

"... Apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment," it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a

more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27(1)(b) of the Code. "

27. In the case of Sangram Singh vs. Election Tribunal, Kotah, Bhurey Lal Baya, 1955 (2) SCR 1 (at page 8), considering the Order 41 Rule 27, the Apex Court observed as under:-

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

28. In the case of ***Corporation of Madras and another v. M. Parthasarathy and others; (2018) 9 SCC 445,*** considering the Order 41 Rule 27, the Apex Court observed as under:-

"13. First, it took into consideration the additional piece of evidence while deciding the appeals on merits without affording any opportunity to the appellants herein (who were respondents in the first appeals) to file any rebuttal evidence to counter the additional evidence adduced by the respondents (appellants before the first appellate court). This caused prejudice to the appellants herein because they suffered the adverse order from the appellate court on the basis of additional evidence adduced by the respondents for the first time in appeal against them. (See LAO v. H. Narayanaiah [LAO v. H. Narayanaiah, (1976) 4 SCC 9] , Shalimar Chemical Works Ltd. v. Surendra Oil & Dal Mills [Shalimar Chemical Works Ltd. v. Surendra Oil & Dal Mills, (2010) 8 SCC 423 : (2010) 3 SCC (Civ) 392] and Akhilesh Singh v. Lal Babu Singh [Akhilesh Singh v. Lal Babu Singh, (2018) 4 SCC 659 : (2018) 3 SCC (Civ) 131] .)"

29. Looking into the facts and circumstances of the case, the order dated 30.01.2019 passed by this Court, quoted above, the view expressed by the Apex Court in relation to dealing with the application under Order 41 Rule 27, in the judgments referred hereinabove, and the averments made in the affidavits, referred hereinabove, as well as in the interest of substantial justice, we hereby ***allow*** the application for production of additional evidence on record filed by the appellants/claimants.

30. Considering the facts of the case, provisions envisaged in the Order 41 Rule 28 of C.P.C. and observations of the Apex Court in the case of Corporation of Madras (supra), we are of the view that the matter may be remanded back to the Tribunal for decision on the issue Nos. 7 and 8 after taking evidence, as per Law, of the parties to the litigation.

31. While deciding the issue Nos. 3 and 7, the Tribunal/Trial Court would also consider the principles settled by the Hon'ble Apex Court in the case of ***Smt. Sarla Verma and others. v. Delhi Transport Corporation and another; 2009 (2) T.A.C. 677 (S.C.) and National Insurance Co. Ltd vs Pranay Sethi reported in (2017) 4 TAC 673 (SC)*** as

well as in the case of ***Magma General Insurance Co. Ltd. v. Nanu Ram reported in 2018 SCC Online SC 1546,*** wherein the Apex Court has settled the relevant issues related to grant/award of compensation under the Motor Vehicles Act, which includes the proper deduction, multiplier and amount to be awarded towards conventional heads.

32. The aforesaid observation has been made keeping in view the findings recorded by the Tribunal on the issue Nos. 7 and 8 and the operative portion of the judgment and award dated 23.02.2015.

33. For the foregoing reasons, the appeal is ***allowed.*** The matter is remanded back to the Tribunal for afresh decision, as per Law and observations made hereinabove, on the issue Nos. 7 and 8. Fresh decision on the issue Nos. 7 and 8 would substitute the findings and conclusion of the award dated 23.02.2015. As far as other findings recorded by the Tribunal are concerned, they remain undisturbed. This has been provided keeping in view the principle of speedy disposal of the case.

34. The aforesaid view of this court finds support from the observations made by the Hon'ble Apex Court in para 28 of the judgment in the case of***National Insurance Co. Ltd. v. Balakrishnan,*** **(2013) 1 SCC 731 : (2013) 1 SCC (Civ) 771 : (2013) 1 SCC (Cri) 677 : 2012 SCC OnLine SC 939,** the same reads as under:-

"28. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the Tribunal as regards the liability of the insurer and remit the matter to the Tribunal to scrutinise the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a "comprehensive/package policy", the liability would be fastened on the insurer. As far as other findings recorded by the Tribunal and affirmed by the High Court are concerned, they remain undisturbed."

35. It is provided that for fresh decision on issue Nos. 7 and 8, the learned Court below/Tribunal would provide reasonable opportunity of hearing to the respondents by permitting them to file additional Written Statement and additional evidence in rebuttal to the additional evidence filed by the appellants/claimants before this Court, if they choose.

36. The parties would appear before the Tribunal on 23/September/2019.

37. Office is directed to send the lower court record to the Motor Vehicle Accidents Tribunal/Additional District Judge, Court No. 10, Lucknow.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2018

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHASHI KANT, J.

F.A.F.O. No. 1133 of 2017

M/s Kapila Krishi Udyog Ltd. ...Appellant
Versus
M/s Kamdhenu Cattle Feeds Pvt. Ltd. ...Respondent

Counsel for the Appellant:
Sri Kartikeya Saran

Counsel for the Respondents:

Sri Abhinava Krishna, Sri Saurabh Srivastava

A. First Appeal from order- appeal u/s 37(1)(a) of Arbitration and Conciliation Act, 1996- application u/s 8 rejected on non-filing of original or certified copy of arbitration agreement copy - application filed after filing written statements- requirements of the provision not complied with. When the arbitration agreement is part of the plaint therefore it was on record of the Court, application u/s 8 cannot be rejected if the original or certified copy is not provided separately. The court below should have referred the matter for arbitration as the appellant did not submit to the dispute in their written statement. (Para 22, 24 and 28)

B. Arbitration agreement- appellant is a licensee of the trademark /artistic work of the respondent for the purpose of manufacturing cattle feed- suit for injunction for infringing registered trademark of the respondent barred as arbitration clause exists - appeal allowed

Chronological List of Cases Cited: -

1.Suit No. 331 of 2013 Eros International Media Limited Vs. Telemax Links India Pvt. Ltd. And others.

2.Civil Revision No. 775 of 2003 U.P. Industrial Co-operative Association Ltd. Through its General Manager Vs. Smt. Shobha Chandra and Others.

3.AIR 2006 SC 2800 Rastriya Ispat Nigam Ltd. And Another Vs. M/s Verma Transport Company

4.(2007) 7 SCC 737 Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Ltd.

5.(2008) 2 SCC 602 Atul Singh and others Vs. Sunil Kumar Singh and others.

6.(2009) 10 SCC 103 Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and another.

7.(2017) 5 SCC 185 Ananthesh Bhakta Represented by mother Usha A. Bhakta and others Vs. Nayana S. Bhakta and others

8.2011 (2) ADJ 870 Alok Nath Chattopadhya Vs. Anil Narayan Tadvalkar and others. (E-10)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This appeal under Section 37(1)(a) of Arbitration and Conciliation Act, 1996 *(hereinafter referred to as "Act, 1996")* has arisen from Judgment and Order dated 07.03.2017, passed by District Judge, Kanpur Nagar in Suit No. 02 of 2016, whereby defendant-appellant's *(hereinafter referred to as "appellant")* application filed under Section 8 of Act, 1996 has been rejected on the ground that it was not accompanied by original copy of agreement or duly certified copy thereof, henc e, application did not satisfy requirement of Section 8 of Act, 1996.

2. Facts in brief giving rise to present appeal, in brief, are stated as under :

3. Appellant M/s Kamdhenu Cattle Feeds Pvt. Ltd. is engaged in the business of manufacture and sale of cattle feed under the brand name "Kapila Pashu Aahar". It is undisputed that Original Suit No. 2 of 2016 was filed by plaintiff-respondent seeking injunction restraining appellant M/s Kapila Krishi Udyog Ltd., its servants and other representatives etc. from infringing registered trade mark/label indicating "Kapila Pashu Aahar" in any manner, including deceptively using similar mark etc. In the plaint it was specifically pleaded that plaintiff entered into an agreement with appellant on 17.05.2014, permitting to use registered trade mark, artistic work and

goodwill in relation to cattle feed to be manufactured with the formula specified and expert know how supplied by plaintiff. Under the said agreement appellant, at best was a licensee of the trade mark/artistic work etc. Copy of agreement dated 17.05.2014 was enclosed alongwith the plaint. Suit was instituted vide plaint dated February, 2016.

4. After notice, appellant appeared and filed written statement dated 1st April, 2016. In paragraph 30 thereof, besides other, appellant pleaded as under :-

"30. ..... Without prejudice to the above contentions, it is further submitted that the ***disputes in the present Suit are pertaining to the rights of the parties arising out of the Brand Sharing Agreement dated 17.05.2015 which specifically has an Arbitration Clause for the resolution of such disputes.....****"*

(Emphasis added)

5. In paragraph 35 of written statement, besides other, appellant pleaded as under :

"35. ..... Finally, it is also submitted that as the basis of the present suit is violation of the alleged Brand Sharing Agreement, this ***suit is barred as the said Agreement contains an Arbitration Clause*** *and the Defendant reserves their right to take appropriate legal recourse with respect to the same. The contents of the preliminary submissions and the foregoing paras is reiterated and reaffirmed in this regard."*

(Emphasis added)

6. Thereafter, defendant-appellant filed an application dated 29th July, 2016 under Section 8 of Act, 1996, requesting District Judge to refer dispute between the parties for adjudication by an independent Arbitrator.

7. Plaintiff filed objection stating that agreement dated 17.05.2014 has already been terminated by notice dated 06.02.2016; defendant-appellant has filed Suit No. 1 of 2016, seeking declaration that agreement dated 17.05.2014 is void; defendant himself is not honouring agreement dated 17.05.2014; no steps were taken by defendant-appellant to appoint Arbitrator; the application should have been filed before filing of written statement and that defendant-appellant has neither filed original arbitration agreement nor any application before filing objection to the injunction application.

8. Application filed under Section 8 of Act, 1996 has been rejected by District Judge on the following grounds : -

(i) it has been filed after filing written statement,

(ii) application cannot be entertained unless it is accompanied by original arbitration agreement or duly certified copy thereof and there is no such compliance by defendant-appellant.

9. Learned counsel for appellant contended that agreement was already part of plaint and objection with reference to "arbitration clause" was also taken in written statement. Therefore, rejection of application on above stated technical grounds is patently illegal. Reliance is placed by Sri Anurag Khanna on Bombay High Court's judgment in **Suit No. 331 of 2013 - Eros International Media Limited Vs. Telemax Links India Pvt. Ltd. and Others** decided by a learned

Single Judge (Hon'ble G.S. Patel, J.) vide judgment dated 12th April 2016.

10. Per contra, learned counsel for respondent contended that compliance of Section 8 of Act, 1996 in letter and spirit is mandatory and, therefore, learned District Judge has rightly rejected application filed by defendant-appellant under Section 8 of Act, 1996 for non compliance of requirement of Section 8 of Act, 1996. He placed reliance on a learned Single Judge judgment of this Court in **Civil Revision No. 775 of 2003 - U.P. Industrial Co-operative Association Ltd. through its General Manager, 117/418, Sarvodaya Nagar, Kanpur and Another Vs. Smt. Shobha Chandra and Others** (decided on 2nd March, 2012).

11. Heard Sri Anurag Khanna, learned Senior Advocate assisted by Sri Kartikeya Saran, learned counsel for appellant and Sri Ramendra Sinha, learned Senior Advocate assisted by Sri Saurabh Srivastava, learned counsel for respondent.

12. In view of rival submissions, we find that two points for determination have arisen in this appeal which require adjudication by this Court :

(I) Whether arbitration agreement, if already filed by plaintiff before Court below, would justify non filing of original copy of agreement or certified copy alongwith application filed under Section 8 by defendant?

(II) Whether filing of written statement before filing application under Section 8 of Act, 1996 would exclude application of Section 8?

13. In order to examine the requirement, effect and consequence of Section 8, it would be appropriate to have Section 8 of Act, 1996, which reads as under :-

"8. Power to refer parties to arbitration where there is an arbitration agreement.-*(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies* ***not later than when submitting his first statement on the substance of the dispute,*** *refer the parties to arbitration.*

(2) The ***application*** *referred to in sub-section (1)* ***shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.***

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

(Emphasis added)

14. Section 8 contemplates that if there is an "arbitration agreement", in an action brought by a party, the other party by not later than submitting his first statement on the substance of dispute, may request Court to refer the matter to arbitration. Sub-section (2) places an embargo for such reference, stating that application under sub-Section (1) shall not be entertained unless it is accompanied by original arbitration agreement or a duly certified copy thereof.

15. In the present case, existence of "arbitration agreement" is not in dispute. It also cannot be doubted that in written

statement filed by appellant he has referred to said "arbitration clause". It is also admitted fact that a copy of agreement, which contains arbitration clause, was filed by plaintiff-respondent himself alongwith the plaint as its enclosure. It is in this backdrop of facts we have to examine and answer aforesaid questions.

16. Section 8 has been considered by Supreme Court in **Rashtriya Ispat Nigam Ltd. and Another Vs. M/s. Verma Transport Company, AIR 2006 SC 2800.** Appellant, a Public Sector Undertaking, engaged in the business of manufacturing and marketing of iron and steel products, entered into contract with respondent - M/s Verma Transport Company, a partnership firm engaged in the business of consignment agents. Agreement was in regard to handling and storage of iron and steel materials of appellant at Ludhiana. Respondent Firm received certain payments illegally and by misrepresentation. Matter was investigated by Central Bureau of Investigation and a criminal case was initiated against Anil Verma, one of partners of respondent- Firm and certain officials of appellant. Contract of respondent was terminated by appellant on 23.05.2002. Respondent Firm filed Suit No. 122 of 2002, seeking permanent injunction restraining appellant from black-listing respondent-Firm and terminating consignment agency contract. Civil Judge, Junior Division, granted interim injunction directing parties to maintain status-quo qua termination of contract as well as black listing. Appellant sought time to file written statement. In reply to injunction application, it took a plea that subject matter of suit is covered by "arbitration agreement" between the parties and suit is not maintainable. On 7th June, 2002, application under Section 8 of Act, 1996 was filed which was rejected by Civil Judge by order dated 03.10.2002. Revision filed by appellant was dismissed by High Court on the ground that application filed under Section 8 did not accompany "arbitration agreement", hence application was not maintainable. Court in paragraph 17 of judgment while considering Section 8, said as under :

"17. Section 8 confers a power on the judicial authority. He must refer the dispute which is the subject-matter of an arbitration agreement if an action is pending before him, subject to the fulfillment of the conditions precedent. The ***said power,*** *however,* ***shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute."***
(Emphasis added)

17. Court also said that the fact that agreement was terminated is also a dispute arising out of contract. It also said that direction to make reference is not only mandatory but arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award would remain unhampered by pendency of any suit. It also held that filing of reply to the injunction application cannot be a ground to reject application. Appellant did not submit to the jurisdiction of the Court. They did not waive their right. They in effect and substance questioned jurisdiction of Court and raised a contention that suit was liable to be dismissed. It also said that first statement on the substance of the dispute must be contra-distinguished with the written statement. Court said:

"....it employs ***submission of the party to the jurisdiction of the judicial***

authority. *What is, therefore, is needed is* ***a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause.*** *If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of Act, 1996 may not held wholly unmaintainable."*
(Emphasis added)

18. Court also said that waiver of a right on the part of defendant to the lis must be gathered from the fact situation obtaining in each case. A party, when receives notice from the Court, is bound to respond to Court. While doing so, they may raise a specific plea of bar of the suit in view of existence of an arbitration agreement. Court ultimately held that Section 8 was attracted and application was erroneously rejected.

19. In **Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Ltd., (2007) 7 SCC 737,** photocopy of agreement was filed. Suit was filed by appellant Bharat Sewa Sansthan for eviction and recovery of arrears of rent against respondent. Application under Section 8 (1) of Act, 1996 was filed by respondent which was rejected by Additional District Judge, Lucknow, but writ petition preferred by respondent before High Court Lucknow Bench was allowed and Court held that application under Section 8 was wrongly rejected. High Court directed the matter to be referred for arbitration. In Supreme Court, an argument was raised that original copy of agreement or certified copy was not filed, therefore, application under Section 8 was not maintainable. Court noticed that respondent-Corporation specifically took a plea that original agreement was in possession of appellant while appellant stated that original agreement was not in its possession. In this background, Supreme Court upheld the view taken by High Court that photocopy of lease agreement could be taken on record under Section 8 for ascertaining existence of arbitration clause.

20. In **Atul Singh and others Vs. Sunil Kumar Singh and Others, (2008) 2 SCC 602,** suit was filed by Atul Singh and others *(hereinafter referred to as 'plaintiff')* in the Court of Sub-Judge I, Patna against Sunil Kumar Singh and Others *(hereinafter referred to as 'defendant'),* seeking declaration that partnership deed dated 17.02.1992 is illegal and void. A declaration was also sought that plaintiffs being heirs of Rajendra Prasad Singh may be deemed to continue as partners to the extent of their share. Further a decree for rendition of accounts of Firm from 01.04.1992 was also prayed. Suit initially proceeded ex-parte against defendant. Subsequently ex-pare order was recalled, whereafter defendants filed an application under Section 8 of Act, 1996, but an objection was raised by plaintiff that Rajendra Prasad Singh was not a party to the partnership deed dated 17.02.1992 and further agreement was not filed alongwith application. Court held that since Rajendra Prasad Singh or plaintiff were not party to the deed dated 17.02.1992, Section 8 has no application at all and in such a case, matter could not have been referred to arbitration. It also held that there is non compliance of Section 8(2) of

Act, 1996 which is mandatory. As the copy of agreement was not filed, therefore, also the application was rightly rejected. Court observed :

"..therefore ***for application of Section 8 it is absolutely essential*** *that* ***there should be arbitration agreement*** *between the parties." (Emphasis added)*

21. In **Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another, (2009) 10 SCC 103,** respondent Smt. Potluri Madhavilata filed a suit seeking recovery of possession of vehicle and restraining appellant M/s Magma Leasing and Finance Limited from transferring said vehicle to any one. After receiving notice, appellant made an application under Section 8 of Act, 1996 before Trial Court praying for reference to arbitrator and to stay the proceedings. Application was contested by respondents on the ground that hire-purchase agreement having been terminated, arbitration agreement does not survive and matter need not be referred for arbitration. Application was rejected by First Additional Senior Civil Judge, Vijayawada. Thereafter, revision was filed in Andhra Pradesh High Court, which was also dismissed on the ground that upon termination of hire-purchase agreement, arbitration agreement does not survive. Examining the question whether arbitration clause also stood terminated with termination of contract, Court said that it will not. Findings recorded in paras 14 and 15 are reproduced as under :-

"14. The statement of law expounded by Viscount Simon, L.C. in Heyman as noticed above, in our view, equally applied to the situation where the contract is terminated by one party on account of the breach committed by the other particularly in a case where the clause is framed in wide and general terms. ***Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor is rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract.*** *This is in line with the earlier decisions of this Court, particularly as laid down in Kishorilal Gupta.*

15. In the instant case, Clause 22 of the hire-purchase agreement that provides for arbitration has been couched in the widest possible terms as can well be imagined. If embraces all the disputes, differences, claims and questions between the parties arising out of the said agreement or in any way relating thereto. The hire-purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, ***we hold, as it must be, that the arbitration Clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination.****"* (Emphasis added)

22. Then coming to question with regard to compliance of Section 8 of Act, 1996, Court held that Section 8 is in the form of legislative command to the Court and once prerequisite conditions are satisfied, Court must refer the parties to arbitration. As a matter of fact, on fulfilment of conditions of Section 8, no option is left to the Court and Court has to refer the parties to arbitration.

23. Then we come to a very recent decision, which is quite nearer to the facts

of the case in hand. In **Ananthesh Bhakta Represented by Mother Usha A. Bhakta and Others Vs. Nayana S. Bhakta and Others, (2017) 5 SCC 185,** a suit was filed by Ananthesh Bhakta in the Court of District Judge, Mangalore. An application under Section 8(1) of Act, 1996 was filed by respondent-defendants relying on arbitration agreement in the retirement deed dated 25.07.2005 as well as partnership deed dated 05.04.2006. District Judge allowed application and referred the matter to arbitration. Revision was filed by plaintiff-appellant Ananthesh Bhakta in the Karnataka High Court which was rejected vide judgment dated 08.07.2014 and that is how matter came to Supreme Court. One of the issue raised before Supreme Court was that application filed under Section 8 of Act, 1996 by respondent-defendant did not accompany retirement deed and partnership deed both, by referring whereto arbitration was prayed. Two more objections were raised - (i) all the parties to suit were not party to the agreement and (ii) the Firm being unregistered Firm no reference could be made. With regard to question that agreement was not appended to the application filed under Section 8, Supreme Court noticed in para 9 that both agreements were filed by plaintiff-appellant himself alongwith list of documents and therefore, non filing thereof alongwith application filed under Section 8 by defendant was inconsequential. Court also observed that subsequently, before passing order by District Judge, two deeds were filed by defendants themselves and therefore also, application ought not to be rejected on the ground of non filing of agreement and thus non compliance of Section 8(2) of Act, 1996. Court distinguished judgment in **Atul Singh and Others (supra**) by observing that therein copies of agreement were not on record and since agreement was not on record at all, therefore, application under Section 8, if not accompanied by agreement, could have been rightly rejected for non compliance of Section 8(2) of Act, 1996. Court also referred to judgment of **Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Ltd. (supra),** wherein a deviation was admitted and photocopy of lease agreement was taken to be sufficient compliance of Section 8(2). Court then also proceeded to decide issue by interpreting Section 8(2) using phrase *"shall not be entertained"*. It held that Section 8(2) has to be interpreted to mean that Court shall not consider an application filed under Section 8(1) unless it is accompanied by original arbitration agreement or duly certified copy thereof. Filing of an application without such original or certified copy but bringing original arbitration agreement on record at the time when Court is considering application, shall not entail rejection of application under Section 8(2). It further said in para 29 that two documents were relied by plaintiff himself, therefore, rejection of application for want of agreement was not justified. Para 29 of judgment reads as under :

"29. In the present case it is relevant to note that the ***retirement deed and partnership deed have also been relied upon by the plaintiffs.*** *Hence,* ***the argument of the plaintiffs that the defendants' application IA No. IV was not accompanied by the original deeds, hence, liable to be rejected, cannot be accepted.*** *We are thus of the view that the appellants' submission that the application of the defendants under Section 8 was liable to be rejected, cannot be accepted."* (Emphasis added)

24. In the present case also it is admitted fact that agreement was placed on record by plaintiff-respondent itself as

an enclosure to the plaint. It is also true that appellant did not submit to the dispute and instead refers to arbitration clause in written statement and clearly pleaded that suit is barred and matter is liable for arbitration.

25. In a Single Judge judgment of this Court in **Alok Nath Chattopadhya Vs. Anil Narayan Tadvalkar and others, 2011 (2) ADJ 870,** a specific plea was taken in written statement that subject matter of suit is covered by arbitration agreement entered between the parties. Written statement was filed on 15.05.2006. Thereafter on 09.09.2006 application was filed for termination of proceedings and reference for arbitration. Trial Court allowed the application, where against review application was filed, which was also rejected and then matter came to this Court in writ petition. It was argued that plea for arbitration ought to have been raised before filing written statement. Court referred to plea taken in written statement that there existed an arbitration clause and matter is liable to be referred for arbitration and held that it cannot be said that defendant has waived its right and submitted to the substance of dispute and jurisdiction of Court. Objection raised in written statement in effect and substance questioned jurisdiction of Court and therefore, application if filed subsequently, could not have been rejected on the ground that it was not filed before filing written statement.

26. In our view, learned Single Judge has rightly held so, and this is consistent with the discussion made by us hereinabove.

27. We therefore, answer Question - I holding that if agreement containing arbitration clause is already on record, application under Section 8(2) of Act, 1996 filed by defendant cannot be rejected on the ground that it does not accompany original copy or certified copy of the agreement.

28. Question - II is also answered by holding that when objection has been taken in written statement itself referring to arbitration clause in the agreement, it will mean that defendant has not submitted to the jurisdiction of Court and application filed subsequently under Section 8 cannot be said to be a non compliance of Section 8(1) of Act, 1996.

29. In the result, judgment in question passed by learned District Judge, Kanpur Nagar, in Suit No. 02 of 2016, cannot be sustained.

30. Appeal is **allowed.** Judgment and order dated 07th March, 2017 is hereby set aside. District Judge is directed to refer the dispute to arbitration without any further delay.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

F.A.F.O. No. 160 of 1996

State of U.P. and Ors.
...Defendants/Appellants
Versus
M/s Harveer Singh Bulandshahar
...Plaintiffs-Respondent

Counsel for the Appellants:
Sri S.K. Mehrotra (S.C.)

Counsel for the Respondent:
Sri Anil Tiwari, Sri Sharda Prasad Mishra

A. Arbitration Act, 1940- Section 39- appealable orders - arbitrator's appointment revoked by State but stayed by the Court below - remained pending before court below - arbitrator proceeded to pass an award in favour of contractor-award made Rule of the Court under the Act- during pendency of litigation, arbitrator award and appointment under challenge- appellants not satisfied by the arbitrator

Held:-It cannot be said that the order was passed ex-parte just because the appellant objected to the appointment of the arbitrator. The opportunity to hear both the parties were given before the Arbitrator as well as before the Court below therefore no interference in the Rule of the Court has been made by the Court below and based on the same reasoning this Court see no reason to interfere. (Para 13)

Chronological list of Cases Cited: -

1. (1997) 1 SCC 469 State of Orrisa Vs. B.N. Agarwalla.

2. (1989) 1 SCC 411 Puri Construction Pvt. Limited Vs. Union of India.

3. (2009) 10 SCC 63 Steel Authority of India Ltd. Vs Gupta Brothers Steel Tubes Ltd.

4. (2010) 11 SCC 296 Sumitomo Heavy Industries Ltd. Vs. Oil & Natural Gas Commission of India.

5. 2012 (5) SCC 306 Rastriya Ispat Nigam Ltd. Vs. M/s Dewan Chand Ram Saran 6. 2011 (5) SCC 758 J.G. Engineers Pvt. Ltd. Vs. Union of India &Anr.

7. First Appeal No. 137 of 1992 State of Gujarat &Anr. Vs Nitin Construction Company (Hon'ble Gujrat High Court decided on 22.03.2013).

8. 2000 (4) GLR 3652 Oil& Natural Gas Corporation Limited Vs. Essar Steel Limited

9. 1999 (9) SCC 449 Arosan Enterprises Limited Vs Union of India

10. 2003 (8) SCC 4 Continental Construction Limited Vs. State of U.P.

11. AIR 2017AssamState Electricity Board vs. Buildworth (P) Ltd.

12. 1989 (1) SCC 532 Gujrat Water Supply & Sewerage Board vs. Unique Erectors (Gujrat) (P) Ltd.

13. 1992 1 SCC 508 Irrigation Departmnet, State of Orissa Vs. G.C. Roy

14. AIR 1993 SC 864 Jugal Kishore Prabhatilal Sharma Vs. Vijayendra Prabhatilal Sharma

15. AIR 1988 SC 873 Smt. Aruna Kumari Vs Government of Andhra Pradesh

16. First Appeal From Order No. 714 of 2005 State of U.P. and another Vs. J.M. Construction Company

17. 2003 (8) SCC 154 Bharat Coking Coal Ltd. Vs. Annapurna Construction

18. 2019 JX (SC) 391 K.Marappan (Dead) Vs. Supretending Engineer T.B.P.H.L.C. Circle Anantapur

19. AIR 2018 SC 3109 Raveechee and Compan Vs. Union of India

20. (2017) 14 SCC 323 Ambica Construction Vs. Union of India

21. First Appeal No. 3256 of 2001 Oil and Natural Gas Corporation Limited vs. Birla Techneftegas Exploration Limited (Gujrat high Court) (E-10)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri S.K. Mehrotra, learned counsel for State and Sri Anil Tiwari, learned Advocate assisted by Sri Sharda Prasad Mishra, learned counsel for respondent.

2. This First Appeal From Order has been filed under section 39 of Indian

Arbitration Act, 1940 (hereinafter referred to 'Act, 1940') by the appellant, being aggrieved by order dated 1.12.1995 passed by Civil Judge (Senior Division), Bulandshahar in Original Suits No. 602 of 1994 and 665 of 1994.

3. The parties are referred to as State/Appellant and Contractor/Respondent.

4. Facts of the present case are that dispute arose between the contractor and the State, namely the appellant and one Harish Chandra was appointed as an arbitrator and his appointment was sought to be revoked by the State which was stayed by the Court below and which was pending before this Court. The arbitrator gave his award accepting the demands raised by the contractor. The said arbitral award was sought to be made the Rule of the Court under the Act, 1940 which was opposed by the appellant herein. The Court below accepted the award rejected the objection raised by the appellant herein. The claimant's claims came to be allowed. Full opportunity was given to the appellant both by Arbitrator and Court below.

5. The judgment of the Court below is brought into challenge by the appellant. During the pendency of this litigation the ground that Harish Chandra could not have acted as an arbitrator was given up. Harish Chandra was permitted to act as an arbitrator vide order dated 18.1.1994. Against the said order appeal was preferred before this Court and also a writ was also preferred by State which culminated into orders being passed against the State. The arbitrator thereafter had passed the orders.

6. The arbitrator's award was assailed by the State before the concerned Court which has held against the State and upheld the award and made it Rule of the Court. .

7. Detailed claim petition was filed by the claimants before the arbitrator appointed by the State from the panel it has suggested. However, they were not satisfied with the arbitrator and litigation as herein above mentioned continued. The State filed objection No. 30/33 of the Act, 1940 challenging the award of the arbitrator dated 27.7.1994 before the Court of concerned jurisdiction. However the said objection have been rejected. It is submitted by counsel for appellant that the arbitrator and learned Judge did not consider the contract in its proper prospective and have committed mistake which is an error apparent on the face of the record calling for interference by this Court. The appellant has challenged the same before this Court.

8. While going through the record the principles enunciated for either interference or modifying the award are embodied which will have to be analyzed and looked into.

9. The principles for interfering in arbitral proceedings are time and again enunciated by the High Court and the Hon'bel Supreme Court. Recently in First Appeal From Order No. 714 of 2005 (State of U.P. and others Versus J.M. Construction Company) and in First Appeal From Order No.1237 of 2000 (Harindra Singh Versus Union of India and another) decided on 8.7.2019. The facts as shown above have been properly appreciated by the arbitrator and also the Court below and, therefore, unless the contours of interference are proved by the appellant, this Court would be loathe in interfering in the arbitration matter.

10. Learned counsel for the respondent has relied on the judgments of Supreme Court in **State of Orissa Versus B.N. Agarwalla, (1997) 1 SCC 469 and Puri Construction Pvt. Limited Versus Union of India** for the purposes of pendente life and interest.

Judgments on Arbitration Act, 1940

11. (I) **Steel Authority of India Ltd Vs. Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63 .**

"..... The courts below have currently held that the arbitrator has gone into the issues of facts thoroughly, applied his mind to the pleadings, evidence before him and the terms of the contract and then passed duly considered award and no ground for setting aside the award within the four corners of Section 30 has been made out..... In what we have already discussed above, the view of the arbitrator in this regard is a possible view. Consequently, appeal has no merit and costs."

(ii) **Sumitomo Heavy Industries Ltd Vs. Oil & Natural Gas Commission of India (2010) 11 SCC 296**

".... award was not only a plausible one but a well reasoned award. In the circumstance the interference by the High Court was not called for. In that view of the matter we allow this appeal and set aside the judgment of the learned Single Judge, as well as that of the Division Bench...."

(ii) **Rashtriya Ispat Nigam Ltd. Vs. M/s Dewan Chand Ram Saran reported as 2012 (5) SCC 306**

".... There was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of clause 9.3. The learned single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. Both those judgments will, therefore, have to be set-aside. Accordingly, the appeal is allowed and the impugned judgments of the learned Single Judge as well as of the Division Bench, are hereby set aside...."

(iii) **Reported as 2011 (5) SCC 758, in the case of J.G. Engineers Pvt. Ltd. Vs./ Union of India &Anr.**

(iv) First Appeal No.137 of 1992, in the case of S**tate of Gujarat&Anr. Vs. Nitin Construction Company,** judgment dated 22.03.2013 of the Hon'ble High Court of Gujarat.

(v) First Appeal No.3688 of 2012, in the case of State of **Gujarat Vs. Vijay Mistri Construction&Anr.,** judgment dated 22.03.2013 of the Hon'ble High Court of Gujarat.

(vi) Reported as 2000 (4) GLR 3652 in the case of **Oil & Natural Gas Corporation Limited V/s. Essar Steel Limited,** (Paragraph-8).

(vii) Reported in 1999(9)SCC 449, **Arosan Enterprises Limited V/s. Union of India &Anr.**

(vii) Reported in 2003 (8) SCC 4, **Continental Construction Limited V/s. State of U.P., Assam State Electricity Board V. Buildworth (P) Ltd.**, AIR 2017 **,Gujarat Water Supply & Sewerage Board V. Unique Erectors (Gujarat) (P) Ltd.,** 1989 (1) SCC 532: **Irrigation Department, State Of Orissa V. G.C. Roy,** 1992 1 SCC 508 : **Jugal Kishore Prabhatilal Sharma V. Vijayendra Prabhatilal Sharma,** AIR 1993 SC 864 and **Smt. Aruna Kumari V. Government Of Andhra Pradesh,** AIR 1988 SC 873.

12. This Court in First Appeal From Order No. 714 of 2005 **(State of U.P. and another Versus J.M. Construction Company)** decided on 11.4.2019 has summarized the principles for deciding matters under the Arbitration Act, 1940 & 1996 wherein in paragraph no.24 & 25 it is observed as follows :

*"24. **In Rajasthan State Road Transport Corporation (supra),***

*the learned counsel for the respondent-Company submitted that in fact there was no material on which the finding was recorded by the Arbitrator. In support thereof, learned counsel invited our attention to a decision of this Court in the case of **K.P. Poulose v. State of Kerala &Anr., reported in [1975] 2 SCC 236** wherein it was held that the award can be set aside on the ground of misconduct if relevant documents are not considered by the Arbitrator. Therefore, we asked learned counsel for the appellant- Corporation to substantiate the finding recorded by the arbitrator that it is based on the material on record. In pursuance to the direction given by this Court, learned counsel for the Corporation filed an affidavit on 12.7.2006 and submitted that the document wherein the details on divisionwise average kilometer of new tyres and retreaded tyres along with average short-fall in guaranteed kilometers for the various periods was on record of arbitrator and same was produced before us. The details were given of all the Divisions i.e. Bharatpur, Jaipur, Sikar, Kota, Ajmer, Bikaner, Jodhpur and Udaipur. In all these eight divisions for the various period i.e. from June 1991 to February, 1994 the details have been given to substantiate the allegations that what was the average mileage of the new tyre and what was the average mileage given by the retreaded tyres and on that basis, the short-fall was given and accordingly, the amount of loss was worked out. These details which were placed before us formed part of the record before the arbitrator. The arbitrator in his detailed award has recorded his finding on the basis of the average performance of new vehicle tyres with that of the retreaded tyres of the Company and on that basis he has worked out the assessment in paragraph 17 of the award. Paragraph 17 of the award reads as follows :*

"The RSRTC has compared the performance of retreaded tyres with the performance of new tyres in each division. In each division, as mentioned earlier, the road conditions, the vehicles used, the weather conditions, the general driving skills of the drivers and the level of maintenance and upkeep of vehicles were similar for the new tyres as well as retreaded tyres. The retreaded tyres should have given a kilometerage of 46,000 or 95 % of the life of new tyres. Therefore, the assessment of the performance done by the RSRTC is strictly in conformity with the provisions of clause 5 of the agreement. Notwithstanding the acceptance by the respondent of an error of judgment in guaranteeing 46,000 kms for a retreaded tyre, from the Statements enclosed by the claimant with its letters mentioned in para 5 of this order, it is clear that the retreaded tyres performance fell short of the guaranteed level. I, therefore, find claim of the RSRTC to be fully justified."

25. This is the finding of fact given by the arbitrator. As against this, learned Single Judge as mentioned above, has held that there was no assessment in each division in similar conditions.

Therefore, the learned Single Judge set aside the award but it is not factually correct. As mentioned above, there was a comparative assessment given by the Corporation and that was part of the record before the arbitrator and on that basis the finding of fact was recorded by the arbitrator. Learned counsel for the respondents strenuously urged before us that the performance of new tyres and of retreaded tyres on roads like Jaipur-Delhi would be better as against the road of Jaipur-Lalsot. Therefore, there was no assessment of performance of the new tyres vis-a-vis the retreaded tyres supplied by the Company in similar conditions. In fact, an average has to be taken of each division. It is not necessary that in each of the divisions of the Corporation, the road conditions will be similar. Once the company has entered into an agreement knowing fully well the conditions obtaining in the State of Rajasthan that all the routes in the State are not the roads of Class `A' category but there are roads of Class `A', Class `B' and Class `C' categories also. Therefore, the average performance has been recorded taking into consideration this aspect. It is unlikely that all over the State of Rajasthan the road condition like Jaipur-Delhi will be available for all other divisions. Therefore, in all the divisions the average performance has been taken into consideration. The assessment has been based on average of similar conditions of the roads i.e. the good quality as well as the poor quality. Therefore, average performance of the new tyres with the retreaded tyres has to be taken on the basis of roads available in Rajasthan. The average running of the new tyres on these road conditions with that of the retreaded tyres was to be compared to find out whether the performance of retreaded tyres was up to 95% average or not. After assessing the comparative assessment and going through the materials on record the arbitrator has recorded his finding. It was for the company if they wanted more information or wanted to allege that the road conditions are not similar or that the performance of the tyres which were fitted in the rear axle or on the front axle would not be the same, all these details if it wanted, it could have obtained from the Corporation but they did not do so and only at this stage the company wants to bring this factual controversy that retreaded tyres were not used in similar conditions. This argument at this belated stage cannot be accepted as all the materials have been considered by the arbitrator and after taking into consideration the average of each tyre in each region of the corporation has worked out that the performance of the retreaded tyres was not to the extent of 95%. This was a finding of fact recorded by the arbitrator and the same was made rule of the court by the District Judge. But the learned Single Judge erroneously took upon himself to sit as a court of appeal and disturbed this finding of fact. In our opinion, the view taken by the learned Single Judge of the High Court cannot be sustained."

13. Therefore in light of decisions of the Apex Court and the discussion the scope of interference with the findings of Arbitrator as confirmed by the District Judge, on the basis of principles enunciated by Apex Court goes to show that the dispute will have to be decided. The objections were not accepted as they did not fall within the purview of the objections which could be raised under the Act and the judgment of this High

Court and the Apex Court was relied by the learned Judge. The Arbitrator gave all his reasons for allowing the claim of the present respondent. Just because the name of the arbitrator was revoked by the appellant is judgment could not be assailed under the said fact. Section 34 and 41 of the Specific Relief Act. And therefore the said Act did not apply. The arbitrator was under a duty to decide the lis. The appellants though objected to the appointment of the said arbitrator. The said objection was not considered by this Court also in first appeal from order preferred before this Court. Hence, the said submission has been rightly rejected by the Court below. Even on merits it cannot be said that it is an ex-parte award as they were fully represented and the appellants avail the opportunity of placing their objections both before the Arbitrator as well as the Court below and, therefore, also no interference can be made in the Rule of the Code made by the Court below and the reasoning given would not permit this Court to interfere with the findings in view of the decision in case of **Bharat Coking Coal Ltd Vs. Annapurna Construction reported in 2003 (8) SCC 154.**

14. Recently, the Apex Court in **K.Marappan (Dead) Versus Superintending Engineer T.B.P.H.L.C. Circle Anantapur, 2019 JX(SC) 391** and in **Raveechee and Company Versus Union of India, AIR 2018 SC 3109** has interpreted the role of the Courts while hearing matters under the arbitration Act .The judgments go to show that *pendente lite* interest will depend upon several factors such as ; phraseology used in the agreement clauses conferring power relating to arbitration, nature of claim and dispute referred to arbitrator, and on what items power to award interest has been taken away and for which period. The Court observed:

"34. Thus our answer to the reference is that if contract expressly bars award of interest pendente lite, the same cannot be awarded by the Arbitrator. And that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court , it would be for the Division Bench to consider the case on merits."

15. Further, Gujrat High Court considered an identical clause in the contract in the case of **Ambica Constructions v. Union of India,(2017) 14 SCC 323**, wherein it observed that the Clause of the GCC did not bar the arbitrator from awarding interest pendente lite and affirmed the award passed by the arbitrator. The three Judge Bench of this Court held that the contention raised by the Union of India based on the Clause of the GCC that the arbitrator could not award interest pendente lite was not a valid contention and the arbitrator was completely justified in granting interest pendente lite. Relying on the three Judge Bench judgment in Union of India v. Ambica Construction (supra) and in Irrigation Deptt., State of Orissa (supra), this Court held that the bar to award interest on the amounts payable under the contract would not be sufficient to deny the payment of interest pendente lite.

16. Thus when a dispute is referred to for adjudication to an arbitrator, a term of such a nature as contained in the

Clause 16(3) of GCC, that is binding on the parties cannot be extended to bind an Arbitrator. The Arbitrator has the power to award interest pendente lite where justified. We, therefore, set aside the judgment of the High Court and restore the award passed by the Arbitral Tribunal in respect of Claim No. 12."

17. While going through the record and the award it appears that while considering the claim of the contractor, the arbitrator has considered each and every aspect of the claim made by both the parties and has considered each and every item and the arbitral award reflects on the merits of each claim which the arbitrator has considered and it can be culled out from the arbitral award as well as the subsequent yellow cover that it was either purposefully withheld by the officers of respondents and or were not submitted to the court below. It is in the written submissions accepted by the Union of India and it has been submitted as follows:

"It is also most respectfully submitted that the second sealed cover envelope which probably contains the proceedings during arbitration was not summoned by the court below, so it can not be produced and when this Hon'ble Court has summoned, it was produced by the officials. It is also submitted that reasons can not be written separately it should contain in the award itself, therefore non-production of second seal cover envelope which contains proceedings has got no nexus."

18. The only aspect which requires further consideration is whether the interest has been properly granted or not and what should be the rate of interest. The powers of interference of Courts in grant of interest in arbitral matter came up before the Division Bench of Gujarat High Court of which the undersigned was a presiding Judge in **First Appeal No. 3256 of 2001 (OIL and Natural Gas Corporation Limited Versus Birla Techneftegas Exploration Limited decided on 7.4.2016** by the High Court of Gujarat wherein the following observations are relevant and are extracted herein below:-

".....28. Therefore in light of decisions of the Apex Court and the discussion hereinabove, the scope of interference with the findings of Arbitrators and confirmed by the District Judge, on the basis of principles, we are not inclined to interfere with the findings, as settled in view of decision in case of Bharat Coking Coal Ltd Vs. Annapurna Construction reported in 2003 (8) SCC 154.

29. The award so far as interest is concerned, reads as follows:

"With regard to contention (a) above, it is contended by the respondent that increase in HSD is not by operation of law but on account of the administrative orders and, therefore, the claim is not maintainable under Article 23.1 which deals only with variation in operating costs on account of change in or enactment of law in India or interpretation of existing law in India after the date of opening of price bid. To examine this contention it is essential to refer to the provisions of Essential Commodities Act, 1955. Section 2 of this Act in subsection (a) defines "Essential Commodity". In sub clause (viii) of clause (a) of section 2, petroleum and petroleum products have also been included as "Essential Commodities Act, Central Government has power to regulate and control the prices at which an essential commodity may be bought or sold. Therefore, increase in prices of HSD being a petroleum product is pursuant to the exercise

of powers given to the Central Government under Section 3 of the Essential Commodities Act and is therefore, on account of a change in law."

The Tribunal has relied on the decisions of the Privy Counsel and Apex Court and also relied upon the affidavit of appellant filed before the Tribunal before the Award passed.

The awarding of interest cannot be said to be in any manner, warranting any interference, however, the factum of interest, in our view may be considered, which in our view is on higher side looking to prevalent practice at the relevant time. The quantum of interest, if reduced to 9% from 15%, the same would meet with ends of justice. As a result thereof, we modified the same and factum of interest is ordered to be reduced from 15% to 9%. The rest of the award is not interfered in any manner."

19. While going through the record, it is clear that grounds of appeal were against the continuation of the arbitrator and his removal was stayed and he was authorized to give the arbitral award. Arbitral award cannot be said to be ex-parte award. The objection was also heard by the learned Judge. The judgment and decree cannot be said to be such which would permit this Court to allow the appeal. It cannot be said that the arbitrator misdirected and misconducted himself and, therefore, also the judgment of Court below cannot be interfered with in view of the the settled legal position. The only interference which can be shown is quo the interest and interest shall be at 9% and not 12%.

20. In the final analysis, this appeal is partly allowed. As far as the rate of interest is concerned, the arbitral award and the order of the Court below shall stand modified to the extent that the rate of interest shall be 9% and not 12% as ordered by arbitrator confirm by the Court below. The stay shall stands vacated. If the amount is yet not deposited or partly deposited the said shall recalculated and be deposited within 12 weeks from today before the Court below.

21. The record and proceedings be sent back to the Tribunal.

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APPELLATEJURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2019

BEFORE
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No.47 of 2003

The Oriental Insurance Company Ltd. ...Appellant

Versus

Shamshad Ali &Ors. ...Respondents

Counsel for the Appellant:
Sri V.C.Dixit

Counsel for the Respondents:
Sri Nigamendra Shukla, Sri Amresh Sinha.

A. Contributory Negligence - negligent act must contribute to the negligence- head on collision - both drivers equally negligent.

B. Driving license- no produced by any drivers- first liability of the Insurance Company- money can be recovered from the owner- finding upturned.

Chronological List of Cases Cited: -

1.Civil Appeal No. 5906 of 2008 Pawan Kumar and Anr. Vs. M/s Harikrishan Dass Mohan Lal & Ors (SC)

2.First Appeal From Order No. 1818 of 2012 Bajaj Allianz General Insurance Co. Ltd. Vs. Smt. Renu Singh and Ors.

3.AIR 2018 SC 1143 Archit Saini and Anr. Vs. Oriental Insurance Co. Lt.

4. 2015 LawSuit (SC) 469 Khenyei Vs. New India Assurance Company Ltd. & Ors

5.AIR 2018 SC 592 Pappau and ors Vs. Vinod Kumar Lamba and Ors

6.(2014) 5 SCC 330 Sanjay Kumar Vs. Ashok Kumar and another

7.(2014) 2 SCC 735 Syed, Sadiq and others Vs. Divisional Manager, United India Insurane Company Limited

8.(2014) 11 SCC 178U V. Mekala Vs. M. Malathi and Anr. (E-10)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri V.C. Dixit, learned counsel for the appellant and Sri Amresh Sinha, learned counsel for the respondent Insurance company. None appears for the owner.

2. By means of this appeal, the appellant challenges the judgment and award dated 7.10.2002 passed by Motor Accident Claims Tribunal, Meerut, (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No. 764 of 1999 awarding a sum of Rs. 4,33,710/- with interest at the rate of 9 per cent.

3. The claim petition was preferred under Section 163-A of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") claiming a sum of Rs.26 Lac with 18% rate of interest. As far as the claimant injured is concerned, he was a person who was a conductor/helper in one of the vehicle. The issue is could the Tribunal had decided the issue of negligence in a claim petition under Section 163-A of the Act. Could the Tribunal has decided the issue of negligence? In a petition under Section 163-A of the Act it should not have which means that the Tribunal went on to decide the claim petition as if it was a claim petition under Section 166 of the Act and, therefore, this Court will have to ascertain whether it was a case of co-authorship of negligence of the drivers who were driving the vehicles and qua the claimant it would be a case of composite negligence. The principles enunciated for deciding negligence by the various courts would have to be visualized which are as follows:-

4. The concept of contributory negligence has been time and again evolved, decided and discussed by the courts.

5. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

6. The term contributory negligence has been discussed time and again a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place.The Apex Court in **Pawan Kumar &Anr. vs M/S Harkishan Dass Mohan Lal & Ors** decided on 29 January, 2014 has held as follows:

7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha &Ors. (supra). Paras 6 and 7 of T.O. Anthony (supra) which are relevant may be extracted hereinbelow:

"6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

7. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co. Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 which has held as under:

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an

inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in **Rylands V/s. Fletcher, (1868) 3 HL (LR) 330**. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

8. The insurance company has failed to prove that accident occurred due to carrying of more persons as pillion rider. In absence of such a finding, the insurance company having not proved factum of negligent on the part of the scooterist, cannot be benefitted. The negligent act must contribute to the accident having taken place. The Apex Court recently has considered the principles of negligence in case of **Archit Saini and Antother Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143.**

9. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasOrs. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan &Ors. [2008 (3) SCC 748]*** has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer

separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in ***Challa Bharathamma &Nanjappan (supra)*** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount

in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasOrs. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

10. The findings on issue nos.1 and 4 relating to negligence goes to show that the Tribunal has exonerated the other driver just because the chargesheet was not laid against the driver of trolley no. HR 37 4343. On 12.5.1999, the accident occurred in the early morning. It was a head on collision. The conductor - claimant has deposed that the tanker was dashed with the trailer. The tanker number was HR-38-3144. The claimant in his deposition has categorically mentioned that both the drivers are equally responsible. The road was about 20 feet broad. The trolley driver has not stepped into the witness box. Hence, both the drivers will have to be held equally negligent.

11. The finding on issue no.2 goes to show that neither of the owner nor the driver appeared before the Tribunal. They did not prove that the driver of either of the vehicles had produced any driving licence. The Tribunal threw the onus on the Insurance company to prove the negative. This kind of finding has been disapproved by the Apex Court in **Pappu and others Vs. Vinod Kumar Lamba and another, AIR 2018 SC 592** and Ram Chandra Singh Vs. Rajaram and others, AIR 2018 SC 3789, wherein it has been held that the liability of Insurance company arises only if the truck was driven by authorized person. Recently the Apex Court has held that where there was no licence or a fake licence, the compensation be first paid by the Insurance company and can be recovered from the owner. In this case, the appellant has been ordered to deposite the entire amount by the interim direction of this Court given on 7.1.2003 and, therefore, it will be entitled to recover its portion from the owner, driver and Insurance company of the

other tortfeasor. The finding of the Tribunal is upturned to this extent.

12. It is an admitted position of fact that driving licence was not produced. Neither Sri Amresh Sinha nor Sri Nigamendra Shukla appearing for respondents could dispute the fact.

CROSS OBJECTION

13. The cross objection has been filed after 12 years. The judgment of the Apex Court will not permit this Court to dismiss the cross objection as the appeal preferred by the Insurance company is pending before this Court.

14. As the appeal preferred by Insurance company is pending, the said objection is over ruled.

15. The question of compensation and the quantum will also have to be looked into as held above the matter was decided as a matter under 166 of the Act and, therefore, it cannot be said that it was considered under 163-A of the Act.

16. It is submitted by the counsel for the claimant that the income of the injured could not have been Rs.2000/- per month. The income should have been considered to be Rs. 15,000/- per annum. The compensation awarded is on higher side as against this, Sri Nigamendra Shukla appearing for the claimant in the cross objection, has submitted that his income should have considered Rs.3,000/- per month as he was in employment. It is submitted that his both the lower limbs were amputed. The Tribunal has considered to grant 100% by way of loss of income and the Tribunal has considered Rs.50,000/- under the head of pain shock suffering and he has been awarded sum of Rs.20,710/- under the head of medical expenses. The Tribunal granted 9% rate of interest.

17. The pain shock suffering for amputation of both legs will be Rs.2 Lac as per the judgment of Apex Court and in view of the Division Bench Judgement in FIRST APPEAL FROM ORDER No. - 199 of 2017 (National Insurance Company Limited, Lucknow Versus Lavkush and another), decided on 21.3.2017, and the said judgment has been ordered to be circulated.

39. Section 168 contemplates determination of "just compensation". 'Just' means, fair, reasonable and equitable amount accepted by legal standards. "Just compensation" does not mean perfect or absolute compensation. "Just compensation" principle requires examination of particular situation obtaining uniquely in an individual case.

40. When compensation is to be determined on an application under Section 166, various heads under which damages are to be assessed, have to be looked into by Tribunal and not by merely determining income and applying multiplier.

41. We may consider some broad aspects in the context of injury/ disability and death separately.

Bodily Injury/Disability

42. Here damages are broadly in two categories, i.e., pecuniary damages and special damages. Pecuniary damages are

those which victim has actually incurred and which are capable of being calculated in terms of money. Pecuniary damages may include: (i) medical attendance; (ii) loss of earning profit upto the date of trial; (iii) other material loss.

43. Non-pecuniary damages are such which are incapable of being assessed by arithmetical calculation. They may include; (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

and in the following decisions reliance can be placed as they relate to additional amount being paid for future loss of income even in the case of injured claimant:-

(I) Sanjay Kumar Vs. Ashok Kumar and another, (2014) 5 SCC 330;

(II) Syed. Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735;

(III) V. Mekala Vs. M. Malathi and another, (2014) 11 SCC 178; and

(IV) Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011.

18. Additional amount of Rs.1 Lac for his future loss of income requires to be granted looking to the fact that he has been totally crippled and he will not be able to do the work of conductor. He is entitled to a sum of Rs.50,000/- for each limb for getting artificial limb or crutches. The amount awarded by the Tribunal is enhanced by Rs.4 Lac. The amount not deposited yet be deposited within 12 weeks.

19. The interest at the rate of 9% from the date of filing of the claim petition till award and 6% thereafter from the date of filing of cross objection. The Insurance companies first shall deposit their share of the amount namely 50% each and then recover the said amount from the owner. The appellant would be entitled to recover the amount deposited pursuant to the interim order from the driver - owner as per the procedure prescribed.

20. Record and proceedings be sent back to the Tribunal. Appeal and cross-objection both are partly allowed.

21. This Court is thankful to both the counsels to see that this very old matter is disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2019

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 3971 of 2008

Jagdamba Singh ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Janardan Singh

Counsel for the Respondents:
C.S.C.

A. U.P Junior High School (Payment of Salary to Teachers and other Employees) Act, 1978– Section 6 (3) – Whether power for reviewing the earlier order given to the Joint Director under the said Act? (Paras 6 to 10)– Power to revoke an order passed under Section 6 (3) of the said Act has been specifically granted to the Education Officer, which can be exercised by him on sufficient cause being shown by the elected Committee of Management – Writ Petition Dismissed. (E-8)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)
(ORAL)

(1) Heard learned counsel for the parties and perused the record.

(2) This petition has been filed challenging the order dated 27.02.2008 passed by the opposite party no.2-Joint Director Education, Faizabad, as contained in Annexure No.1 to the petition.

(3) It has been submitted by the learned counsel for the petitioner, who is the Adhyaksh, Ayodhya Prasad Bachchoo Lal Uchchatar Madhyamik Vidyalaya, Bangaon, Tehsil Tarabganj, District Gonda, which runs the School that such order could not have been passed. It is wholly without jurisdiction as there is no such power for reviewing the earlier order given to the Joint Director, under U.P. Junior High School regarding (Payment of Salary to Teachers and other Employees) Act, 1978.

(4) The facts of the case as argued by the learned counsel for the petitioner are that Ayodhya Prasad Bachchoo Lal Uchchatar Madhyamik Vidyalaya, Bangaon, Tehsil Tarabganj, District Gonda, is an Institution imparting education upto Intermediate and the petitioner is the Adhyaksh of the Institution, and the opposite party no.5 namely Jagdish Prasad, is the Manager of the Committee of Management. Since the Institution in question is under Grant-in-Aid upto Class VIIIth, the provisions of U.P. Junior High School (Payment of Salary to Teachers and Other Employees), Act, 1978 (hereinafter referred as Act of 1978) are applicable to the Institution. A recommendation was made by the District Basic Shiksha Adhikari on 17.10.2007 to the Joint Director, the opposite party no.2 regarding several problems is making payment of salary to the Teachers and other employees of the Institution and requested for appointment of Authorized Controller. The Joint Director, Education, Devi Patan Mandal, Faizabad, passed the order on 19.01.2008 appointing Finance Accounts Officer, in the office of the BSA, Gonda, as Authorized Controller for the Institution. The Authorized Controller was functioning in accordance with the directions issued by the High Court from time to time in several writ petitions and had complied with such orders. All of a sudden, the opposite party no.2 has passed an order on 27.02.2008 revoking his earlier order passed under Section 6 (3) of

the Act of 1978 and reinstated the Management.

(5) It has been argued by the learned counsel for the petitioner that there is no provision of review of order by the Education Authorities in the Basic Education Manual and, therefore the opposite party no.2 could have passed the order reviewing his earlier order.

(6) This Court has perused the Section 6 (3) of the Act of 1978 which has been referred to in the impugned order and also in the earlier order dated 19.01.2008. It is being quoted hereinbelow:-

"6. Enforcement of provision and directions. *-(1) Where on the basis of an inspection of an institution or its records or otherwise, the Education Officer is satisfied that the management has committed default in complying with any direction given under Section 4 or with the provisions of Section 3 or Section 5, he may through the Inspector, recommend to the Regional Deputy Director, Education, that action be taken against the institution under sub-section (2).*

(2) On receipt of a recommendation under sub-section (1), the Regional Deputy Director, Education, may call upon the management to comply with the said direction or provision or to show cause within a week why the management should not be superseded.

(3) Where the management fails to comply as aforesaid or to show cause, or the Regional Deputy Director, Education, considers the cause shown to be insufficient he may by order supersede the management, for such period not exceeding one year as may be specified in the order, and authorise any person (hereinafter referred to as the Authorised Controller), to take over the management of the institution for the said period:

Provided that the Regional Deputy Director, Education, may where he considers it necessary or expedient so to do -

(i) extend the said period from time to time, so however, that the period so extended does not exceed five years in the aggregate; or

(ii) revoke the order at any time :

Provided further that nothing in clause (ii) of the preceding provision shall bar the passing of a fresh order under this section."

(7) It is apparent from a perusal of the Section itself that under the First Proviso Sub Clause (ii), the Authority who has passed the order can also revoke his order at any time. But after revoking, the Second Proviso further provides that nothing in Clause (ii) of the preceding Proviso shall bar the passing of a fresh order under the Section.

(8) It is apparent that on cause being shown to be sufficient by the Management that it has complied with a directions issued by the Education Officer earlier and with the provisions of the Act, the officer has been conferred the power of revoking his earlier order. Therefore, the arguments raised by the learned counsel for the petitioner, cannot be said to be appropriate.

(9) Learned counsel for the petitioner has placed reliance upon the judgment rendered by a Co-ordinate Bench in the case of **Janta Shiksha Prasar Samiti and Another Vs. State of U.P. and Others** reported in [2008 (26) LCD 433]. The facts in the aforecited case were that an Authorized Controller had been appointed in the Institution and

elections were conducted by him on 24.01.1997. The elections were granted approval by the Sub Divisional Officer by order dated 09.08.2001 while exercising the power under Section 25 (1) of the Societies Registration Act. Later on, the SDM passed another order on 03.04.2002, recalling his earlier order dated 09.08.2001. The contention before the Court was that Sub Divisional Officer while exercising his jurisdiction under Section 25 (1) of the Act of the Societies Registration Act could not have recalled his earlier order which would amount to exercising the power of review which he was inherently lacking.

(10) This Court referred to several judgments rendered by this Court in similar matters, and then observed in Paragraph no.8 as follows:-

"From the aforesaid decision cited by learned counsel for the petitioner, it appears that the inherent power which an authority can possess is with relation to either a specific provision for the same or application of the principles as are available under Section 151 of the Code of Civil Procedure. In the absence of such a provision an order could be recalled by the authority only upon a proved ground of fraud or misrepresentation. It cannot be disputed that in case an order has been obtained by fraud or misrepresentation, the authority concerned would be within its power to recall such order. However, in case no such ground exists an order cannot be recalled by reviewing it by the authority in the absence of a specific power under a statute. Admittedly, the Societies Registration Act does not provide for any such inherent power in the Sub-Divisional Officer while exercising his jurisdiction under Section 25 (1) of the Act. Such inherent power has not been given by any express provision either in the Act or in the Rules. Therefore, in the absence of any provision under the statute permitting exercise of inherent power it cannot be assumed by the Sub-Divisional Officer."

(11) It is apparent from a perusal of Section 6 (3) of the Act, 1978, that the power to revoke an order passed under Section 6 (3) of the Act has been specifically granted to the Education Officer, which can be exercised by him on sufficient cause being shown by the elected Committee of Management. The aforecited case is hence not applicable.

(12) Accordingly, the writ petition is dismissed. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.04.2019

BEFORE
THE HON'BLE IRSHAD ALI, J.

Misc. Single No. 2247 of 1991
connected with
Misc. Single No. 2248 of 1991 and Misc. Single No. 2249 of 1991

Santoshi ...Petitioner
Versus
VIth Addl. Dist. Judge Sultanpur &Ors. ...Respondents

Counsel for the Petitioner:
V.P. Nagaur, Manju Nagaur

Counsel for the Respondents:
C.S.C., R.K. Saxena, Shailesh Pathak

A. The Court Fees Act, 1870 – Section 7 (xi) (cc) – whether order passed by the trial court as well as by the revisional court on the issue of payment of Court

Fees is valid, or not? – Question of title of plaintiff to house in dispute raised by tenant does not change nature of suit (Paras 6-10) – valuation of such suit for court-fee and jurisdiction would be annual rent of house and not value of house in dispute (Paras 18 & 19) (E-8)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard learned counsel for the petitioners and learned counsel for the respondents.

2. All the above-referred writ petitions involve similar controversy, therefore treating the Writ Petition No.2247 (MS) of 1991 titled 'Santoshi v. Vith Addl. Distt. Judge, Sultanpur and others' as leading writ petition, the writ petitions are decided by means of a common judgment.

3. The issue involved in the bunch of writ petitions is that the order passed by the trial court as well as by the revisional court on the issue of payment of court-fee is valid, or not.

4. Submission of learned counsel for the petitioner-defendants in the suit is that valuation of the property is more than rupees one lakh, therefore, the court-fee paid is not sufficient. In the circumstance, the order passed by the trial court rejecting the objection of the petitioner and dismissing the revision suffers from apparent illegality.

5. He next submitted that he is a licensee of the house, therefore, the court-fee is payable under Section 7(v)(e) of the Court Fees Act, 1870. In support of his submission, learned counsel for the petitioner placed reliance upon the judgment of Bombay High Court in the case of **Ratilal Manilal v. Chandulal Chhotalal** reported in **A.I.R. (34) 1947 Bombay 482.**

6. On the other hand, learned counsel for the respondents submitted that in view of the provisions contained under Section 7(xi)(cc) of the Court Fees Act, 1870, in the suit between the landlord and tenant for recovery of rent, question of title of plaintiff to house in dispute raised by tenant does not change nature of suit. Basis for valuation of such suit for court-fee and jurisdiction would be annual rent of house and not value of house in dispute. In support of his submission, learned counsel for the respondents placed reliance upon the judgment rendered by this Court in the case of **Paramhansanand Shiksha Mandir Ashram v. VII Additional District Judge, Deoria and others** reported in **AIR 1994 ALLAHABAD 293.**

7. He next submitted that the defendant of the suit has no grievance and has no right in regard to payment of court-fee on the basis of valuation of one year's rent. It is between the plaintiff and the State. In support of his submission, learned counsel placed reliance upon the judgment rendered by Hon'ble Supreme Court in the case of **Sri Rathnavarmaraja v. Smt. Vimla** reported in **AIR 1961 Supreme Court 1299.**

8. After having heard the rival submissions of learned counsel for the parties, I perused the material on record and the judgments relied upon by the learned counsel for the parties.

9. To resolve the controversy involved in the present writ petition in regard to payment of court-fee, the provisions of Section 7(v)(e) of the Court Fees Act, 1870 relied upon by learned counsel for the petitioner are quoted below:

*"**7. Computation of fees payable in certain suits** .The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:*

(i) xxxxxxxxxx

(ii) xxxxxxxxxx

(iii) xxxxxxxxxx

(iv) xxxxxxxxxx

***for possession of land, houses and gardens.**(v) In suits for the possession of land, houses and gardensaccording to the value of the subject-matter; and such value shall be deemed to be where the subject-matter is land, and*

(a) xxxxxxxxxxx

(b) xxxxxxxxxxx

(c) xxxxxxxxxxx

(d) xxxxxxxxxxx

for houses and gardens.(e) Where the subject-matter is a house or garden according to the market-value of the house or garden;"

10. Learned counsel for the respondents placed reliance upon Section 7(xi)(cc) of the Court Fees Act, 1870 and submitted that in the suit between the landlord and tenant for recovery of rent, question of title of plaintiff to house in question raised by the tenant does not change the nature of suit. Thus, basis for valuation of such suit for court-fee and jurisdiction would be annual rent of the house and not value of the house in dispute. For the ready reference, Section 7(xi)(cc) of the Court Fees Act, 1870 reads as under:

"7. Computation of fees payable in certain suits for money.- The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:..

.....

.....

Between landlords and tenant.-(xi) In the following suits between landlord and tenant-

.....

.....

(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy;"

11. In the case of **Badal M. Mittal and others v. Omprakash M. Mittal and others** reported in **2018(2)ALLMR 499: 2017(6)BomCR 339**, the Bombay High Court while considering the judgment rendered in the case Ratilal Manilal (supra) relied upon by learned counsel for the petitioner, has held in paragraphs 5 and 7 as under:

"5. In my opinion, the judgment of the learned Single Judge in Sushila Uttamchand Jain is clearly per incurium. Firstly, it does not take into account the applicable provision of law contained in the Schedule to the Court Fees Act. Article 1 of Schedule I of the Act, which provides for ad valorem fees payable on a suit presented to any civil court, requires the court fees to be calculated on the basis of the amount or value of the subject matter in dispute subject to a maximum of Rupees 3 lakhs. Article 2 provides for a plaint in a suit for possession under Section 6 of the Specific Relief Act. In case of such suit, the fee prescribed is one-half of the amount prescribed in the scale provided under Article 1. This clearly implies that even in the case of a suit under Section 6 of the Specific Relief Act, the amount or value of the subject matter in dispute is ascertainable and court fee is to be computed ad valorem on the basis of such amount or value.

Secondly, there are Division Bench judgments of our Court, particularly in the cases Shah Ratilal Manilal vs. Shah Chandulal Chhotalal MANU/MH/0129/1946: AIR 1947 BOM 482, Hiranand Assumal v. Mohandas Vishindas Chainani MANU/MH/0377/ 1976: 1977 Mh.L.J.501 and Lakhiram Ramdas v. Vidyut Cable and Rubber Industries MANU/MH/0110/1963: 1963 Mh.L.J.942, which clearly suggest that in a suit for possession, whether against a defendant claiming to be a licensee, whose licence has been determined, or against a trespasser, the Court fees are payable ad valorem as in the case of any other suit for possession based on market value of the property, of which possession is sought. Shah Ratilal's case was a suit for possession of a house from a licensee. The trial Court, on the defendant's objection, went into the question of the Court fee and came to the conclusion that the subject matter of the suit was not the house itself but the right to eject the defendant. At that time, suits for possession of immovableproperty fell under s.7(v)(e) of the Court Fees Act and were to be valued according to the value of the subject-matter, namely, the property. Taking it that the subject matter of the suit was the right to eject the defendant, the learned Judge found that the value of that right was the value at which the defendant's right to remain in the house could be valued; and looked at from that point of view he considered that the value which the plaintiff put upon his-claim, namely Rs.5,000 odd, could be accepted even though the market value of the house itself was about four times as much. The division bench of our Court hearing a revision from this order set it aside and held that court fees were payable on the value of the house under Section 7(v) (e) of the Court Fees Act, 1870 (equivalent to Section 6(v) of Bombay Court Fees Act). This is what the division bench had to say:

"In plain English the subject-matter of a suit is what the suit is about. It is not the same thing as the object of the suit. The object of the suit is the claim, in other words possession of the house. The subject of the suit is the house. That this is the correct view to take is, I think, clear also from the wording of s.7(5) itself. The section says that suits for the possession of land, houses or gardens are to be valued according to the subject-matter and the sub-section goes on to say that where the subject matter is land, the value shall be determined according to cls. (a), (b), (c) or (d) and where the subject-matter is a house or garden, the value shall be deemed to be the market value of the house or garden. In other words the section contemplates the subject matter of a suit for the possession of land as being the land, the subject matter of a suit for the possession of a garden as being the garden and the subject-matter of a suit for the possession of a house as being the house, and there is no suggestion to be derived from the section itself or, so far as I know, from anywhere else that the subject-matter ought to be taken to be anything else. I can imagine hard cases arising out of this provision; I can imagine cases where paying the Court-fee on the value of a house might in all the circumstances be an unduly heavy price to pay in the event of the suit being lost. But we cannot do anything about that. The law seems to be as I have said; and if the law is harsh, it can always be amended."

Lakhiram's case (supra) was a suit for a mandatory injunction against the defendants, who were licensees and

whose licence had been terminated. The argument before the court was that the plaintiff had merely sought declaration coupled with a mandatory injunction for the defendants' removal from the premises and a preventive injunction restraining them from re-entering or interfering with the plaintiff's possession, and the suit must accordingly be valued under Section 6(iv)(j) of the Bombay Court Fees Act. The argument was rejected by the court, holding the suit to be in substance a suit for possession, however ingenuously the substantive prayer for possession was circumvented by asking for mandatory and preventive injunctions instead. It reiterated the law laid down in Shah Ratilal's case (supra) quoted above and negatived the contention that it was a case for a declaration with consequential relief of injunction falling within clause (j) of Section 6(iv) of the Bombay Court Fees Act. Since the plaintiff had in effect asked for possession, for which there was a provision in the Act, in Section 6(v), clause (j) was held to be inapplicable. This position of law was also reiterated by yet another division bench of our Court in Hiranand Assumal's case (supra). In fact, in Hiranand Assumal, the Division Bench quoted with approval a judgment of Chandrachud, J., as he then was, in a Civil Revision Application bearing on this point. That was a case, where the subject matter in dispute was a shop in a building. It was in possession of the defendant as a tenant on a monthly rent. This shop was given by the defendant to the plaintiffs on a monthly fee. The plaintiffs had brought the suit, from which the aforesaid revision application arose, against the defendant under Section 6 of the Specific Relief Act, alleging that they were in possession of the shop as licensees of the defendant and were wrongly dispossessed by the defendant. Chandrachud, J. agreed with the manner in which the trial court determined the market value of the shop. The suit was held to be correctly valued on the basis of such market value of the shop and not on the basis of statutory right to be enforced by the plaintiffs under Section 6 of the Specific Relief Act.

7. Learned Counsel for the Defendants submits that a decree passed in a specific performance suit under sub-section (1) of Section 6 is a temporary decree; it does not bar any person from suing to establish his title to such property and to recover possession thereof from the decree- holder. Learned Counsel in this behalf relies on sub-section (4) of Section 6. There is nothing in law to indicate that a decree passed under sub- section (1) is a temporary decree. Sub-section (4) merely implies that any decree passed under sub-section (1) does not bar any person from establishing his title to the property. That does not mean a decree under Section (1) is not final. The thrust of the Defendants' argument is that anyway a decree under sub-section (1) of Section 6 of the Specific Relief Act is a decree, which is liable to be defeated by another decree that may be passed in a title suit by the true owner. The suggestion appears to be that court fee based on the market value of the property for such a decree is harsh on the plaintiff. In the first place, for a suit under Section 6 of the Specific Relief Act, the legislature has provided for only half the court fees payable on a regular suit for possession. But secondly, and more importantly, even if paying such court fee on the value of the property could be termed as an unduly heavy price to pay, to repeat the words of the Division Bench in Shah Ratilal's case, "we cannot do

anything about it ..... if the law is harsh, it can always be amended"

12. The provisions contained under Section 7(v)(e) clearly specifies that in the suit for the possession of land, houses and gardens according to the value of the subject-matter, such value shall be deemed where the subject-matter is land and where the subject-matter is house or garden according to the market value.

13. In the case of **Sri Rathnavarmaraja (supra)** relied upon by learned counsel for the respondents, the Court has held in paragraph 2 of the judgment as under:

"2. The Court-fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting party with a weapon of defence to obstruct the trial of an action. By recognising that the defendant was entitled to contest the valuation of the properties in dispute as if it were a matter in issue between him and the plaintiff and by entertaining petitions preferred by the defendant to the High Court in exercise of its revisional jurisdiction against the order adjudging court-fee payable on the plaint, all progress in the suit for the trial of the dispute on the merits has been effectively frustrated for nearly five years. We fail to appreciate what grievance the defendant can make by seeking to invoke the revisional jurisdiction of the High Court on the question whether the plaintiff has paid adequate court-fee on his plaint. Whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State. How by an order relating to the adequacy of the court-fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again, the jurisdiction in revision exercised by the High Court under s. 115 of the Code of Civil Procedure is strictly conditioned by cls. (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the court has acted illegally or with material irregularity in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior court by appeal or in revision against the order adjudging payment of court-fee payable on the plaint. But counsel for the defendant says that by Act 14 of 1955 enacted by the Madras Legislature which applied to the suit in question, the defendant has been invested with a right not only to contest in the trial court the issue whether adequate court-fee has been paid by the plaintiff, but also to move the High Court in revision if an order contrary to his submission is passed by the Court. Reliance in support of that contention is placed upon sub-sec. (2) of S. 12. That sub-section, in so far as it is material, provides :

"Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim.....plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the court shall fix a date before which the plaint shall be amended in accordance with the

court's decision and the deficit fee shall be paid....."

14. Learned counsel for the respondents in support of his submission, placed reliance upon another judgment in the case of **Paramhansanand Shiksha Mandir Ashram (supra)**, wherein the Hon'ble Supreme has held in paragraphs 7, 8 and 9 of the jurisdiction as under:

"7. From the perusal of the copy of the plaint, which is available before this Court as Annexure "1' to the petition, it is absolutely clear that the suit is one for recovery of immovable property from the petitioner who is alleged to be tenant. The question of title to the house in dipsute raised by the petitioner is only incidental. The success of the suit of the respondents-II set for recovery of the property in suit will, obviously, depend upon proof of the existence of relationship of landlord and tenant between them and the petitioner. If they fail toe stablish that relationship, the suit will fail. For the purpose of determination of question as to whether the respondents-II set are entitled to the decree prayed for in the suit the question of their title to the property in dispute is not directly and substantially involved, and incidential enquiry thereof will not change the nature of the suit which was and continues to be a suit between the landlord and tenant for recovery of the disputed immovable property notwithstanding the order of the Judge Small Causes directing return of the plaint.

8. The exercise of finding out the valuation of the property in dispute undertaken by the trial court was misconceived. In a suit instituted by the landlord for recovery of immoveable property from the tenant the quantum of valuation of the immoveable property is irrelevant. The valuation of a suit for recovery of immoveable property founded on relationship of landlord and tenant, for the purpose of pecuniary jurisdiction of the court and payment of court fees, has to be assessed on the basis of annual rent of the immoveable property as envisaged in Section 7(xi)(cc) of the Act.

9. In the instant case the suit being one by the landlord for recovery of the immoveable property from the tenant, based on the alleged relationship of landlord and tenant, and the monthly rent being Rs.100/-, it has been correctly valued at Rs.1200/- for the purpose of determination of the pecuniary jurisdiction of the court, and the court fees paid thereon has rightly been held to be sufficient. Further, it has been appropriately pointed out by the courts below that the order of the Judge small causes, Deoria passed in Suit No.29 of 1978, directing the return of the plaint does not change the nature of the Suit No.1265 of 1981, and will also not have the effect of amending the plaint of the suit."

15. Section 7(xi)(cc) clearly lays down that in the suit instituted by the landlord for recovery of immoveable property from the tenant, the quantum of valuation of the immoveable property is irrelevant. The valuation of a suit for recovery of immoveable property founded on relationship of landlord and tenant for the purpose of pecuniary jurisdiction of the court and payment of court fees, has to be assessed on the basis of annual rent of the immoveable property as envisaged in the aforesaid Section.

16. In the aforesaid case, the question was in regard to that the court fee payable in

a suit for possession of a house based upon the allegation that the defendant in possession is licencee of the plaintiff. The trial court on the defendant objection, went into the question of court-fee and came to the conclusion that the subject matter of the suit was not the house itself, but the right to eject the defendant. The suit for possession of immoveable property falls under Section 7 (v) of the Court Fees Act and are valued according to the subject matter of the suit. Taking it that the subject-matter of the suit was the right to eject the defendant, the learned Single Judge found that value of that right was the value at which the defendant's right to remain in the house could be valued; and looked at from that point of view he considered that the value which the plaintiff put upon his claim, namely Rs.5,000 odd, could be accepted even though market value of the house itself was about four times as much.

Considering the facts and circumstances of the case, this Court holds that the subject-matter of the suit is house. The Section says that the suits for possession of land, house or maintenance are to be valued according to the subject matter and the sub-section goes on to say that where subject-matter is land, the value shall be determined according to clauses (a), (b), (c) or (d) and where the subejct matter is house or garden, the value shall be deemed to be the market value of the house or garden.

17. On perusal of the judgment relied upon by learned counsel for the petitioner, this Court records that the same does not support the submissions advanced by learned counsel for the petitioner. In regard to the judgments relied upon by learned counsel for the respondents, the submissions advanced fully support the contention of the learned counsel for the respondents.

18. In the judgment relied upon by learned counsel for the respondents, it has been held that in exercise of finding out the valuation of the property in dispute undertaken by the trial court was misconceived. In a suit institued by the landlord for recovery of immoveable property from the tenant the quantum of valuation of the immoveable property is irrelevant. The valuation of a suit for recovery of immoveable property founded on relationship of landlord and tenant, for the purpose of pecuniary jurisdiction of the court and payment of court fees, has to be assessed on the basis of annual rent of the immoveable property as envisaged in Section 7(xi)(cc) of the Act.

19. In the instant case the suit being filed by the landlord for recovery of the immoveable property from the tenant, based on the alleged relationship of larndlord and tenant, and the monthly rent being Rs.100/-, it has been correctly valued at Rs.1400/- for the purpose of determination of the pecuniary jurisdiction of the court, and the court fees paid thereon has rightly been held to be sufficient. Further, it has been appropriately pointed out by the courts below that the order of the Judge, Small Causes, passed in Regular Suit No.120 of 1989, directing the return of the plaint does not change the nature of the suit, and will also not have the effect of amending the plaint of the suit.

20. Considering over-all facts and circumstances of the case and the judgments relied upon, the petitioner has failed to establish his case on the point of payment of court-fee.

21. Accordingly, this writ petition lacks merit and is hereby dismissed.

22. However, respondent no.1- IInd Additional Civil Judge, Junior Division is directed to proceed to decide the Suit No.120 of 1999 expeditiously and preferably within a period of one year from the date of production of a certified copy of this order.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.09.2019

BEFORE
THE HON'BLE RAJAN ROY, J.

ARBITRATION APPLICATION NO. 29 of 2012

Goldrush Sales &Services Ltd.
...Applicant
Versus
The Managing Director U.P. S.R.T.C.&Anr.
...Opposite Parties

Counsel for the Applicant: Shradha Agarwal, Akash Prasad,Shraddha Agarwal, Sri Akash Prasad, Sri Amrendra Nath Tripathi, Sri Prashant Agarwal, Sri Sachin Garg, Sri Shishir Tiwari.

Counsel for the Opposite Parties:
Sri Mahesh Chandra, Sri Ratnesh Chandra.

A. Arbitration and Conciliation Act, 1996- section 11- In response to the notice opposite party no.2 intimated the Applicant about appointment of an arbitrator and not by opposite party no.1 as agreed in the arbitration agreement. Onus to prove receiving-Indian Evidence Act-section 114-III(f) and General clauses Act-section 27-Opposite party no.2 assert serving of notice of opposite party no.1 to the applicant after 7 years.

Held:-Unless delivered, it cannot be treated as having been communicated. Accordingly, once the application under Section11had been filed no such appointment could have been made and the matter was purely within the domain of this Court to do so. (Para 9)

B. Arbitration and conciliation Act, 1996- Section 3(2)- until delivered no communication; actual delivery of order of appointment of arbitrator is a necessary prerequisite specially in terms of section 3(2) of the Act.

Held:-The term ''delivered' is distinct from the word ''dispatch'. Delivered means to bring and handover something to the addressee. (Para12) (E-9)

(Delivered by Hon'ble Rajan Roy J.)

1. Heard learned counsel for the parties.

2. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996.

3. Before proceeding with the merits of the matter it is necessary to mention that in the relief clause cancellation of appointment/ nomination of Shri Niranjan Kumar- opposite party no. 3 as Arbitrator had also been sought. Realizing the mistake, as, such a relief could not be sought under Section 11, although the other part of the relief was admissible, an application for amendment of the relief clause was filed which was objected by the opposite parties on the ground that it should not be allowed at such a belated stage. But, considering the nature of the proceedings and the technicality involved which does not materially affect the substantive disposal of the application for appointment of an Arbitrator, the application for amendment is allowed. As, it does not affect the merits, therefore, no fresh response is called for consequent to

the amendment being allowed which is of a technical nature as the words "cancel the appointment/ nomination of Shri Niranjan Kumar- opposite party no. 3' would stand deleted and the words "appoint under Section 11(6) of the Arbitration and Conciliation Act, 1996' be substituted in its place and the words "be appointed' as mentioned in the application, would be deleted.

4. The application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act, 1996') was filed on 08.11.2012. The agreement and the arbitration clause contained therein is not in dispute. As per the arbitration clause any dispute arising out of or in connection with the agreement shall be referred to the sole Arbitration of the Managing Director or his nominee not below the rank of General Manager whose decision shall be binding both on the Contractor and the U.P.S.R.T.C. subject to the provisions of the Act, 1996. A dispute arose between the parties on account of which a notice was given by the applicant on 29.06.2012 to the opposite parties no. 1 and 2 for appointment of an Arbitrator. The opposite party no.1- the Managing Direction, U.P.S.R.T.C., Lucknow is the party to the agreement with the applicant, whereas, the opposite party no. 2 is not a party thereto. In fact the opposite party no. 2 is another Company in respect of which the work mentioned in the agreement was to be performed. In response to the aforesaid notice the opposite party no. 2- the Managing Director, Lucknow City Transport Services Limited is said to have intimated the applicant about the appointment of Shri Niranjan Kumar, Chief General Manager (Technical), U.P.S.R.T.C. as an Arbitrator vide his letter dated 13.07.2012, a copy of the said intimation is annexed as Annexure No. 4 to the application. As the intimation was not by the Managing Director, U.P.S.R.T.C. with whom the agreement had been entered by the applicant, therefore, vide letter dated 20.07.2012 the applicant informed the opposite party no. 2 that copy of letter of M.D., U.P.S.R.T.C. i.e. opposite party no. 1 had not been received nor made available to it and in fact such communication should have come from the opposite party no. 1. A request for a copy of the said order was also made. According to the applicant the alleged order of the M.D., U.P.S.R.T.C. dated 13.07.2012 appointing an Arbitrator was never delivered to the applicant accordingly this application was filed on 08.11.2012 specifically disclosing the factum of receipt of letter dated 13.07.2012 of the opposite party no. 2 and the non receipt of any such order of the opposite party no. 1 appointing an Arbitrator. This fact is mentioned in Para 18 of the application. The opposite parties filed counter affidavit and supplementary counter affidavit stating the intimation of appointment of the Arbitrator vide letter of the opposite party no. 2- The Managing Director, Lucknow City Transport Services Limited dated 13.07.2012 but no such assertion was made in the said counter affidavits that in fact the order of the Managing Director, U.P.S.R.T.C. dated 13.07.2012 was also communicated to the applicant albeit subsequently vide another letter dated 06.08.2012 of the opposite party no. 2. It is only vide affidavit dated 07.02.2019 filed after almost more than seven years that a document numbered as SCA-1 dated 13.07.2012 signed by the Managing Director, Lucknow City Transport

Services Limited, Lucknow was annexed, along with its annexure an order of the M.D., U.P.S.R.T.C. dated 13.07.2012, asserting that the appointment of the Arbitrator was by the M.D., U.P.S.R.T.C. The letter dated 13.07.2012 signed by the M.D., Lucknow City Transport Services Limited, Lucknow in part is the same as was sent to the applicant, a copy of which is annexed as Annexure No. 4 to the application but the said letter contained in Annexure SCA-1 to the supplementary counter affidavit itself says that in the original document certain portions of it were not there by using the words "ewy izfr ij ugha'. It is inexplicable as to why these recitals of endorsement of copies did not exist on the original which was sent to the applicant. Furthermore, the letter contained in Annexure SCA-1 does not refer to any enclosures, yet the order of the M.D., U.P.S.R.T.C. dated 13.07.2012 which does not bear any letter number or reference but appears to have been passed on a sheet of paper, has been annexed with it for the first time i.e. with the affidavit dated 07.02.2019. The said order is no doubt on the record of the file of U.P.S.R.T.C. which has been placed before the Court but it is intriguing as to why it was not filed earlier and why the copy of the letter dated 13.07.2012 is not the same as that of the original. Nevertheless, even at this stage no proof of service of the order dated 13.07.2012 was filed by the opposite parties. It was only when the Court inquired into the matter further and asked the opposite parties to produce the records, then, another supplementary counter affidavit dated 27.03.2019, wherein a letter of the M.D., Lucknow City Transport Services Limited, Lucknow- opposite party no. 2 dated 06.08.2012 was brought on record, in which it was stated that the order of the M.D., U.P.S.R.T.C. appointing the Arbitrator in response to the notice dated 29.06.2012 was served upon the applicant by registered post with acknowledgment due on 06.08.2012. In the interregnum another supplementary counter affidavit dated 08.03.2019 was filed which did not mention this fact nor contain the documents subsequently filed with the affidavit dated 27.03.2019. The dispatch register has been perused by the Court and no doubt there is a mention of the letter dated 06.08.2012 as having been dispatched, but the intriguing aspect still remains as to why this fact was never brought to the notice of the Court or the applicant prior to March, 2019.

5. It is not out of place to mention that after appointment as Arbitrator, Shri Niranjan Kumar informed the applicant about the date fixed but the applicant sought an adjournment on the ground of pendency of application under Section 11 before this Court. During pendency of this application as Shri Niranjan Kumar retired, another officer Shri Atul Bharti was appointed, but, the proceedings could not take place on account of pendency of this application.

6. Now, the applicant has consistently filed affidavits denying the receipt of the order of the M.D., U.P.S.R.T.C. dated 13.07.2012 appointing an Arbitrator as per the agreement entered into between the applicant and the U.P.S.R.T.C. The applicant has also denied the averments made by the opposite parties in the supplementary counter affidavits including the receipt/delivery of any such letter dated 06.08.2012 and the letter of the M.D., U.P.S.R.T.C. dated 13.07.2012.

7. It is the contention of Shri N.K. Seth, learned Senior Counsel for the applicant that under the Arbitration and Conciliation Act, 1996 as per Section 3

which deals with receipt of written communication and says that any such communication in respect to Arbitration is deemed to have been received on the date it is so delivered, therefore, his contention was that mere sending of intimation about appointment of Arbitrator is not sufficient. Such intimation, assuming that it was sent though not admitting it, is required to be delivered. Unless it is delivered, it can not be treated as having been communicated, therefore, his submission was that prior to filing of the application under Section 11 there was no communication by the competent Authority which was the M.D., U.P.S.R.T.C. of his decision appointing Shri Niranjan Kumar as Arbitrator. Accordingly, once the application under Section 11 had been filed no such appointment could have been made and the matter was purely within the domain of this Court to do so. The submission was that considering the objective and requirements of impartiality and independence of the Arbitrator, the M.D., U.P.S.R.T.C. having forfeited his entitlement to appoint such Arbitrator, the Court should appoint an independent and impartial Arbitrator, especially as, inspite of 9 years neither the Arbitrator had been appointed nor Arbitration had taken place on merits. He relied upon the decision of the Supreme Court reported in ***2012 (6) SCC 384; S.A. Bipromasz Bipron Trading S.A. Vs. Bharat Electronics Ltd. and 2011 (4) SCC 616; State of Maharashtra Vs. Arch Builders.***

8. It was his contention that once that applicant has repeatedly denied on oath the receipt and delivery of the alleged communication of the order of the M.D., U.P.S.R.T.C. dated 13.07.2012 and the letter of the M.D., Lucknow City Transport Services Limited, Lucknow dated 06.08.2012 the presumption under Section 114 of the Evidence Act as also Section 27 of the General Clauses Act stood rebutted and the onus shifted upon the opposite parties to prove such receipt/delivery of the communication referred hereinabove upon the applicant and as they had failed to do so, therefore, this Court should proceed to appoint an Arbitrator.

9. Shri Seth, learned counsel for the applicant also raised certain issues with regard to rank of Shri Niranjan Kumar that he was not of the Rank of General Manager, hence ineligible to act as an Arbitrator as per the arbitration clause, but the Court does not find merit in his arguments which are belied from the records.

10. Shri Ratnesh Chandra, learned counsel for the opposite parties no. 1 and 2 on the other hand submitted that there was clinching evidence on record to show that the communication of the decision of the M.D., U.P.S.R.T.c. appointing Shri Niranjan Kumar as Arbitrator had been made to the applicant firstly by the letter of the M.D., Lucknow City Transport Services Limited, Lucknow dated 13.07.2012. Secondly, by his letter dated 06.08.2012 along with which the order of the M.D., U.P.S.R.T.C. was enclosed, however, on being asked as to why this fact was not averred in the earlier counter affidavits and supplementary counter affidavits, as many as three affidavits having been filed and was asserted for the first time in March, 2019, although, the application had remained pending for almost 7 years and why the relevant documents were not brought on record, he did not have any reply in this regard. This

aspect is a matter of inquiry by the concerned Authorities. On the question of rank of Shri Niranjan Kumar, Shri Ratnesh Chandra, learned counsel for the opposite parties asserted that he was of the rank of General Manager and the assertion to the contrary was misconceived. Shri Chandra also relied upon the decision of the Supreme Court reported in ***(2004) 10 SCC 504; Union of India and Anr. Vs. M. P. Gupta.***

11. Having heard learned counsel for the parties and having perused the records even assuming that any such communication dated 06.08.2012 enclosing therewith the order of the M.D., U.P.S.R.T.C. dated 13.07.2012 was made to the applicant, although, there is no explanation as to why these facts and documents were not brought on record earlier although this application has remained pending before the Court for almost 7 years, the fact of the matter is that such sending of the letters would at best raise a presumption about the fact that the same were sent, but, as per the provision contained in Section 3(2) of the Act, 1996 this is not sufficient in respect of matters pertaining to Arbitration and such communication has to be "delivered'. Even otherwise, the presumption referred hereinabove in terms of Section 114-III(f) of the Indian Evidence Act or in terms of Section 27 of the General Clause Act is rebuttable and once the applicant has stated on oath by way of an affidavit that it had never received any such letter dated 06.08.2012 or the decision of the M.D., U.P.S.R.T.C. dated 13.07.2012, then, the onus shifted upon the opposite party no. 1 to prove by evidence that in fact it was served and delivered. It was incumbent upon the opposite party no. 1 to produce the postman or ask for his summoning as he would be the best person to testify as to whether the aforesaid letters/orders were served upon the applicant or not or produce a certificate of service issued by the postal department. None of these has been done. As already stated earlier the factum of letter dated 06.08.2012 along with letter of the M.D., U.P.S.R.T.C. dated 13.07.2012 as having been sent to the applicant itself was asserted as a fact for the first time in March, 2019 and no attempt was made to produce the Postman or to seek his presence through the Court within reasonable time, even after filing of such affidavit nor certificate of service by the postal department was filed. In this view of the matter, it can not be said that there is any proof of delivery or service of the decision of the M.D., U.P.S.R.T.C. dated 13.07.2012 upon the applicant. The communication of the order of the M.D., Lucknow City Transport Services Limited, Lucknow dated 13.07.2012 is not material, as, the said Officer or his Corporation was not a party to the agreement in respect of which a dispute has arisen. The Competent Authority for appointing the Arbitrator was M.D., U.P.S.R.T.C., therefore, it is his decision which was required to be served/delivered upon the applicant. The opposite party no. 1 has not been able to prove such service/delivery of his decision upon the applicant. Reference may be made in this regard to a decision of the Supreme Court reported in ***(1976) 2 SCC 409; Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana*** wherein it affirmed the view taken by the Bombay High Court that the presumption of service had been repelled by the defendant's statement on oath that he had not refused service by registered post as it was never brought to him and that in this state of evidence unless the Postman was produced the

statement of the defendant on oath must prevail. It was a case of endorsement of "refusal' to receive made by the postman. In the case at hand the applicant has refused on oath the receipt of any such communication and there is no document not even the acknowledgment due containing any such endorsement by the Postman of a refusal by the applicant. The opposite party no. 1, had he taken this plea within a reasonable time, could have obtained a certificate from the postal department about the service/delivery upon the applicant, but this has not been done. There is nothing on record from the conduct of the applicant which could establish that it had in fact received and was served the decision of the M.D., U.P.S.R.T.C. The first letter dated 13.07.2012 of M.D., Lucknow City Transport Services Limited, Lucknow does not mention about the said decision having been enclosed with it and there is no evidence of it, as already noticed. The copy of the said letter filed with the supplementary counter affidavit is not the same as that which was served upon the applicant, a fact which is admitted in the document itself. In the aforesaid decision of the Supreme Court in ***Puwada Venkateswara Rao's case*** (supra) a decision of the Calcuttta High Court in the case o***f Nirmalabala Devi Vs. Provat Kumar Basu reported in (1948) 52 CWN 659*** was also affirmed, which was on different lines than the Bombay High Court's decision, however, having affirmed both the views the Supreme Court held that they were reconciliable as what the Culcutta High Court had applied was a rebuttable presumption which had not been repelled by any evidence, whereas, in the Bombay High Court's case the presumptions had been held to be rebutted by the evidence of defendant on oath so that it meant that the plaintiff could not succeed without further evidence. In this case also the applicant has rebutted the presumption but the opposite party no. 1 has not led any further evidence to succeed in his defence and as stated earlier even after a close examination of evidence on record there is nothing to establish that the order of the M.D., U.P.S.R.T.C. dated 13.07.2012 had been actually served/delivered on the applicant, which is a necessary per-requisite specially in terms of Section 3(2) of the Act, 1996. Reference may also be made in this regard to another decision of the Supreme Court on this issue reported in ***(2008) 17 SCC 321; V. N. Bharat Vs. Delhi Deveopment Authority and Anr.*** wherein considering the question of presumption of service of notice the Supreme Court held that presumption under Section 114-III.(f) of the Evidence Act is a rebuttable presumption and on denial of receipt of the registered letter from D.D.A. the Appellant discharged his onus and the onus reverted back to the respondent to prove such service by either examining the postal authorities or obtaining a certificate from them showing that the registered article had been delivered to and had been received by the appellant. In this case also the onus sifted upon the opposite party no. 1 who has not been able to discharge it.

12. The term "delivered' is distinct from the word "dispatch'. Delivered means to bring and handover something to the addressee.

13. The Arbitral proceedings in the present case having commenced on 29.06.2012 the provisions of the unamended Act, 1996 would apply.

14. In view of the above, it is held that there was no service/delivery of the decision of the M.D., U.P.S.R.T.C. appointing Shri Niranjan Kumar as Arbitrator prior to filing

of the application under Section 11 of the Act, 1996. The application for appointment of an Arbitrator under Section 11 is maintainable.

15. The unamended Act, 1996 is applicable to this case. Considering the arbitration clause agreed upon by the parties the M.D., U.P.S.R.T.C. is appointed as an Arbitrator to himself arbitrate in the matter, as, the applicant had agreed to his Arbitration as per the arbitration clause. He shall conclude the proceedings at the earliest, say, within a period of one year.

16. The original records comprising the dispatch register and the file bearing No. 31LCT/12 shall be returned by the Bench Secretary to Shri Ratnesh Chandra, learned counsel for the opposite party no. 1.

17. The application is **disposed of.**

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

SPECIAL APPEAL NO. 622 of 2019

State of U.P. & Ors. ...Appellants
Versus
Mohd. Ramjan & Anr. ...Respondents

Counsel for the Appellants:
Sri Ghanshyam Dwivedi.

Counsel for the Respondents:
Sri Sunil Kumar Srivastava.

A. Pay parity – Under Rules 4 and 8 of Service Rules, 1991- Single cadre of instructors. Single grade. No difference in educational qualification established. Claim allowed by Single Judge– directing the state authorities (the appellants herein) to treat them at par with other instructors (paras 13 to 16)–Special Appeal dismissed. (E-8)

(Delivered by Hon'ble Manoj Misra J.)

1. This intra-court appeal has been filed against the judgment and order dated 12.12.2018 passed by the learned Single Judge in Writ A No. 5163 of 2003 by which the writ petition filed by the respondents has been allowed and a direction has been issued to the state-authorities (the appellants herein) to treat the writ petitioners at par with other Instructors and place them in pay scale of Rs. 5,000-8,000 with all consequential benefits.

2. Before we proceed to address the arguments raised in this appeal, it would be apposite for us to have a glimpse of the facts of the case.

3. The writ petitioners (the respondents herein) were appointed as Instructor in Government Industrial Training Institute (for short GITI) in the year 1981 against the post of Wood Work Instructor. In the year 1989, the GITI was merged with Industrial Training Institute (for short ITI) as a consequence whereof the writ petitioners became employee of the ITI and they continued to work as Wood Craft Instructor. Prior to the merger, both the institutes, that is GITI and ITI, were under the Director, Training and Employment, Govt. of U.P., Lucknow (for short Director Training). Post merger also the institute (ITI) remained under the Director Training. However, an anomalous situation in respect of the pay scale of the Instructors arose. The writ petitioners who were from the GITI were

maintained at the pay scale of Rs. 3200-4900 whereas the Instructors who had been appointed in the ITI were in the pay scale of Rs. 5000-8000. The writ petitioners claimed that post merger there existed just one class of Instructors in the ITI, regardless whether they came from GITI or had been, since before, in the ITI, therefore they were entitled to the same pay scale. It appears that prior to filing Writ A No. 5163 of 2003, the writ petitioners, seeking pay parity, had filed Writ A No. 6619 of 2002 in this Court which was disposed off, vide order dated 15.02.2002, with a direction to the authorities to consider and decide the representation of the writ petitioners made in that regard. Pursuant to the direction given in that writ petition, by order dated 29.11.2002, the Principal Secretary, Labour Department, on behalf of the State, took a decision that under the present set of service rules, as amended in the year 1994, there is no provision for enhancement / up-gradation in salary of an Instructor payable in the pay scale of Rs. 3200-4900 to that of Trade Instructor payable in the pay scale of Rs. 5000-8000 because the post of Trade Instructor is a post which is to be filled by direct recruitment and the eligibility qualifications of an Instructor are different from that of Trade Instructor and as such it is not legally permissible to place the writ petitioners, who were appointed as Instructors in the pay scale of Rs. 3200-4900, in the pay scale of Rs. 5000-8000 admissible to Trade InstructOrs.

4. Assailing the order dated 29.11.2002, the writ petitioners (the respondents herein) filed Writ A No. 5163 of 2003 claiming that as GITI got merged with ITI and the Instructors in GITI continued as Instructors in the ITI and there being no separate cadre of Trade Instructor in the service rules, which speaks of only one cadre, that is of Instructors, the writ petitioners who were performing same duties and functions were entitled to same pay scale. It was urged that in the year 1991, U.P. Industrial Training Institutes (Instructors) Service Rules, 1991 (for short Service Rules, 1991) were framed and notified by the Governor in exercise of powers conferred by the proviso to Article 309 of the Constitution of India. In those rules, which are applicable to the writ petitioners, there is just one cadre, that is of Instructors, and no distinction has been drawn between an Instructor and a Trade Instructor. Hence, the writ petitioners who are performing same duties and functions as any other Instructor and hold Diploma in Wood Working, are entitled to the same scale of pay as payable to the so-called Trade Instructors in the establishment.

5. In paragraph 5 of the counter-affidavit filed in Writ A No. 5163 of 2003, the stand taken by the respondents (appellants herein) in the writ petition was that before merger between GITI and ITI in the year 1989, there were two types of Instructor, one, lower grade instructor, who were working in GITI in the pay scale of Rs.3200-4900 (old Rs.200-320), and the other, an Instructor, working in ITI in the higher pay scale of Rs. 5000-8000 (old Rs.1400-2600). It was claimed that the pay scale of Rs.5000-8000 is admissible only to those Instructors who were working as Trade Instructor. It was also claimed that qualification of lower grade instructor is just a certificate/ diploma whereas for appointment as Trade Instructor one is required to complete course from NCVT apart from other qualifications. It was claimed that

the writ petitioners have not completed the course from NCVT.

6. In a nutshell, the stand of the appellants (respondents in the writ proceedings) before the writ court was that the higher pay scale was admissible only to the Trade Instructors whose qualifications were higher and not to the writ petitioners as they did not possess those qualifications.

7. The learned Single Judge found that as it was not in dispute that the two sets of institutes, namely, GITI and ITI, got merged, and the Service Rules, 1991 did not draw a distinction between the lower grade instructor and the higher grade instructor, as claimed by the state-respondents, and, in fact, the Service Rules, 1991 provided for a solitary cadre of Instructor, denial of the same pay scale to the erstwhile GITI Instructors is arbitrary and violates Article 14 of the Constitution of India.

8. We have heard Sri Ghanshyam Dwivedi, learned Standing Counsel for the appellants; Sri Sunil Kumar Srivastava for the writ petitioners (respondents) and have perused the record.

9. The learned counsel for the appellants contended that the learned Single Judge has failed to consider that the post of Trade Instructor is to be filled by direct recruitment, under the Service Rules, 1991, and, to hold that post, minimum qualifications are prescribed which are higher than those possessed by the writ petitioners, therefore the writ petitioners, who were not eligible to be appointed on the post were not entitled to the pay scale admissible to the post of Trade InstructOrs. Therefore, the order of the learned Single Judge is liable to the set aside.

10. Per contra, the learned counsel for the writ petitioners (the respondents herein) submitted that in paragraph 5 of the writ petition it has been specifically stated by the writ petitioners that they were fully qualified and they possess certificate of diploma in Wood Working and were selected and appointed only after interview by a Selection Committee. It has been urged that there is no specific denial of the averments made in paragraph 5 of the writ petition though, in an ambiguous manner, in paragraph 7 of the counter affidavit, it is stated that the averments made in paragraph 5 of the writ petition are not admitted as stated inasmuch as the Director had made appointment in lower grade. It has been urged that the assertion of the writ petitioners that they possess certificate of Diploma in Wood Working (Craft) has not been denied. It has also been urged on behalf of the writ petitioners that the learned Single Judge has examined all aspects and has correctly held that as it is not in dispute that the Service Rules, 1991 provide for a solitary cadre post of Instructor and no distinction between higher and lower grade Instructor has been drawn in the service rules, and all kind of Instructors qua their trade are performing the same duties, the claim for pay parity is justified.

11. Having heard the rival submissions, at the outset we may observe that the learned counsel for the appellants has not questioned the observation made by the learned Single Judge in paragraph 54 of the judgment, which is extracted below:-

"54. When questioned, learned Standing Counsel could not dispute that prior to 1991 there were no service rules, as such applicable, to Instructors

appointed in G.I.T.I. and I.T.I. He also could not dispute that two sets of institutes when merged together, all Instructors working therein were treated as a single lot and their sanctioned strength was noticed in Rule 4 of Rules, 1991 as 1931 permanent and 1011 temporary, total 2942. This strength has now been reduced by Second Amendment Rules, 2003 to 1597 permanent and 1168 temporary i.e. 2765 in total. He also could not dispute that in the work, duties and responsibilities of petitioners qua other Instructors, there is no distinction. It may be noticed that Instructors, who were appointed in I.T.I. prior to 1989, as a matter of fact, may have possesses Certificate or Diploma or other qualification, but, the fact remains that at the time of merger in 1989, when two Institutes were merged, no distinction was carved out by State between persons working as 'Instructor' in these Institutes since all were discharging same duties."

12. Further, upon careful perusal of the record as also the Service Rules, 1991, as amended from time to time, we find that Rule 4 of the Service Rules, 1991 provides for the cadre of service. Sub-rule (2) of Rule 4 provides for the strength of the service and the number of posts therein. It discloses the name of the post as Instructor of which the number of posts, that is strength of the cadre, is given in sub-rule (2) of Rule 4. There is no mention of Lower Grade Instructor or Higher Grade Instructor in the Service Rules, 1991. Rule 8 of the Service Rules, 1991 provides for the academic qualifications. It provides the qualifications for different trades relating to the post of Instructor, not for higher or lower grade. At Serial No.7, which is now at Serial No.6, post amendment in the year 2003, Carpenter is enlisted as one of the Trades for the post of Instructor. The essential qualification for the post of Instructor in the Trade of Carpenter is Diploma in Wood Working. The Rule 8 of Service Rules, 1991, as was initially notified (prior to amendments), is extracted below:-

"8. **Academic Qualification** - A candidate for recruitment to a post in the service must possess the following qualifications:

(A) **Essential-** (1) Educational-

(i) Must have passed Intermediate Examination from the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognised by the Government as equivalent thereto.

(ii) Must have obtained a certificate in the respective trade from the National Council for Training in Vocational Trades.

Or

Must have obtained National Apprenticeship Certificate in the respective trade;

Or

Must have obtained the following diploma relating to the respective trade from Board of Technical Education, Uttar Prdesh or from any other Institution recognised by the Government:

Sr. No.	**Trade**	**Desirable Diploma**
1.	(A) Radio/T.V. Mechanic	: Diploma in Electronics.
	(B) Electronics Mechanic	: Diploma in Electronics.
2.	(A) Stenographer English	: Diploma in Secretarial Practice.
	(B) Stenographer Hindi	: Diploma in Secretarial Practice.

3. (A) Surveyor
:Diploma in Civil Engineering

(B) Draftsman Civil
: Diploma in Civil Engineering

4. Refrigeration and Air Conditioning
Mechanic
: Diploma in Refrigeration and

Air conditioning Engineering.

5. Diesel Mechanic
:Diploma in Automobile

Engineering.

6. Draftsman Mechanical : Diploma in Drafting (Mechanic) and

Designing.

7. Carpenter : Diploma in Wood working.

8. Cutting Tailoring : Diploma in Costume Design and Dress

making.

9. Engineering Drawing
: Diploma in Mechanical Engineering or
Diploma in Draftsman from

Industrial Training Institute.

10. Workshop Calculation
: Diploma in Mechanical or Electrical
Engineering.

Note: The candidate must have passed the National Council for Training in Vocational Trades or National Apprenticeship Certificate Examination or Diploma Examination in First Division.

2. Experience-

The candidate must have experience of not less than five years including the training period spent in National Trade Certificate or National Apprenticeship Certificate or Apprenticeship in any registered industrial concern for a period not less than three years or Diploma in the appropriate branch in the trade concerned.

3. Other-

Working knowledge of Hindi.

(**B) Preferential-** Successful training from Central Training Institute in respective Trade."

13. A perusal of the extracted Rule 8 of Service Rules, 1991 would reveal that a certificate in the respective Trade from National Council for Vocational Trade (NCVT) is one of the three alternative qualifications. The service rules that were applicable in the year 1991 would be relevant for the petitioners because they were appointed prior to it and the merger of GITI with ITI took place prior to 1991, that is in 1989, as would be clear from paragraph 5 of the counter affidavit filed by the appellants in the writ proceedings.

14. We find that in paragraph 5 of the writ petition it has been specifically stated by the writ petitioners that they hold diploma in Wood Working. In the counter-affidavit filed to the writ petition, the reply of paragraph 5 is given in paragraph 7 of the counter-affidavit where there is no specific statement that the writ petitioners do not hold diploma in Wood Working though, in paragraphs 5 and 9 of the counter affidavit, the eligibility of the petitioners for appointment as Instructor in the Trade of Carpenter is challenged by claiming that the writ petitioners do not possess certificate for the course from NCVT.

15. As we have found that in Rule 8 of the Service Rules, 1991, as applicable at the relevant time, one of the alternative essential qualifications was diploma from Board of Technical Education, Uttar Pradesh or from any other Institution recognised by the Government in the trades specified, non possession of certificate in the respective trade / course from the National Council for Training in Vocational Trade would not be fatal to their appointment on the post of Instructor if they hold the alternative eligibility qualification. We further find that the trade of Carpenter is one of the Trades enlisted in Rule 8 for which a diploma in Wood Working is required. The writ petitioners in paragraph 5 of the writ petition claimed that they possess diploma in Wood Working of which there is no specific denial in the counter affidavit, as noticed above. Under the circumstances, the argument of the learned counsel for the appellants that the writ petitioners do not possess the necessary qualification for the post has no legs to stand.

16. Otherwise, it is not in dispute that the two institutes, namely, GITI and the ITI were merged in the year 1989 and a solitary cadre of Instructors, though in different trades, in the ITI was created as would be clear from Rule 4 of the Service Rules, 1991. The Service Rules, 1991 do not carve out higher and lower grade for the post of Instructor. Further, at the time of merger of GITI and ITI, admittedly, the writ petitioners were in service as Instructors in GITI, therefore, post merger, when the Service Rules, 1991 provided a solitary cadre of Instructors, they cannot be deprived of the pay scale attached to the post of Instructors, by artificially carving out distinction, when there exists none, particularly, when it has not been demonstrated that their initial appointment was in any way illegal or that the duties assigned to them are functionally different from that of the other InstructOrs.

17. For all the reasons recorded above, we are of the view that the learned Single Judge was justified in allowing the writ petition and providing pay parity to the writ petitioners. The appeal is dismissed.

18. There is no order as to costs.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Government Appeal No. 309 of 2019

State of U.P. ...Appellant.
Versus
Prem Kumari @ Gayatri And Ors. ...Respondents.

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

A. IPC. Section 306-Abetment of suicide-merely because of registration of criminal case, no prudent man would commit suicide. Condition precedent is abetment. The intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary. Requires an active act or direct act, which lead the deceased to commit suicide. (Para-4)

B. IPC. Section 107 of I.P.C - Abetment of a thing - active participation for commission of offence of abetment given Held:- The basic constituents of an offence punishable under section 306 I.P.C. are

suicidal death and abetment thereof as has been propounded by Apex Court in Sangarabonia Sreenu Vs. State of Andhra Pradesh, (1997) 4Supreme 214. (Para 3)

It was held to be suicide owing to lodging of case of cruelty with regard to demand of dowry by accused persons and deceased persons being behind bar for two to three days in above case. This was presumption of informant and other witnesses of fact. The alleged suicidal notes were neither proved nor were produced in original before the trial Judge, hence not admissible.

CHRONOLOGICAL LIST OF CASES CITED: -

1.(1997) 4Supreme 214 Sangarabonia Sreenu Vs. State of Andhra Pradesh

2.AIR 2011 SC 1238 M. Mohan Vs. State (E-7)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Government Appeal under Section 378(3) Cr.P.C. has been proposed by State of U.P. against Prem Kumari @ Gayatri and four others against judgment of acquittal dated 12.3.2019 passed by Court of Additional Sessions Judge (F.T.C.), Mahoba, in S.T. No. 04 of 2009, State of U.P. Vs. Prem Kumari @ Gayatri and others, u/s 306 I.P.C. arising out of Case Crime No. 2341 of 2008, P.S. Kotwali Mahoba, District Mahoba, upon information lodged by Dr. Narendra Kumar Vaidhya about suicide by three persons in their house because of abetment caused by accused persons, who got a false case registered regarding cruelty with regard to demand of dowry for which deceased persons were enlarged on bail after being in jail for 2-3 days. They were mentally tortured and were harassed by accused persons, which compelled deceased persons for committing suicide and it was in close proximity of the date on which they were to appear before the trial court at Banda and this was proved by informant-PW1 Dr. Narendra Kumar Vaidhya, another witness PW2 Smt. Divya Vaidhya, PW6-Ram Kumar Soni, registration of case crime number was formally proved by PW7- Constable Kushalpal Singh. This testimony was having corroboration by medical evidence of PW3- Dr. D. K. Sullerey, who had conducted autopsy examination on persons of deceased Pramod Soni, Smt. Asha @ Sarman and Amod. PW4-Constable Vinod Kumar Nigam, secondary evidence of S.I. Om Prakash Sharma and HCP Raghuvanshi Rathore. But the trial court passed judgment of acquittal. Hence, this was a result of perversity, wherein relevant and admissible evidence, produced by prosecution, were not taken into consideration. Hence this application with a prayer for grant of leave to appeal.

2. Perusal of impugned judgment and record reveals that criminal machinery was put into motion by way of registration of Case Crime under section 306 I.P.C. by way of F.I.R. (Ext. Ka1) lodged by Dr. Narendra Kumar Vaidya with this contention that owing to registration of a false case of cruelty with regard to demand of dowry under conspiracy and connivance of accused persons Prem Kumari @ Gayatri, Dilip Soni, Phoolwati @ Kalawati, Dayawati and Bhola Prasad @ Kamta Prasad, the deceased persons were put behind bar and were granted bail resulting mental torture of them and thereby they after bolting door from inside took some poisonous substance and died. There was recovery of suicidal note from the place of occurrence. Investigation resulted in submission of charge sheet. But in the trial neither suicidal notes were proved nor were admissible because of lack of

their proof. Though death by consuming some poisonous substance after bolting door from inside by deceased persons was undisputed fact. Previous registration of a case regarding offence of cruelty with regard to demand of dowry was also undisputed fact. But merely because of registration of this case crime number or pendency of case, no prudent men will commit suicide. Moreso, for an offence punishable u/s 306 I.P.C. the condition precedent is abetment because this offence itself is for abetment of suicide - if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine i.e. abetment for attempting to commit suicide is a condition precedent.

3. It has been held that once offence of abetment of committing suicide is clearly made out against accused, the offence punishable under section 306 I.P.C. shall be made out. The basic constituents of an offence punishable under section 306 I.P.C. are suicidal death and abetment thereof as has been propounded by Apex Court in ***Sangarabonia Sreenu Vs. State of Andhra Pradesh, (1997) 4 Supreme 214.***

4. To attract ingredients of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary. In order to convict a person under section 306 I.P.C. there has to be a clear mens rea to commit the offence. It also requires an active act or direct act, which lead the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/ she committed suicide. This has been propounded in ***M. Mohan Vs. State, AIR 2011 SC 1238.***

5. In the present case no such cogent evidence is there. Neither informant-PW1 nor PW2 was present at the place of occurrence either on the date of the occurrence or in close proximity of time of occurrence. Rather they received information of this untoward happening of bolting door from inside and consuming some poisonous substance resulting death of those persons. It was held to be suicide owing to lodging of case of cruelty with regard to demand of dowry by accused persons and deceased persons being behind bar for two to three days in above case. This was presumption of informant and other witnesses of fact. The alleged suicidal notes were neither proved nor were produced in original before the trial Judge, hence not admissible.

6. The active participation for commission of offence of abetment given u/s 107 I.P.C. was not there. Section 107 of I.P.C. provides abetment of a thing- a person abets the doing of a thing, who- firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing i.e. active instigation or entering in conspiracy or intentionally aids by any act or illegal omission are conditions precedent for constituting offence of abetment. But in the present case no such ingredients were either proved or placed

on record before trial Judge. As a result the judgment of acquittal was passed. There is no illegality or perversity in the impugned judgment requiring a ground for grant of leave for this appeal.

7. Accordingly, this prayer is rejected.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal Revision No. 450 of 1993

State of U.P. ...Revisionist.
Versus
Rajendra Kumar Jain ...Opposite Party.

Counsel for the Revisionist:
A.G.A.

Counsel for the Opposite Party:
A.G.A., Sri Satish Trivedi, Sri Ajay Kumar Pandey

A. Criminal Revision - discharge order under challenge- Section 162 Indian Penal Code- bribery by Lekhpal (accused)- forgery against Rup Singh- Section 420, 120B, 463, 466, 468 and 471 of Indian Penal Code- unreasonable to again remand for trial - 27 years elapsed- disposed of. (Para 12,13,16 &19)

B. Sanction by Competent Authority- sanction to prosecute Lekhpal- public servant u/s 6(c) of Prevention of Corruption Act, 1977- refused by Sub-Divisional Magistrate- granted by Governor- grant of sanction is a solemn and sacrosanct act to protect the government servants.
Under the Lekhpal Service Rules, 1958 the State Government had conferred the power of appointment on the Assistant Collectors as well right dismiss or remove him from office as well. This implies that the sanction for prosecution can be granted by the officer similar to the rank who appointed him and not below his rank. Therefore, sanction granted by the Governor holds good.

C. Prevention of Corruption Act- incident took place on 19.07.1988- Act of 1977 applicable- not amended Act

Chronological list of Cases Cited: -

1. AIR 1968, All 207 SIta Ram Vs State

2. 1994 Supp (2) SCC 405 State of T.N Vs. T. Thulasingam

3. MANU/SC/0045/1954 Mahesh Prasad Vs. State of U.P.

4. (2015) 14 SCC 186 Nanjappa Vs. State of Karnataka (E-10)

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Vivek Rastogi, learned A.G.A. for the State and Sri Satish Trivedi, learned Senior Advocate assisted by Sri Ajay Kumar Pandey, learned counsel for the opposite party.

2. This Criminal Revision has been preferred by the State against the judgment and order dated 24.12.1992 passed by 5th Additional District and Sessions Judge, Agra in S.T. No. 2 of 1991, (State Vs. Rajendra Kumar Jain), under Section 162 I.P.C., P.S. Etmaddaula, District Agra and it is prayed that the said order of discharge passed by the trial court be set-aside and the accused-respondents be convicted according to law.

3. It is mentioned in the grounds of the revision that opposite party no. 2 was Lekhpal, who was trapped by police for accepting Rs. 6,000/- as bribe from Rup Singh, which was organized on an application of Rup Singh. It was stated

by Rup Singh that he had moved an application before Tehsildar for demarcation of his land, which was sent to the accused, who demanded and accepted Rs. 6,000/- as bribe. The Sub-divisional Officer Appointing Authority of the accused did not record the sanction to prosecute the accused on the ground that Rup Singh had committed forgery and a case under Section 420, 120B, 463, 466, 468 and 471 IPC was initiated against Rup Singh. The objection which was raised from the side of accused with respect to framing charge was that since the offence took place much before the enforcement of the Act No. 49 of 1988, the old Act of 1947 would be applicable in the present case, according to which, the sanction by the Competent Authority was required to be taken before taking cognizance of offence under Section 161 IPC or 165 IPC or under Section 5(2) of the Prevention of Corruption Act. The prosecution placed reliance upon the amendment of Section 19 of the Act No. 49 of 1988 which had settled the controversies by amending the clause as follows:-

"Notwithstanding anything contained in clause (c), the State Government may where it considers necessary, so to do, required the authority referred to in clause (c) to give previous sanction within the period specified in this behalf and if said authority fails to give the previous sanction may be given by the State Govt."

4. The above quoted provision has not been found by this Court in the said Act, thus it appears to have been misquoted/erroneously quoted.

5. Further the ground is set up that the order of the discharge passed by the trial court is perverse. Section 19(d) explanation-2 has empowered the State Government to accord sanction where the sanction has been refused by the concerned Authority. In the instant case, the State Government accorded the sanction vide its order dated 18.4.1890 to prosecute the accused. The impugned order discharging the accused is patently illegal due to reasons that the provisions of U.P. Amendment Act, 1991, Section 19(d) were applicable on the relevant date. The sanction has been accorded by the State Government after full application of mind. The miscarriage of justice has taken place due to discharge of the accused, hence the said order needs to be set aside.

6. In order to understand the controversy and to appreciate whether the impugned order is against provisions of law, it would be pertinent to refer here to the facts as narrated in the impunged order as well as the finding of the trial court given therein.

7. The trial court has recorded in the impugned order that accused Rajendra Kumar Jain, a Lekhpal was trapped by police for accepting Rs. 6,000/- as bribe from Rup Singh. The said trap proceedings were laid on the basis of application moved by Rup Singh stating therein that the area of his Plot No. 1292 was 16 bighas 10 biswas and the litigation was also pending with the State. In that regard, he had moved an application before Tehsildar for demarcating his land which was sent to the accused Lekhpal, who demanded the said amount. Further it is recorded in the impugned order that the sanction for prosecution of the accused in this case was refused by Appointing Authority, S.D.O., mentioning that actual area of land of Rup Singh was 7 bighas,

but during the consolidation proceedings, he manipulated to obtain the area of land measuring 16 bighas 10 biswas, which was found to be forged. It was also mentioned that Rup Singh had earlier made an agreement for sale of the land to various persons and subsequently he sold the entire land on 28.10.1987 on much lower price. On the basis of report of Lekhpal, (accused), a forgery was detected and a case under Section 420, 120B, 463, 466, 468 and 671 IPC was lodged against Rup Singh (complainant). It was recorded in the impugned judgment that the accused had discharged his duty sincerely, he was an honest and upright Lekhpal and that the complaint was moved with the ill-will due to repeated reports given by the Lekhpal against Rup Singh. Rup Singh had manipulated to implicate the accused in this forged case.

8. It is also recorded in the impugned judgment that permission for prosecuting the accused was granted subsequently by the Governor and the charge sheet was submitted against the accused. The trial court has recorded in the impugned judgment that Section 6 of the Act of 1947 bars court from taking cognizance of the offences enumerated therein alleged to have been committed by public servant except with the previous sanction of the Competent Authority. The object underlying such provision was to save the public servant from being harassed from frivolous or un-substantiated prosecution, therefore, when the court is called upon to take cognizance of the offence, sanction ought to be taken from appropriate authority otherwise the court would have no jurisdiction to take cognizance of the offence. The trial, without valid sanction, would be without jurisdiction and it would render the proceedings ab-initio void.

9. The grant of sanction is not a mere formality but a solemn and sacrosanct act which gives the umbrella of protection to the government servants against frivolous prosecution. It is further recorded in the impugned judgment that it appears that the permission was refused by the competent authority which was perhaps not brought to the knowledge of Governor at the time of obtaining sanction. The sanction accorded by the Governor does not mention the said fact. If the said fact had been brought to the notice of the Governor, the Governor might have discussed the same and recorded in the sanction order the opinion as to why he differed from the competent authority and why he was of the view that permission should be accorded. It is also recorded that the omission of mentioning these facts goes to show that the sanction was given in a mechanical way without applying the mind and accordingly the accused was discharged for non grant of valid sanction.

10. It would be pertinent to mention here the relevant Rules which would be applicable in the present case. The occurrence in the present case took place on 19.7.1988, when the prevention of Corruption Act 1977 was holding the field.

11. Section 6 of the Prevention of Corruption Act is as follows:-

6. Previous sanction necessary for prosecut ions. *- (1) No Court shall take cognizance of an offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code or under sub-section (2) or sub-*

section (3A) of Section 5 of this Act , alleged to have been committed by a public servant, except

with the previous sanction, -

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office gave by or with the sanction of the Central Government, of the Central Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of the State Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

12. It is apparent from the above ruling that under clause (c) of the same it is laid down that prosecution against Government employee facing the charge of Prevention of Corruption Act can be started only after sanction being taken from Competent Authority and that Authority would mean the Authority who is competent to remove him from office at the time when the offence was alleged to have been committed. In the case in hand, the accused is a Lekhpal. The Lekhpal in U.P. is a public servant who is not removable from his office save by or with the sanction of the State Government or some Higher Authority. Lekhpals in Uttar Pradesh are appointed under the Lekhpals Service Rules, 1958, published in the U. P. Gazette dated May 17, 1958. It is provided in Rule 2 that the Lekhapals' service is a non-gazetted subordinate service. Rule 7 provides that whenever the halqa of a Lekhpal falls vacant the Assistant Collector shall appoint thereto the senior most candidate on the list maintained under paragraph 6 (1), provided further that the order passed by the Assistant Collector shall be appealable before the Collector whose orders shall be final. Rule 16 lays down that all persons on appointment as Lekhpals shall be placed on probation for a period of two years, and the Assistant Collector may at his discretion extend the period of probation in individual cases for a period not exceeding one year. Clauses (d) and (e) of Rule 16 read as follows:-"(d) where it transpires at any time during or at the end of the period of probation or extended period of probation that a Lekhpal has not made sufficient use of his opportunities or has otherwise failed to acquit himself satisfactorily his service shall be terminated after observing the formalities prescribed in Rule 5(3) of the Civil Services (Classification, Control and Appeal) Rules without entitling him to any compensation, (e) A probationer shall be confirmed in his appointment by the Assistant Collector at the end of the period of probation or the extended period of probation if his work and conduct are found satisfactory. The period of probation shall continue till the order of confirmation is passed or the probation is terminated.

13. It has not been specifically mentioned in Clause (d) of Rule 16 that the Assistant Collector shall have the powers to remove a Lekhpal under that clause. However, the Rule read as a whole makes it clear that the intention must have been that the powers under Clause (d) of Rule 16 must also be exercised by the Assistant Collector, who is authorised to confirm a Lekhpal in his appointment under Clause (e) of Rule 16.

14. In this connection two other rules of the Lekhpals Service Rules, 1958, might be considered. Sub-rule (2) of Rule 28 runs as follows:-

"When it is proposed to dismiss or remove a Lekhpal as a measure of punishment he shall first be suspended, and shall make over his papers and records to the Supervisor Kanungo or to such other person as the Supervisor Kanungo may indicate within one week from the receipt of the order. In either case the Supervisor Kanungo shall be responsible for seeing that the Lekhpal has made over all his records and papers."

15. Rule 29 provides:-

"A Lekhpal will be punished by the Collector or the Assistant Collector for misconduct or neglect of duty by fine not exceeding three months' pay."

16. Rule 28(2) does not specifically mention that the Assistant Collector shall be empowered to dismiss or remove a Lekhpal. However, if the rules are read as a whole, there can be no doubt that the intention was that the said powers should be exercised by the Assistant Collector and no one else, it is significant to note that the rules nowhere lay down that in cases where it is proposed to dismiss or remove a Lekhpal the proceedings need be submitted by the Assistant Collector to any higher authority for passing final orders.

17. Prior to the reorganisation of the services of Lekhpals, the Patwaris, who used to do the same work as the Lekhpals, were governed by the rules framed under Section 234 (b) of the Land Revenue Act, 1901, and contained in the Land Records Manual. It was provided in those rules (vide Rule I) that the punishing authority shall be the Collector, and the Assistant Collectors in charge of sub-divisions were also authorised to exercise the powers of the Collector. It was specifically mentioned in Rule 13 that a Patwari may be removed or dismissed by the Collector or the Assistant Collector in charge of the sub-division on any of the grounds mentioned therein. Rule 14 provided that a patwari could also be punished by the Collector or Assistant Collector in charge of a sub-division for misconduct or neglect of duty by fine not exceeding three months' pay, by reduction from a higher grade to a lower grade or by loss of seniority within his grade. The Lekhpals Service Rules, 1958, virtually followed the same pattern which existed in the rules framed earlier under Section 234 (b) of the Land Revenue Act, 1901. with this exception only that (a) the Assistant Collectors were primarily made appointing authorities, and (b) it was not mentioned in the rules framed under Article 309 of the Constitution of India that the Assistant Collectors shall be the authority to dismiss or remove the Lekhpals.

18. It has, therefore, to be considered whether under the Lekhpal Service Rules, 1958 the State Government conferred only the power of appointment on the Assistant Collectors, reserving for itself the power to dismiss the Lekhpals by its own orders, or whether the power to appoint given to the Assistant Collectors by implication also conferred on them the power to remove or dismiss the Lekhpals.

19. The above question was considered by this Court in **Sita Ram Vs. State, AIR 1968, All 207** and it was opined by this Court that Section 16 of the General Clauses embodies a Rule of general interpretation and unless the context otherwise required, it must be held that Authority competent to appoint

had also by implication been authorized to dismiss or remove the Lekhpal who was the person in civil employment of the State. A perusal of the Lekhpal Service Rules 1958 clearly indicates that intention must have been to confer the power of dismissal also on the Assistant Collector who was specifically authorized to appoint Lekhpal.

20. The attention of the trial court was drawn by the learned counsel for the revisionist to the fact that Section 19 of the Act of 49 of 1988 provides as under: -

"Notwithstanding anything contained in clause (c), the State Government may, where it considers necessary so to do, require the authority referred to in clause (c), to give previous sanction within the period specified in this behalf and if the said authority fails to give the previous sanction within such period, the previous sanction may be given by the State Government."

21. In the light of above provision it was argued that under the old Act of 1947 the power to grant sanction lay with the authority which would be competent to remove the public servant from his office at the time when offence was alleged to have been committed but under the new Act, if the said authority fails to give the previous sanction within the specified period, the previous sanction may be granted by the State Government, therefore the said controversy stands settled, but due to the offence in the case in hand being of 19/07/1988, while the new Act having come into force on 09/09/1988, the said provision would not be applicable. Hence, it was argued that the sanction granted by the State Government would not hold good particularly keeping in view the fact that earlier the prosecution sanction was declined by the appointing authority i.e. Sub Divisional Officer. This argument was accepted by the trial court and accordingly it discharged the accused revisionist.

22. I have gone through the provision of Section 19 of Prevention of Corruption Act, 1988 which is as follows:-

"19. Previous sanction necessary for prosecution.-*(1) No court shall take cognizance of an offence punishable under sections 7, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 -*

(a) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed] in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the

case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless-

(i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.

Explanation.-For the purposes of sub-section (1), the expression "public servant" includes such person-

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.]

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission orirregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial,appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.-For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

23. It shows that the provision quoted above by the trial court does not find mention in the said provision.

24. I am not inclined to subscribe to the above line of argument because in the **State of T.N. vs T. Thulasingam, 1994 Supp (2) Supreme Court Cases 405**, in Para 77 of the judgment, the Hon'ble Supreme Court has held that "77. The last finding of the High Court in reversing the decision of the trial court so far as it upheld the sanction for prosecution of the employees is again erroneous. The High Court was in error in its view that only the special officer appointed by the Corporation, when it was superseded, was competent to grant the sanction. It will be noticed that here the sanction had been given by the superior authority, namely the Government itself which appointed the special officer. **Once the sanction is granted by the superior authority it does not get invalidated. It could be invalid if the sanction had been granted by the authority subordinate to the authority who had to grant the sanction and in that case would have been subject to challenge.** We thus find that the trial court was right in holding that the sanction was validly granted by the competent authority.

25. Similarly in **Mahesh Prasad vs the State of Uttar Pradesh, MANU/SC/0045/1954** following has been held: -

"7. The only serious argument that has been advanced and which requires a little closer examination is that there was no valid sanction for the prosecution. There is no doubt that this is a case to which the Prevention of Corruption Act, 1947 would apply and that by virtue of section 6(c) thereof the prosecution requires the sanction of the authority "competent to remove the appellant from his office." It is urged that this requirement was not satisfied on the facts of this case. It has been pointed out that the appellant is a civil servant of the Indian Union and that by virtue of article 311(1) of the Constitution he cannot be removed by an authority subordinate to that by which he was appointed. This appears also to be the position under rule 1705(c) of the Indian Railway Establishment Code, Volume I (1951 Edition) which is as follows :

"No railway servant shall be removed (or dismissed) by an authority lower than that by which he was appointed to the post held by him substantively".

8. The sanction for the prosecution in this case was granted under Ex. 10 by one Shri L. R. Gosain, Superintendent Power, East Indian Railway, Allahabad. The order of appointment of the appellant, Ex-F, shows

the Divisional Personnel Officer, East Indian Railways, Allahabad, as the appointing authority. It may be mentioned that in the appeal before the Sessions Judge a contention was raised that appointment of the appellant was in fact made by the Divisional Superintendent and that Ex. F was only signed by the Divisional Personnel Officer on his behalf. The Sessions Judge foundagainst this contention and the same has not been challenged before us. What, however, is urged is that the Superintendent Power who gave the sanction for prosecution is not shown to be an officer not lower in rank than the Divisional Personnel Officer who made the appointment. The question as to the validity of the sanction has been raised both before the Sessions Judge as well as before the High Court. The High Court in considering the question appears to have merely satisfied itself that under the Railway Regulations, Shri L. R. Gosain, Superintendent Power, was a person competent to remove the appellant from his office within the terms of section 6 of Prevention of Corruption Act. The High Court does not appear to have considered the further question whether or not the requirements of article 311(1) of the Constitution and rule 1705(c) of the Railway Establishment Code have been satisfied with reference to the inter se position as between the authority who appointed the appellant and the authority who sanctioned the prosecution. The learned Sessions Judge, however, has recorded a categorical finding that the Divisional Personnel Officer is in the same grade as the Superintendent Power. His finding is in the following terms :

"I, therefore, hold that the accused could be and was actually appointed by the Divisional Personnel Officer who is in the same grade as the Superintendent Power. It cannot therefore be said that the Superintendent Power Mr. L. R. Gosain was not authorised to remove the accused from service by virtue of rule 1705 and this argument advanced against the validity of sanction, Ex. 10, falls to the ground".

9. Learned counsel for the appellant urged that the requirement both of the Constitution and of the rule of the Railway Code, contemplated that the authority competent to remove must be either ***the very authority who appointed or any other authority directly superior to the appointed authority in the same department.*** *We do not think that this contention is tenable. What the Constitution requires is that a personshould not be removed by an authority subordinate to the one by whom he was appointed and what the rule in the Railway Code prescribes is substantially the same, viz.,* ***"the authority competent to remove should not be lower than the one who made the appointment".*** *These provisions cannot be read as implying that the removal must be by the very same authority who made the appointment or by his direct superior. It appears to us to be enough that the removing authority is of the same rank or grade. In the present case it does not appear into which particular branch of the department the appellant was taken, in the first instance in 1944 under Ex. F. But it is in the evidence of P.W. 4, the Head-clerk of the office of the Divisional Superintendent, that the office of the Running Shed Foreman in which the appellant was a clerk in 1951 was directly under the Superintendent Power. He was obviously the most appropriate officer to grant the sanction, provided he was of a rank not less than the Divisional Personnel Officer.*

10. Counsel for the appellant urges that the evidence does not support the finding of the learned Sessions Judge that Shri L. R. Gosain, Superintendent

Power, was of the same grade as the Divisional Personnel Officer who made the appointment. P.W. 4 in his evidence, however, quite clearly speaks to this as follows :

"Divisional Superintendent is the head of the entire administrative division. The Divisional Personnel Officer is under him. The Superintendent Power and Superintendent Transport are also under him and also such other officers of the same rank..... Divisional Personnel Officer and the various Superintendents are officers of the same rank. They are not subordinate to each other".

11. It has been commented that this should have been substantiated by the official records and not by oral evidence. That no doubt would have been more satisfactory. The learned Sessions Judge on appeal, in order to satisfy himself, has referred to the Classified List of Establishment of Indian Railways and the same has been produced before us for our information. This shows that both the Divisional Personnel Officer as well as Superintendent Power are officers in the senior scale drawing equal scales of pay, Rs. 625-50-1375. This is an indication that they are officers of the same rank and confirms the oral evidence of P.W. 4 who being the Head-clerk of the Divisional Superintendent's office must be competent to speak about these matters. It certainly cannot be said that the Superintendents Power who has granted the sanction for prosecution of the appellant at the time working under him, is of a rank or a grade lower than the Divisional Personnel Officer who appointed the appellant. This matter would probably have been more satisfactorily clarified in the trial court if the question as to the validity of the sanction had been raised not merely with reference to the wording of section 6 of the Prevention of Corruption Act but also as read with article 311(1) of the Constitution and rule 1705(c) of the Railway Establishment Code. On the material we are not satisfied that there is any reason to reverse the findings of the courts below that the sanction is valid. "

26. Thus from the above citations it is absolutely clear that the most appropriate officer to grant sanction would be an officer who was of the same rank who had appointed the accused and not less than his rank. It would pre-suppose that the authority holding higher rank than the authority who had appointed the accused would certainly have power vested in it to grant sanction to prosecute. Therefore in the case in hand the sanction having been accorded by the State Government/Governor would not be held to be erroneous even if the fact that the Sub Divisional Magistrate had refused to grant sanction in this matter, was not brought to his knowledge.

27. Now the question arises as to whether in the present matter in which the trial court has discharged the accused as far back as in the year 1992 that is on 24/12/1992 and since then about 27 years have elapsed, whether it would be meaningful to direct the trial court to initiate trial of the accused in accordance with law.

28. In this regard we would like to rely upon **Nanjappa vs State of Karnataka, (2015) 14 SCC 186.** In this case, the appellant, a bill collector of Gram Panchayat allegedly demanded bribe of Rs. 500 to issue a copy of alleged Panchayat resolution whereby the Panchayat allegedly had decided to

convert the road in front of PW 1 complainant's house in the sites for allotment to 3rd parties. On the basis of allegation of PW 1 complainant, the Lokayukta Police arranged to trap and the evidence relating to receiving of bribe by the appellant was collected and recorded. The trial court however, acquitted the appellant on the principal ground that sanction from competent authority was not obtained, that is sanction from Chief Officer Zila Parishad, was not obtained (Section 113, Karnataka Panchayat Raj Act, 1993). The trial court further recorded the finding that the complainant's accusation about the appellant demanding bribe from him was unreliable and unworthy of credit. The High Court, however, found the discrepancies pointed out by the trial court to be inconsequential. And regarding cognizance by the trial court, the High Court held that the validity of sanction was not questioned at the appropriate stage and the appellant was not entitled to raise the same at the conclusion of the trial. The High Court, therefore, by the impugned order reversed the acquittal and convicted the appellant under sections 7 and 13 read with Section 13 (2), P.C. Act and sentenced him to undergo imprisonment for a period of 6 months under sections 7 and for a period of one year under sections 13 besides fine and sentence of imprisonment in default of payment of the same. Allowing the appeal and setting aside the order of conviction it was held by the Apex Court that in case at hand the special court not only entertained the contention urged on behalf of the accused about the invalidity of order of sanction but found that the authority issuing the said order was incompetent to grant sanction. The trial court held that the authority who had issued the sanction was not competent to do so, a fact which has not been disputed before the High Court or in present appeal. The only error which the trial court committed was that, having held the sanction to be invalid, it should have discharged the accused rather than record an order of acquittal on the merit of the case. Resultantly, the trial by an incompetent court was bound to be invalid and non est in law. Further it was held that the High Court had not correctly appreciated legal position regarding the need for sanction or the effect of its invalidity. It has simply glossed over the subject, by holding that the question should have been raised at an earlier stage. The High Court did not realise that the issue was not being raised before it for the first time but had been successfully urged before the trial court. Next, it was considered as to whether, while allowing the present appeal and setting aside the order of the High Court, a fresh prosecution against the appellant should be permitted. The incident in question had occurred on 24/03/1998. The appellant was, at that point of time, around 38 years old. The appellant was today a senior citizen. Putting the clock back at this stage, when the prosecution witnesses may not be available, would not serve any purpose. That apart, the trial court had, even upon appreciation of the evidence, although it was not required to do so, had given its finding on the validity of the sanction, and had held that the prosecution case was doubtful, rejecting the prosecution story, therefore no purpose would be served to resume the proceedings again. It was further held that there was no compelling reason for directing a fresh trial at this distant point of time in a case of this nature involving a bribe Rs. 500 for which the appellant had

already suffered the ignominy of the trial, conviction and jail term, no matter for a short while. Thus the appeal was allowed and the order passed by the High Court was set aside.

29. As in the above mentioned case, it was held by the Supreme Court that at a distant point of time it would be futile to resume the proceedings of trial because by then the witnesses of prosecution may not be available, in the present case also I find that approximately 27 years have passed since the trial court had passed order of discharge, therefore at this distant point of time it does not appear to be reasonable to direct the trial court to begin proceedings of trial of the accused revisionist, although I find that the discharge order passed by the trial court was not in consonance with law.

30. Accordingly this revision stands dispose of.

31. Let a copy of this judgment be transmitted to the trial court along with the lower court record to do the needful.)

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REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.07.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.

CRIMINAL REVISION No. 1126 of 2017

Akhilesh Kumar ...Revisionist
Versus
State of U.P. &Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Narendra Gupta

Counsel for the Opposite Parties
Sri Ajay Srivastava, A.G.A.

A. Juvenile Justice (Care and Protection of Children) Act, 2015 - heinous crime – Bail "moral, physical or psychological danger" to the victim. Report of Probationary Officer in favour of revisionist- bail granted

On plain reading Section 12 of the Act of 2015 clear the intention of the Legislature is to grant bail to the juvenile unless either of the three condition mentioned in the Section exists. (E-10)

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. Heard Sri Narendra Gupta, learned counsel for the revisionist and Sri Ajay Srivastava, learned counsel for the State. None for complainant-respondent no.2 though served.

2. Present revision has been filed against the order dated 25.10.2017 passed by the Sessions Judge, Sitapur in Criminal Appeal No.61 of 2017, dismissing the appeal preferred by the revisionist assailing the order dated 14.9.2017 passed by Juvenile Justice Board, Sitapur, arising out of Crime No.227 of 2017, under Sections 341,342,312,313,376 of IPC and 3/4 POCSO Act, Police Station Sidhauli, District Sitapur.

3. Facts of the instant case, in brief, are that on 2.6.2017, FIR was lodged by the mother of the prosecutrix, alleging in it that when her daughter had gone to fetch water from the hand pump, she was taken by the wife of one Chander to the house of the revisionist; the door was bolted from outside and then the revisionist committed rape on the prosecutrix. After about half an hour, door was opened by the wife of Chander, who asked the prosecutrix not to disclose the

incident to any one. It is stated that thereafter, whenever her daughter used to fetch water, the revisionist used to commit rape on her and when 17 days prior to 2.2.2017, prosecutrix disclosed the fact to the revisionist that she is pregnant, the revisionist with the help of one Harish Chandra gave certain medicines to the prosecutrix, resulting her abortion. She states that since then the prosecutrix was subjected to threat by the accused persons. Based on this FIR, offence under Sections 341,342,312,313,376,504,506 of IPC and 3/4 of POCSO Act was registered against the revisionist and other accused persons.

4. The revisionist filed an application before the Principal Magistrate, Juvenile Justice Board, Sitapur under Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "Act of 2015') for grant of bail, which was rejected on the ground that if the revisionist is released on bail, he would be exposed to moral, physical or psychological danger.

5. The order passed by the Principal Magistrate was assailed by the revisionist by way of filing an appeal before the Sessions Judge, Sitapur, which has been dismissed by the order impugned dated 25.10.2017, mainly on the ground that the revisionist has committed a serious offence of rape and, if he is released on bail, this would defeat the ends of justice.

Learned appellate court has further held that the judgment of the trial court has been passed after considering all the aspects of the case; the same is based on sound reasons and does not call for any interference.

6. Learned counsel for the revisionist submits that both the courts below have completely overlooked the provisions of Section 12 of the Act of 2015 and more particularly, the report dated 11.9.2017 submitted by the District Probation Officer, Sitapur (Annexure-SA-1) to the supplementary affidavit filed by the revisionist. He submits that in the report, nowhere it has been stated by the Probation Officer that if the revisionist is released on bail, he would be exposed to moral, physical or psychological danger and that if he comes back to the same atmosphere, ends of justice would be defeated. He submits that if the entire report of the Probation Officer is seen, the same appears to be in favour of the revisionist and it is apparent that the revisionist is a 12th class pass student; his discipline in his house is satisfactory; his behaviour with the villagers has been found satisfactory and most importantly, the villagers did not disclose anything adverse against him. However, without there being any basis or material, in the last line of the report, it has been mentioned that on the basis of information given by the villagers, social atmosphere of the revisionist does not appear to be favourable. He submits that there is absolutely nothing adverse in the report of the Probation Officer that if the revisionist is released on bail, he would be exposed to moral, physical or psychological danger and that the words "he would be exposed to moral, physical or psychological danger" have been mentioned in the impugned order just because they are described in the relevant provisions of law.

7. Learned counsel for the respondent/State, however, submits that the application and the appeal of the revisionist have rightly been rejected by the Courts below.

8. Before drawing any conclusion regarding the correctness or otherwise of the orders impugned, a glance of the relevant provisions of Section 12 of the Act of 2015 becomes necessary, which is reproduced as hereunder for ready reference:

*"**Section 12. Bail to a person who is apparently a child alleged to be in conflict with law** . - (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

9. In the present case, in compliance of the provisions of the Act of 2015, a report of the concerned Probation Officer was called by the Juvenile Justice Board and following are the main points in the said report:

"**धर्म के प्रति दृष्टिकोण** : सकारात्मक

समाजिक और आर्थिक प्रास्थिति :– सामाजिक एवं आर्थिक स्थिति निम्न वर्गीय।

वर्तमान जीवन–निर्वाहन की परिस्थितियां :–––––––––––––––––––

अन्य महत्वपूर्ण तथ्य, यदि कोई हो :– वादी पक्ष गांव के ही रहने वाले है।

बालक की आदतें :– घर में अनुशासन के प्रति बालक की राय एवं प्रतिक्रियाः– सामान्य बतायी गयी।

बालक के रोजगार के व्यौरे यदि कोई हो तो :– कोई नही बताया गया।

आय के व्यौरे तथा आय उपयोग करने का तरीका :– नही।

बालक के शिक्षा के व्यौरे :– अपचारी किशोर के बारे मे बताया गया कि किशोर कक्षा 12 पास है।

बालक के प्रति कक्षा के साथियों की अभिवृत्ति (रवैया) :–

बालक के प्रति शिक्षको की अभिवृत्ति (रवैया) :– सामान्य बतायी गयी।

स्कूल छोड़ने के कारण :– कोई नही बताया गया ।

पिछला स्कूल जहॉ अध्ययन किया :–

व्यावसायिक प्रशिक्षण यदि कोई हो तो :– कोई नही बताया गया।

बालक के साथियों और उनका प्रभाव :– हम उम्र के बालको के साथ उठना–बैठान बताया गया।

पड़ोस और पड़ोसियों की रिपोर्ट :– आस–पास के लोगो द्वारा वार्ता के दौरान बताया गया है कि

अपचारी किशोर, किशोरी के साथ गलत काम करने के मामले मे जेल मे बंद है।

जाँच का परिणाम

भावनात्मक तथ्य :– सामान्य।

शारीरिक दशा :– आयु के अनुसार ठीक बतायी गयी।

बुद्धिमत्ता :– आयु के अनुसार ठीक बतायी गयी।

सामाजिक और आर्थिक तथ्य :– निम्नस्तरीय ग्रामीण जीवन यापन।

धार्मिक तथ्य :– सामान्य।

समस्याओं के इंगित कारण :––

प्रकरण का विश्लेषण जिससे यह पता चले कि अपचारी व्यवहार कैसे विकसित हुआ :– स्थलीय जॉच के समय किशोर के माता पिता व निवासीगण ग्रा0 खेरवा मजरा खरौलिया थाना सिधौली जिला सीतापुर। उपस्थित थे, ग्रामवासियो से हुई वार्ता के दौरान जानकारी मे आया कि किशोर पर किशोरी के साथ गलत काम करने के मामले मे मुकदमा दर्ज हुआ था। किशोर कक्षा 12 पास है। वादी पक्ष किशोर के ही गांव मे रहते है। घटना के बारे मे पूछने पर ग्राम वासियो ने कुछ भी बताने से मना कर दिया, और कहा कि हम इससे ज्यादा कुछ नही जानते है। ग्राम वासियो द्वारा हुई वार्ता के अधार पर किशोर का समाजिक परिवेश अनुकूल प्रतीत नही होता है।

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जिला प्रोबेशन अधिकारी

सीतापुर"

10. A bare perusal of the said report makes it clear that it is nowhere mentioned in it that, if the revisionist is released on bail, he would come into association with any known criminal or it would expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. Rather the report of the Probation Officer supports the case of the revisionist.

11. Perusal of Section 12 of the Act of 2015, makes it clear that ordinarily, the bail has to be granted to the juvenile and the same can be rejected only when it appears to the court concerned that either of three conditions laid down in this provision are in existence. The orders of the Juvenile Justice Board and the Sessions Court go to show that while passing the same, both the courts below have not, at all, considered the report of Probation Officer in a correct manner and rejected the application of the revisionist in a mechanical manner simply by reproducing few words of Section 12 of the Act of 2015. Further, the courts below have presumed many things of their own, which is not part of record of Probation Officer. These aforesaid two orders passed by the Courts below do not stand on the touchstone of the relevant legal provisions.

12. From the material available on record, it is also apparent that no proper reason whatsoever has been assigned by the Juvenile Justice Board on the basis of which, application of the revisionist could be rejected. Rather the report of the Probation Officer is in favour of the revisionist.

13. Considering the facts and circumstances of the case and the report of the Probation Officer, the present revision is allowed. Orders impugned are hereby set aside.

14. The revisionist, who has already spent more than two years in Jail, is directed to be released on bail of his guardian or parent furnishing a bond in the sum of Rs.50,000/- with one surety for the like sum to the satisfaction of the concerned Juvenile Justice Board. The revisionist is directed to appear before the said Board on all the dates, as are given to him.

15. It has been informed that there is no progress in the trial and even the statement of

the prosecutrix has not been recorded. If this is correct, the trial court is directed to conclude the trial expeditiously because keeping pending such trial for long period, would defeat the ends of justice and various provisions of law.

16. It is made clear that this Court has not expressed any opinion on merits of the case and the trial court would be at liberty to decide the trial strictly in accordance with law on the basis of evidence so adduced by the parties.

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REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.

Criminal Revision No. 950 of 2017

Amit Kumar ...Revisionist
Versus
State of U.P. &Anr. ...Respondents

Counsel for the Revisionist:
Sri Sobha Nath Pandey

Counsel for the Respondents:
Ms Parul Kant

A. Criminal Revision- Discharge application u/s 227 Cr.P.C. rejected- Section 306 and 506 IPC – love relationship between the revisionist and deceased - father of revisionist did not approve of marriage - suicide out of frustration and anger - ingredients of abatement under Section 107 IPC not made out- trial futile exercise- revisionist discharged- revision allowed.

Chronological List of Cases Cited: -
1. (2002) 5 SCC 371 Sanju Alias Sanjay Singh Sengar Vs. State of Madhya Pradesh

2.(2005) 2 SCC 659 Natai Dutta Vs. Satte of W.B. (E-10)

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. Heard Sri Shobh Nath Pandey, learned counsel for the revisionist and Ms Parul Kant, learned counsel for the State. None for respondent no.2 though served.

2. Revision is formally admitted for hearing and, with the consent of parties, heard finally.

3. Challenge in the instant revision is to the order dated 9.6.2017 passed by the learned Additional Sessions Judge, Faizabad in Sessions Trial No.257 of 2016, whereby the court below has rejected the application as filed by the revisionist-Amit Kumar under Section 227 of Cr PC, seeking discharge.

4. Brief facts of the present case are that on 24.1.2016, FIR was lodged by Smt. Sunita Devi, mother of deceased Priyanka, alleging in it that on 20.1.2016, her daughter had gone somewhere and returned at 5:00 am on 21.1.2016. When she asked her daughter as to from where she is coming, her daughter informed that throughout the night she was with revisionist Amit Kumar, son of Arjun Yadav (co-accused). She further informed her that she loves Amit Kumar and wants to marry him. Smt. Sunita Devi disclosed this fact to her mother-in-law Smt. Prema Devi and told her daughter that this is not good. FIR further states that Smt. Sunita Devi called Arjun Yadav, father of the revisionist (co-accused) and informed him about the affair between the revisionist and deceased Priyanka. In reply, it was told by Arjun Yadav that as long as he is alive, revisionist and Priyanka cannot marry. She states that saying this, co-accused Arjun Yadav had left her house and upon hearing his reply, at about 9:00 am, deceased Priyanka bolted herself inside the room and

set herself on fire. Efforts were made to open the door which was ultimately broken and then dead body of the deceased was found. Based on this FIR, offence under Sections 306 and 506 of IPC was registered against revisionist-Amit Kumar and his father Arjun Yadav (co-accused).

5. Diary statements of Smt. Sunita Devi, Smt. Prema Devi, Smt. Rita Devi and Smt. Amrawati Devi were recorded and all of them have stated almost the same version as has been made in the FIR.

6. On 9.11.2016, revisionist-Amit Kumar filed an application (Annexure-4) under Section 227 of Cr PC, seeking discharge. In this application, it has been submitted by the revisionist that even if the entire prosecution case is taken as it is, considering the FIR and the statements of various witnesses recorded under Section 161 of Cr PC, no case whatsoever is made out against him and, therefore, he be discharged from the alleged offence.

7. By the impugned order, the trial Judge has rejected the said application holding that merit of the case cannot be discussed at this stage. Hence, this revision.

8. Counsel for the revisionist submits:

(i) that the court below has erred in law in passing the impugned order;

(ii) that even if the entire prosecution case is taken as it is, offence under Sections 306 and 506 of IPC is not made out against the revisionist.

(iii) that mere fact that the revisionist was having affair with the deceased does not constitute any offence especially when no role of instigation or abetment has been assigned to him;

(iv) that learned trial Judge has rejected the application of the revisionist in a mechanical manner without applying correct principle of law.

9. On the other hand, supporting the order impugned, it has been argued by learned State Counsel that the order impugned is in accordance with law and there is no infirmity in the same.

10. Before I proceed further, it would be appropriate to consider the definition of Section 306 of IPC, which reads as under:

"**306. Abetment of suicide.**- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

11. 'Abetment' has been defined in Section 107 of Chapter V of IPC and the same reads as under:

"**107. Abetment of a thing.**- A person abets the doing of a thing, who-

First. - Instigates any person to do that thing; or

Secondly. - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1. - A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or

procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2. - Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

12. Considering the above definitions in the case of Sanju Alias Sanjay Singh Sengar v. State of Madhya Pradesh1, while considering the quashment of FIR, it has been held by the Apex Court:

6. Section 107 IPC defines abetment to mean that a person abets the doing of a thing if he firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing.

7. Before we advert further, at this stage we may notice a few decisions of this Court, relevant for the purpose of disposal of this case.

8. In Swamy Prahaladdas v. State of MP, 1995 Supp. (3) SCC 438, the appellant was charged for an offence under Section 306 IPC on the ground that the appellant during the quarrel is said to have remarked the deceased "to go and die" . This Court was of the view that mere words uttered by the accused to the deceased 'to go and die' were not even prima facie enough to instigate the deceased to commit suicide.

9. In Mahendra Singh v. State of MP, 1995 Supp.(3) SCC 731, the appellant was charged for an offence under Section 306 IPC basically based upon the dying declaration of the deceased, which reads as under: (SCC p. 731, para 1)

"My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

10. This Court, considering the definition of 'abetment' under Section 107 IPC, found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment of the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

11. In Ramesh Kumar v. State of Chhattisgarh, (2001) 9 SCC 618, this Court while considering the charge framed and the conviction for an offence under Section 306 IPC on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set herself on fire. Acquitting the accused this Court said: (SCC p. 620)

"A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance,

discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty."

12. Reverting to the facts of the case, both the courts below have erroneously accepted the prosecution story that the suicide by the deceased is the direct result of the quarrel that had taken place on 25-7-1998 wherein it is alleged that the appellant had used abusive language and had reportedly told the deceased "to go and die". For this, courts relied on a statement of Shashi Bhushan, brother of the deceased, made under Section 161 Cr PC when reportedly the deceased, after coming back from the house of the appellant, told him that the appellant had humiliated him and abused him with filthy words. The statement of Shashi Bhushan, recorded under Section 161 Cr PC is annexed as annexure P-3 to this appeal and going through the statement, we find that he has not stated that the deceased had told him that the appellant had asked him "to go and die". Even if we accept the prosecution story that the appellant did tell the deceased "to go and die", that itself does not constitute the ingredient of "instigation". The word "instigate" denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or on the spur of the moment cannot be taken to be uttered with mens rea. It is in a fit of anger and emotion. Secondly, the alleged abusive words, said to have been told to the deceased were on 25-7-1998 ensued by a quarrel. The deceased was found hanging on 27-7-1998. Assuming that the deceased had taken the abusive language seriously, he had enough time in between to think over and reflect and, therefore, it cannot be said that the abusive language, which had been used by the appellant on 25-7-1998 drove the deceased to commit suicide. Suicide by the deceased on 27-7-1998 is not proximate to the abusive language uttered by the appellant on 25-7-1998. The fact that the deceased committed suicide on 27-7-1998 would itself clearly point out that it is not the direct result of the quarrel taken place on 25-7-1998 when it is alleged that the appellant had used the abusive language and also told the deceased to go and die. This fact had escaped notice of the courts below."

13. Further, in the case of **Netai Dutta v. State of WB**, it has been held by the Apex Court:

5. There is absolutely no averment in the alleged suicide note that the present appellant had caused any harm to him or was in any way responsible for delay in paying salary to deceased Pranab Kumar Nag. It seems that the deceased was very much dissatisfied with the working conditions at the work place. But, it may also be noticed that the deceased after his transfer in 1999 had never joined the office at 160 B.L. Saha Road, Kolkata and had absented himself for a period of two years and that the suicide took place on 16.2.2001. It cannot be said that the present appellant had in any way instigated the deceased to commit suicide or he was responsible for the suicide of Pranab Kumar Nag. An

offence under Section 306 IPC would stand only if there is an abetment for the commission of the crime. The parameters of the "abetment" have been stated in Section 107 of the Indian Penal Code. Section 107 says that a person abets the doing of a thing, who instigates any person to do that thing; or engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, or the person should have intentionally aided any act or illegal omission. The explanation to Section 107 says that any wilful misrepresentation or wilful concealment of a material fact which he is bound to disclose, may also come within the contours of "abetment".

6. In the suicide note, except referring to the name of the appellant at two places, there is no reference of any act or incidence whereby the appellant herein is alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag.

7. Apart from the suicide note, there is no allegation made by the complainant that the appellant herein in any way was harassing his brother, Pranab Kumar Nag. The case registered against the appellant is without any factual foundation. The contents of the alleged suicide note do not in any way make out the offence against the appellant. The prosecution initiated against the appellant would only result in sheer harassment to the appellant without any fruitful result. In our opinion, the learned Single Judge seriously erred in holding that the First Information Report against the appellant disclosed the elements of a cognizable offence. There was absolutely no ground to proceed against the appellant herein. We find that this is a fit case where the extraordinary power under Section 482 of the Code of Criminal Procedure is to be invoked. We quash the criminal proceedings initiated against the appellant and accordingly allow the appeal."

14. If above proposition of law is applied in the present case, what emerges is that the revisionist and the deceased were having affair and a night prior to the incident, the deceased was with the revisionist. In the morning when she returned, she informed her mother that throughout the night she was with the revisionist and that she loves him and wants to marry him. Upon hearing this, father of the revisionist, Arjun Yadav (co-accused) was called, who disclosed that as long as he is alive, he would not permit the revisionist and the deceased to marry. Thereafter, out of anger and frustration, deceased entered her room and committed suicide by setting herself on fire. This is not only the case of prosecution as per FIR, but also as per the statements of witnesses recorded under Section 161 of Cr PC. None of the witnesses has assigned any role of instigation or abetment to the revisionist, nor co-accused has stated anything against him. At no stretch of imagination, involvement of the revisionist in commission of offence has been proved by the prosecution. Even if the entire case of the prosecution is taken as it is, offence under Section 306 of IPC is not made out against the revisionist as basic ingredients of Section 107 of IPC are completely

missing. Allowing the court below to frame charge against the revisionist and to go with trial would simply be a futile exercise and cannot be permitted to do so. The trial Court has erred in law in rejecting the application as filed by the revisionist under Section 227 of Cr PC, seeking discharge.

15. For the foregoing reasons, the order impugned is set aside. Application filed by the revisionist under Section 227 of Cr PC, seeking discharge, is allowed and revisionist-Amit Kumar is discharged from the alleged offence.

16. Criminal Revision is allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.07.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.

CRIMINAL REVISION No. 569 of 2017

Aditya Narain Mangla ...Revisionist
Versus
State of U.P. &Anr.. ..Respondents

Counsel for the Revisionist:
Sri C.B. Pandey

Counsel for the Respondents:
Mr. Prachish Pandey, Ms Mahima Pahwa

A. Criminal Revision- maintenance- Section 12 of Protection of Women from Domestic Violence Act, 2005. (Para 10 , 11 & 15)

B. Section 23 read with 20 of Protection of Women from Domestic Violence Act, 2005 - interim maintenance - son and wife - granted Rs. 1,00,000/- maintenance on higher side- wife earlier working and drawing salary Rs. 20,000/- maintenance not charity- capable to give such amount as maintenance to his wife and son. (Para 13)

C. Jurisdiction – Of High Court at Lucknow - never lived in Lucknow- father mother of wife reside at Lucknow - no merit- application dismissed.

Chronological list of cases cited: -

1. (2016) 2 SCC 705 Krishna Bhattacharjee Vs. Sarathi Choudhury and Anr.

2. (2012) 3 SCC 183 V.D. Vhanot Vs. Savita Bhanot

3. (2014) 3 SCC 712 Saraswathy Vs. Bahu

4. (2015) 5 SCC 705 Shamima Farooqui Vs. Shahid Khan

5. (1997) 7 SCC 7 Jasbir Kaur Sehgal Vs. District Judge, Dehradun

6. (2008) 2 SCC 316 Chaturbhuj Vs. Sita Bai

7. (1978) 4 SCC 70 Chander Kaushal Vs. Veena Kaushal

8.(2005) 3 SCC 636 Savitaben Somabhai Bhatiya Vs. State of Gujrat
9.1968 SCC OnLine Del 52 Chander Prakash Bodh Raj Vs. Shila Rani Chander Prakash

10.Criminal Appeal No. 1220 of 2018 Reema Salkan Vs. Sumer Singh Salkan

11. AIR 2014 SC 2875 Bhuwan Mohan Singh Vs. Meena

12.2019 SCC Online SC 493 Rupali Devi Vs. State of Uttar Pradesh (E-10)

(Delivered by Hon'ble Pritinker Diwaker, J.)

Sri C B Pandey, learned counsel for the revisionist, Sri Prachish Pandey, learned counsel for the State and Ms Mahima Pahwa, learned counsel for respondent no.2.

2. Challenge in the present revision is to the order dated 6.4.2019 passed by the Additional Sessions Judge, Court No.1, Lucknow in Criminal Appeal No.0000092 of 2016, whereby the appellate Court has dismissed the appeal, affirming the order dated 9.3.2016 passed by Additional Chief Judicial Magistrate, Vth, Lucknow in a Complaint No.3016 of 2015, granting interim maintenance of Rs.55,000/- per month in favour of respondent no.2 and her minor son, aged about five years.

3. Brief facts of the present case are that the marriage of revisionist and respondent no.2 was solemnized on 17.11.2010 at Noida and out of the wedlock, one son Master Anand was born on 22.2.2014. After marriage, initially couple lived at Noida for few days and thereafter, they shifted to USA where they lived together for about two years. As the revisionist was admitted in IndianSchool of Business for doing his Masters degree, the couple returned back to Hyderabad and after completion of the said course at Hyderabad, they started living at New Delhi.

4. According to respondent no.2, she was subjected to physical and mental torture by the revisionist and under compelling circumstances, she started living with her parents. On 17.8.2015, respondent no.2 filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short 'the Act of 2005') against her husband and his other family members. She also filed an application under Section 23 read with Section 20 of the said Act, claiming interim order of grant of maintenance to the tune of Rs.1 lakh per month. In this application, it has been contended by the wife that her husband is a well qualified person having two Masters Degree, is earning approximately Rs.45 lakhs per annum and, therefore, she be awarded suitable maintenance. She has also submitted that earlier she was working and was getting Rs.20,000/- per month, but presently, she is not working as she has to take care of her minor son. In the application, various instances of cruelty meted out to her have been quoted by respondent no.2 and for brevity, at this stage, this Court is not referring to all those pleadings.

5. Counsel for the revisionist submits:

(i) that learned Magistrate has erred in law in granting interim maintenance to respondent no.2 and likewise, the order passed by the appellate court is also not in accordance with law wherein the order of learned Magistrate has been affirmed without appreciating the correct facts;

(ii) that respondent no.2 had never lived at Lucknow and as such Lucknow Court has no jurisdiction to hear the case filed by her under the provisions of the Act of 2005. In her entire pleadings, nowhere it has been stated that as to how respondent no.2 came to Lucknow and filed the case at Lucknow;

(iii) that the pleadings as made by the revisionist have been completely ignored by the two courts below;

(iv) that the income of the revisionist, while he was serving in USA, has nothing to do with his salary in India and the said income cannot be considered, at all, for determination of interim maintenance to respondent no.2;

(v) respondent no.2 is living separately of her own without there being any justification or sufficient cause;

(vi) that even as on date, the revisionist is willing to keep respondent no.2 with him and his minor son aged about 5 years;

(vii) that respondent no.2 has done her Post Graduation in Advertisement and Marketing and as such, she is in a position to maintain herself;

(viii) that personal allegations levelled against the revisionist, including consuming of liquor with his friends, are not correct.

(ix) that the interim maintenance awarded in favour of respondent no.2 is on the higher side and, under no stretch of imagination, such amount can be awarded as interim maintenance; and

(x) that twice the revisionist has made efforts for mediation and amicable settlement between the parties, but on account of non-cooperation of respondent no.2, the same failed.

6. Supporting the impugned order passed by learned Magistrate dated 9.3.2016 and that of appellate court dated 6.4.2017, it has been argued on behalf of respondent no.2:

(i) that application under the Act of 2005 has been rightly filed at Lucknow because, at the relevant time, respondent no.2 was living at Lucknow, on the given address, along with her parent, as after retirement, her father and mother were residing in the said house at Lucknow. Learned counsel submits that in the affidavit filed in support of main application, residential address of Lucknow has been categorically mentioned by respondent no.2, and even if she has not mentioned in the memo of application as to how the cause of action arose at Lucknow, this would not make any difference in the case. It has been argued that pleadings can be substantiated and proved at the time of evidence.

(ii) that concerned Protection Officer, in its report, had verified about the factum of living of respondent no.2 at Lucknow and the contents of the applications made by respondent no.2. Learned counsel further submits that before the first Court, respondent no.2 had submitted her Bank Passbook of a Nationalized Bank and in the said passbook also address of Lucknow is being mentioned. It has been further argued that point of jurisdiction at Lucknow has been duly considered by learned Magistrate in its order dated 9.3.2016;

(iii) that the revisionist had filed a case at Tis Hazari Court, New Delhi for restitution of conjugal rights, matter travelled upto the Supreme Court where on an application filed by respondent no.2, the Apex Court has transferred the case from Delhi to Lucknow and at that time, no objection whatsoever was raised by the revisionist regarding jurisdiction of the present case at Lucknow;

(iv) that the revisionist has not approached this Court with clean hands, despite the fact that learned Magistrate has passed the order on 9.3.2016 granting interim maintenance of Rs.55,000/- per month to respondent no.2, but till date this order has not been honoured by him and the full maintenance amount has not been paid. Of his own, the revisionist has made certain submissions before this Court and had deposited meager amount (Rs.11,00,000/-, i.e. Rs.1 lakh, Rs.2 lakhs, Rs.3 lakhs and Rs.5 lakhs pursuant to orders passed by this Court and Rs.30,000/- per month is being paid from December 2018 till date). Learned counsel submits that there was no order from this Court, modifying the amount of

interim maintenance but yet by adopting delay tactics, to harass respondent no.2, entire amount has not been deposited by the revisionist. According to respondent no.2, as on date, the revisionist is required to deposit Rs.8.60 lakhs towards arrears of interim maintenance;

(v) that respondent no.2 is somehow surviving along with her son aged about 5 years, though financial capacity of her father is not as such where he can afford the expenses of respondent no.2, but anyhow he too is just managing and supporting respondent no.2 and her son;

(vi) that learned Magistrate has assessed the interim maintenance of Rs.75,000/- per month in favour of respondent no.2, but erred in law in deducting Rs.20,000/- per month from interim maintenance after holding that respondent no.2 is capable of earning Rs.20,000/- per month. Learned counsel submits that though this part has not been challenged by respondent no.2, but the same may also be considered by this Court;

(vii) that even if the income of the revisionist in USA is ignored, from his own pleadings it is apparent that he is earning Rs.1.70 lakhs per month and is spending Rs.50,000/- on himself. Learned counsel submits that if the revisionist is enjoying luxury car, which was purchased by him on loan, and Rs.35,000/- per month is being paid as its EMI, respondent no.2 cannot be blamed for that and if the revisionist has any financial constraint, he can definitely go for a cheaper car. Pleading of the revisionist about expenditure of Rs.45,000/- towards parental/domestic support is required to be ignored and rejected because his father is a retired public servant and is getting pension, whereas once respondent no.2 is living separately along with her son, question of spending any amount towards parental/domestic support does not arise at all;

(viii) that on two occasions mediation has failed because offer made by the revisionist to pay Rs.85 lakhs along with an accommodation to respondent no.2, was later denied by him whereas, in second mediation proceeding, the revisionist had stopped appearing. Learned counsel submits that respondent no.2 is not a maid servant of the revisionist where she can be ill treated or ousted at his whims and fancies;

(ix) that under the provisions of the Act of 2005 itself, affidavits of the parties are required to be considered and respondent no.2 in her affidavit has categorically stated about the manner in which she was ill treated, the fact that she is not in a position to maintain herself along with her son aged about 5 years and that she was residing at Lucknow. Likewise, respondent no.2 has given salary details of the revisionist which has not been denied in specific manner and, therefore, the pleadings made by respondent no.2 are required to be accepted as it is;

(x) that once the revisionist has admitted the fact that he is earning Rs.1.70 lakhs per month, then interim maintenance has to be calculated on the basis of said admission and the living standard of the parties;

(xi) that since August 2015, respondent no.2 is fighting for interim maintenance which has not been paid to her fully even after the expiry of four years; and

(xii) that interim maintenance of Rs.55,000/- per month, at the first instance, may look at the higher side, but present is a case where the revisionist is a well qualified person, earning

handsomely and enjoying much better standard in the Society, therefore, he is equally liable to see the welfare of his wife and children.

7. Before adverting to the facts of the case, it would be appropriate to refer to certain case laws decided by the Apex Court. In the case of **Krishna Bhattacharjee v Sarathi Choudhury and Anr.**, the Apex Court held as under:

"3. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts where under the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless "aggrieved person" under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.

8. In our prefatory note, we have stated about the need of sensitive approach to these kinds of cases. There can be erroneous perception of law, but as we find, neither the learned Magistrate nor the appellate court nor the High Court has made any effort to understand and appreciate the stand of the appellant. Such type of cases and at such stage should not travel to this Court. We are compelled to say so as we are of the considered opinion that had the appellate court and the High Court been more vigilant, in all possibility, there could have been adjudication on merits. Be that as it may.

13. Having scanned the anatomy of the 2005 Act, we may now refer to a few decisions of this Courts that have dealt with the provisions of the 2005 Act. In V. D. Bhanot v. Savita Bhanot, (2012) 3 SCC 183 the question arose whether the provisions of the 2005 Act can be made applicable in relation to an incident that had occurred prior to the coming into force of the said Act. Be it noted, the High Court had rejected the stand of the respondent therein that the provisions of the 2005 Act cannot be invoked if the occurrence had taken place prior to the coming into force of the 2005 Act. This Court while dealing with the same referred to the decision rendered in the High Court which after considering the constitutional safeguards under Article 21 of the Constitution vis-a-vis the provisions of Sections 31 and 33 of the 2005 Act and after examining the Statement of Objects and Reasons for the enactment of the 2005 Act, had held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that Parliament enacted the 2005 Act in order to provide for some effective protection of rights guaranteed under the Constitution to

women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them and further that a petition under the provisions of the 2005 Act is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was no more living with him, at the time when the Act came into force. After analyzing the verdict of the High Court, the Court concurred with the view expressed by the High Court by stating thus: (V D Bhanot case, pp. 186-87, para 12)

"12. We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005."

14. In Saraswathy v. Babu, (2014) 3 SCC 712, a two-Judge Bench, after referring to the decision in V.D. Bhanot (supra), reiterated the principle. It has been held therein: (Saraswathy case, SCC p.720, para 24)

"24. We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines "domestic violence" in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DVA, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent husband has not complied with the order and direction passed by the trial court and the appellate court. He also misleads the Court by giving wrong statement before the High Court in the contempt petition filed by the appellant wife. The appellant wife having being harassed since 2000 is entitled for protection order and residence order under Sections 18 and 19 of the DVA, 2005 along with the maintenance as allowed by the trial court under Section 20(1) (d) of the DVA, 2005. Apart from these reliefs, she is also entitled for compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent husband. Therefore, in addition to the reliefs granted by the courts below, we are of the view that the appellant wife should be compensated by the respondent husband. Hence, the respondent is hereby directed to pay compensation and damages to the extent of Rs5,00,000 in favour of the appellant wife."

8. In the case of Shamima Farooqui v Shahid Khan2, it has been held by the Apex Court:

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the

lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on for ever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 Cr PC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 Cr PC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 Cr PC, unless disqualified, is an absolute right.

15. While determining the quantum of maintenance, this Court in

Jasbir Kaur Sehgal v. District Judge, Dehradun, (1997) 7 SCC 7, has held as follows: (SCC p.12 para 8)

"8. ... The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai, (2008) 2 SCC 316, it has been ruled that: (SCC p. 320, para 6)

"6. ... Section 125 Cr PC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 falls within constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat, (2005) 3 SCC 636."

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Parkash Bodh Raj v. Shila Rani Chander Prakash, 1968 SCC OnLine Del 52, wherein it has been opined thus: (SCC OnLine Del para 7)

"An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only

comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance.

20. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs.4,000/- to Rs.2,000/-. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errOrs. In fact, when the order is based on proper appreciation of evidence on record, no revisional court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order."

9. Further, in the case of **Reema Salkan v Sumer Singh Salkan**, the Apex Court held as under:

9. As aforesaid, the sole question is about the quantum of monthly maintenance amount payable by the respondent to the appellant. In that, the Family Court has unambiguously held that the respondent neglected to maintain the appellant, for the elaborate reasons recorded in its judgment dated 28th January 2015. That finding of fact has been upheld by the High Court vide the impugned judgment. The Family Court has also found as a fact that the appellant was unemployed, though she is an MA in English and holds a Post-graduate Diploma in Journalism and Mass Communication and is also a Law Graduate enrolled with the Bar Council of Delhi. The High Court has not disturbed that finding recorded by the Family Court. Resultantly, both the Courts have concurrently found that, in law, the respondent was obliged to maintain the appellant.

13. Be that as it may, the High Court took into account all the relevant aspects and justly rejected the plea of the respondent about inability to pay maintenance amount to the appellant on the finding that he was well educated and an able bodied person. Therefore, it was not open to the respondent to extricate from his liability to maintain his wife. It would be apposite to advert to the relevant portion of the impugned judgment which reads thus:

"79. The respondent during the cross examination has admitted that he too is B.Com, M.A.(Eco.) and MBA from Kentucky University, USA; the respondent is a Canadian citizen working with Sprint Canada and is earning Canadian $(CAD) 29,306.59 as net Annual Salary. However, he has claimed that he has resigned from Sprint Canada on 23.11.2010 and the same has been accepted on 27.11.2010 and the respondent since then is unemployed and has got no source of income to maintain himself and his family.

80. In the instant case, the petitioner has filed the case under Section

125 Cr.P.C., 1973 for grant of maintenance as she does not know any skill and specialised work to earn her livelihood i.e. in paragraph 26 of maintenance petition against her husband. However, the respondent husband who is well educated and comes from extremely respectable family simply denies the same. The respondent husband in his written statement does not plead that he is not an able bodied person nor he is able to prove sufficient earning or income of the petitioner.

81. It is an admitted fact emerging on record that both the parties got married as per Hindu Rights and Customs on 24.03.2002 and since then the petitioner was living with her parents from 10.08.2002 onwards, and the parents are under no legal obligation to maintain a married daughter whose husband is living in Canada and having Canadian citizenship. The plea of the respondent that he does not have any source of income and he could not maintain the wife is no answer as he is mature and an able bodied person having good health and physique and he can earn enough on the basis of him being able bodied to meet the expenses of his wife. In this context, the observation made in Chander Prakash v. Shrimati Shila Rani, AIR 1968 Del 174 by this Court is relevant and reproduced as under:

"7.....an able bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in position to earn enough to be able to maintain them according to the family standard. It is for such ablebodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child."

82. The husband being an ablebodied person is duty bound to maintain his wife who is unable to maintain herself under the personal law arising out of the marital status and is not under contractual obligation. The following observation of the Apex Court in Bhuwan Mohan Singh v. Meena, AIR 2014 SC 2875, is relevant:

"3.....Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created where under she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the

sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is ablebodied. There is no escape route unless there is an order from the court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.

(emphasis applied)

83. The respondent's mere plea that he does not possess any source of income ipso facto does not absolve himself of his moral duty to maintain his wife in presence of good physique along with educational qualification."

The view so taken by the High Court is unassailable. Indeed, the respondent has raised a plea to question the correctness of the said view, in the reply affidavit filed in this appeal, but in our opinion, the finding recorded by the High Court is unexceptionable.

15. The principle invoked by the High Court for determination of monthly maintenance amount payable to the appellant on the basis of notional minimum income of the respondent as per the current minimum wages in Delhi, in our opinion, is untenable. We are of the considered opinion that regard must be had to the living standard of the respondent and his family, his past conduct in successfully protracting the disposal of the maintenance petition filed in the year 2003, until 2015; coupled with the fact that a specious and unsubstantiated plea has been taken by him that he is unemployed from 2010, despite the fact that he is highly qualified and an ablebodied person; his monthly income while working in Canada in the year 2010 was over Rs.1,77,364/ and that this Court in Criminal Appeal Nos.23472349/ 2014 has prima facie found that the cause of justice would be subserved if the appellant is granted an interim maintenance of Rs.20,000/per month commencing from November 1, 2014. At this distance of time, keeping in mind the spiraling inflation rate and high cost of living index today, to do complete justice between the parties, we are inclined to direct that the respondent shall pay a sum of Rs.20,000/per month to the appellant towards the maintenance amount with effect from January 2010 and at the rate of Rs.25,000/per month with effect from 1st June, 2018 until further orders. We order accordingly."

10. From the above principles of law laid down by the Apex Court, it is quite apparent that husband while paying interim maintenance does not do any charity and it is his abandon duty to take care of his family and wife and children cannot be left at the mercy of the husband. If wife and children are not in a position to maintain themselves, it is legal duty of the husband to maintain them irrespective of the fact whether he is earning more or less. In the case of sufficient income on the part of the husband, he has to pay interim maintenance to his wife and children as per standard of living and to ensure that they meet all the necessary requirements for their dignified survival.

11. Present is a case where, from the pleading of the parties, it is apparent that husband is, at least, earning Rs.1.70 lakhs per month and thus, even if I ignore his previous income which he was drawing in USA, it can be easily held that he is earning handsomely and can pay sufficient amount for survival of respondent no.2 and her son. Even the revisionist has admitted the fact that he is expending Rs.50,000/- on himself apart from Car loan of Rs.35,000/- per month being paid by him. The revisionist has also admitted the fact that he is spending

Rs.45,000/- towards parental/domestic support. When his father is a retired government employee and getting sufficient pension, then the revisionist is obliged to give priority to his wife and son for maintaining them in a dignified manner.

12. I find no substance in the argument of the revisionist that the case filed by respondent no.2 in Lucknow Court is not maintainable. In the case of **Rupali Devi v State of Uttar Pradesh**, it has been held by the Apex Court:

1. "Whether a woman forced to leave her matrimonial home on account of acts and conduct that constitute cruelty can initiate and access the legal process within the jurisdiction of the courts where she is forced to take shelter with the parents or other family members". This is the precise question that arises for determination in this group of appeals.

5. The above two views which the learned referring bench had considered while making the present reference, as already noticed, were founded on the peculiar facts of the two sets of cases before the Court. It may be possible to sustain both the views in the light of the facts of the cases in which such view was rendered by this court. What confronts the court in the present case is however different. Whether in a case where cruelty had been committed in a matrimonial home by the husband or the relatives of the husband and the wife leaves the matrimonial home and takes shelter in the parental home located at a different place, would the courts situated at the place of the parental home of the wife have jurisdiction to entertain the complaint under Section 498A. This is in a situation where no overt act of cruelty or harassment is alleged to have been committed by the husband at the parental home where the wife had taken shelter.

14. "Cruelty" which is the crux of the offence under Section 498A IPC is defined in Black's Law Dictionary to mean "The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage (Abuse, inhuman treatment, indignity)". Cruelty can be both physical or mental cruelty. The impact on the mental health of the wife by overt acts on the part of the husband or his relatives; the mental stress and trauma of being driven away from the matrimonial home and her helplessness to go back to the same home for fear of being ill treated are aspects that cannot be ignored while understanding the meaning of the expression "cruelty" appearing in Section 498A of the Indian Penal Code. The emotional distress or psychological effect on the wife, if not the physical injury, is bound to continue to traumatize the wife even after she leaves the matrimonial home and takes shelter at the parental home. Even if the acts of physical cruelty committed in the matrimonial house may have ceased and such acts do not occur at the parental home, there can be no doubt that the mental trauma and the psychological distress cause by the acts of the husband including verbal exchanges, if any, that had compelled the wife to leave the matrimonial home and take shelter with her parents would continue to persist at the parental home. Mental cruelty borne out of physical cruelty or abusive and humiliating verbal exchanges would continue in the parental home even though there may not be any overt act of physical cruelty at such place.

15. The Protection of Women from Domestic Violence Act, as the object behind its enactment would indicate, is to provide a civil remedy to victims of domestic violence as against the remedy in criminal law which is what is provided under Section 498A of the Indian Penal Code. The definition of the Domestic Violence in the Protection of Women from Domestic Violence Act, 2005 contemplates harm or injuries that endanger the health, safety, life, limb or wellbeing, whether mental or physical, as well as emotional abuse. The said definition would certainly, for reasons stated above, have a close connection with Explanation A & B to Section 498A, Indian Penal Code which defines cruelty. The provisions contained in Section 498A of the Indian Penal Code, undoubtedly, encompasses both mental as well as the physical well-being of the wife. Even the silence of the wife may have an underlying element of an emotional distress and mental agony. Her sufferings at the parental home though may be directly attributable to commission of acts of cruelty by the husband at the matrimonial home would, undoubtedly, be the consequences of the acts committed at the matrimonial home. Such consequences, by itself, would amount to distinct offences committed at the parental home where she has taken shelter. The adverse effects on the mental health in the parental home though on account of the acts committed in the matrimonial home would, in our considered view, amount to commission of cruelty within the meaning of Section 498A at the parental home. The consequences of the cruelty committed at the matrimonial home results in repeated offences being committed at the parental home. This is the kind of offences contemplated under Section 179 Cr.P.C which would squarely be applicable to the present case as an answer to the question raised.

16. We, therefore, hold that the courts at the place where the wife takes shelter after leaving or driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section 498A of the Indian Penal Code."

13. In the present case, after retirement, father of respondent no.2 started living at Lucknow and if, at the relevant time, respondent no.2 was also living with her father, she is absolutely justified in filing the case at Lucknow. In the affidavit sworn in support of the application filed by respondent no2 before Lucknow Court, address of Lucknow has been given, likewise the Protection Officer had also verified the factum of living of respondent no.2 at Lucknow and even in the Bank Passbook, respondent no.2 had given the address of Lucknow. Furthermore, when the Apex Court had transferred another case to Lucknow, no objection was raised by the revisionist that Court sitting at Lucknow would not have any jurisdiction. Thus, the objection of the revisionist regarding jurisdiction at Lucknow Court, has no merit and is, accordingly, rejected.

14. I further find no force in the argument of the revisionist that the interim maintenance amount awarded in favour to respondent no.2 and her son is on the higher side. As already stated the revisionist is earning sufficient amount where he can pay interim maintenance of

Rs.55,000/- per month to his wife and son. The revisionist cannot spend his entire earning on himself, but having married to respondent no.2, he has to take care of her and her son.

15. I further find no substance in the argument of the revisionist that once respondent no.2 has capacity to earn Rs.20,000/- per month, then she is not entitled for interim maintenance to the tune of Rs.55,000/- per month. When circumstances are not permitting respondent no.2 to work on account of the fact that she has to take care of her small son, she cannot be blamed for not earning any amount.

16. Yet another important question, which requires consideration, is that though the order impugned granting interim maintenance has been passed on 9.3.2016, till date the revisionist has not honoured the said order in its true spirit. By one way or the other, the revisionist is avoiding to pay the interim maintenance and even though the interim order has not been modified by this Court, the revisionist has not paid the full amount of interim maintenance. It seems that the revisionist is intentionally avoiding payment of interim maintenance.

17. Considering all the facts and circumstances of the case, I am of the considered view that the revision filed by the revisionist has no substance. The same is, accordingly, dismissed. The order passed by the learned Additional Chief Judicial Magistrate, which has been duly affirmed by the Additional Sessions Judge, cannot be faulted with, they are accordingly maintained. The revisionist is directed to pay Rs.25,000/- (Rupees Twenty Five Thousand Only) as costs of this litigation to respondent no.2.

18. As the revisionist has not paid full amount of interim maintenance to respondent no.2, he is directed to clear the entire dues, within two months from today. He is further directed to pay Rs.55,000/- (Rupees Fifty Five Thousand Only) per month, as interim maintenance regularly. He is obliged to deposit the said amount in the first week of every month.

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REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2019

BEFORE
THE HON'BLE PRITINKER DIWAKER, J.

CRIMINAL REVISION No. 1075 of 2017

Smt. Rashmi Tripathi &Anr. .... Revisionists
Versus
State of U.P. &Anr. ...Opposite Parties

Counsel for the Revisionists: Sri Tung Nath Tiwari, Sri Surya Mani Pandey

Counsel for the Opposite Parties
Govt. Advocate, Sri Bhanu Pratap Singh

A. Criminal Revision - enhancement of maintenance- Section 125 Cr.P.C. - respondent no. 2 Income Tax Inspector-revisionist qualified lady-earlier working in private firm – son - paying interim maintenance not charity by husband-legal duty irrespective no matter he earns more or less-maintenance as per their standard of living- revision allowed
(Para 11)

Chronological List of Cases Cited: -
1.(2015) 5 SCC 705 Shamima Farooqui Vs Shahid Khan

2.Criminal Appeal No. 1220 of 2018 Reema Salkan V Sumer Singh Salkan

3.(2015) 2 SCC 385 Jaiminiben Hirenbhai Vyas &Anr. Vs. Hirenbhai Remeshchandra Vyas&Anr. (E-10)

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. Sri Surya Mani Pandey, learned counsel for the revisionists, Dr. Gyan Singh, learned counsel for the State and Sri Bhanu Pratap Singh, learned counsel for respondent no.2.

2. Challenge in the present revision is to the order dated 25.9.2017 passed by the Additional Principal Judge, Family Court, Lucknow in Criminal Misc. Case No.403 of 2013, whereby the court below has awarded maintenance amount of Rs.6,000/- per month to revisionist no.1 (wife of respondent no.2) and Rs.3,000/- per month to revisionist no.2 (son of respondent no.2). .

3. Brief facts of the case are that marriage of revisionist no.1 was solemnized with respondent no.2 on 23.2.2012 and out of the wedlock, they have a son, namely Shivansh. As revisionist no.1 was subjected to cruelty and harassment for demand of dowry, under the compelling circumstance, she left the house of her husband and started living separately. On 17.5.2013, the revisionists filed an application under Section 125 of Cr.P.C. claiming maintenance of Rs.10,000/- each from respondent no.2. In the application, it has been contended by the revisionists that respondent no.2 is working as Income Tax Inspector and his salary is about Rs.40,000/- per month. He has other source of income as well. In her examination, revisionist no.1 has stated that the salary of respondent no.2 is now 50,000/- per month whereas he has other source of income and therefore, suitable maintenance be awarded to the revisionists. Contentions of revisionist no. 1 have been denied by the respondent no.2 and according to him, revisionist no. 1 is a qualified lady, has done her Postgraduate Diploma and was earlier working in a private firm and therefore, she is not entitled for any maintenance. It has been further pleaded by the respondent no.2 that after deduction, his salary is about Rs.33,000/- and he has taken a loan from Life Insurance Corporation. Vide order dated 19.12.2016, the Family Court below has declined the claim of revisionist no.1 and has awarded Rs.3000/- per month as maintenance amount to revisionist no.2. The court below has declined the claim of revisionist no.1 on the ground that she has sufficient qualification. This order of the Family Court was assailed by the revisionists before this Court in Criminal Revision No. 13 of 2017 and after setting aside the order dated 19.12.2016, matter was remanded back to the court below for reconsideration and decision afresh. Pursuant to the order passed by this Court, the Family Court below passed the impugned order dated 25.9.2017 granting maintenance of Rs.6000/- per month to revisionist no.1 and Rs.3000/- per month to revisionist no.2. It is this order which has been challenged by the revisionists before this Court.

4. Counsel for the revisionists submits:

(i) that as the order impugned has not been assailed by the respondent no.2, it is to be presumed that he is admitting all the facts as narrated by the revisionists.

(ii) that salary of respondent no.2, as on date, is Rs.66,000/- and considering the status of respondent no.2, a suitable maintenance amount be awarded in favour of the revisionists.

(iii) that revisionist no.2 has been admitted in CityMontessoriSchool, Lucknow where the revisionist no.1 is required to pay about Rs.5000/- per month as fee. That apart, she has to pay Rs.2200/- for the conveyance of revisionist no.2. For performing other activities also, a lot of amount is required to be spent for revisionist no.2 and considering all these aspects of the case, maintenance amount be suitably enhanced.

(iv) that on the one hand, respondent no. 2 is living a lavish life where he is having luxury car and three dogs with him and on the other hand, he is not maintaining the revisionists.

(v) In support of revisionist no. 1, it has been argued that amount of Rs.3000/- per month is a meager amount and it is literally impossible for a married lady to maintain herself on this meager amount.

5. On the other hand, denying the contentions of revisionists, counsel for respondent no.2 submits:

(i) that after all the deductions, from his meager salary, he has to pay EMI to the tune of Rs.27,000/- per month for the house and it is incorrect to say that he is having three dogs. He submits that post of respondent no. 2 may be of Income Tax Inspector but considering his salary, he is just hand to mouth.

(ii) that number of litigations are pending between the parties in various courts and for that also, respondent no.2 is required to spend huge amount.

(iii) that under the provisions of Domestic Violence Act, revisionist no. 1 is getting Rs.1500/- per month where as revisionist no. 2 is getting Rs.750/- per month and if the total amount of maintenance is calculated, as on date, revisionist no. 1 is getting Rs.7500/- per month whereas revisionist no.2 is getting Rs.3750/- per month.

6. I have heard the parties and perused the documents.

7. Undisputedly, respondent no.2 is working as Inspector in the Income Tax Department and his salary is more than Rs.65,000/- per month. Ignoring his other source of income, suffice to say that income of respondent no.2 is sufficient where he can maintain his wife and son in a dignified manner. There is no substance in the argument of respondent no.2 that as the revisionist is a qualified lady, she is not entitled for maintenance. Mere fact that she is having MBA and Post Graduate Diploma does not mean that she is not entitled for maintenance specially when she is not working anywhere. Difficulty of revisionist no. 1 is required to be appreciated where she is taking care of a child, who has started his schooling and if while maintaining her child she is not working, she cannot be blamed.

8. Before adverting to the facts of the case, it would be appropriate to refer to certain case laws decided by the Apex Court. In the case of **Shamima Farooqui v Shahid Khan**, it has been held by the Apex Court:

"13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the

lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on for ever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 Cr PC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 Cr PC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 Cr PC, unless disqualified, is an absolute right.

15. While determining the quantum of maintenance, this Court in

Jasbir Kaur Sehgal v. District Judge, Dehradun, (1997) 7 SCC 7, has held as follows: (SCC p.12 para 8)

"8. ... The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai, (2008) 2 SCC 316, it has been ruled that: (SCC p. 320, para 6)

"6. ... Section 125 Cr PC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 falls within constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat, (2005) 3 SCC 636."

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Parkash Bodh Raj v. Shila Rani Chander Prakash, 1968 SCC OnLine Del 52, wherein it has been opined thus: (SCC OnLine Del para 7)

"An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort.

Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance.

20. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs.4,000/- to Rs.2,000/-. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errOrs. In fact, when the order is based on proper appreciation of evidence on record, no revisional court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order."

9. Further, in the case of Reema Salkan v Sumer Singh Salkan2, the Apex Court held as under:

9. As aforesaid, the sole question is about the quantum of monthly maintenance amount payable by the respondent to the appellant. In that, the Family Court has unambiguously held that the respondent neglected to maintain the appellant, for the elaborate reasons recorded in its judgment dated 28th January 2015. That finding of fact has been upheld by the High Court vide the impugned judgment. The Family Court has also found as a fact that the appellant was unemployed, though she is an MA in English and holds a Post-graduate Diploma in Journalism and Mass Communication and is also a Law Graduate enrolled with the Bar Council of Delhi. The High Court has not disturbed that finding recorded by the Family Court. Resultantly, both the Courts have concurrently found that, in law, the respondent was obliged to maintain the appellant.

13. Be that as it may, the High Court took into account all the relevant aspects and justly rejected the plea of the respondent about inability to pay maintenance amount to the appellant on the finding that he was well educated and an able bodied person. Therefore, it was not open to the respondent to extricate from his liability to maintain his wife. It would be apposite to advert to the relevant portion of the impugned judgment which reads thus:

"79. The respondent during the cross examination has admitted that he too is B.Com, M.A.(Eco.) and MBA from Kentucky University, USA; the respondent is a Canadian citizen working with Sprint Canada and is earning Canadian $(CAD) 29,306.59 as net Annual Salary. However, he has claimed that he has resigned from Sprint Canada on 23.11.2010 and the same has been accepted on 27.11.2010 and the respondent since then is unemployed and has got no source of income to maintain himself and his family.

80. In the instant case, the petitioner has filed the case under Section 125 Cr.P.C., 1973 for grant of maintenance as she does not know any skill and specialised work to earn her livelihood i.e. in paragraph 26 of maintenance petition against her husband. However, the respondent husband who is well educated and comes from extremely respectable family simply denies the same. The respondent husband in his written statement does not plead that he is not an able bodied person nor he is able to prove sufficient earning or income of the petitioner.

81. It is an admitted fact emerging on record that both the parties got married as per Hindu Rights and Customs on 24.03.2002 and since then the petitioner was living with her parents from 10.08.2002 onwards, and the parents are under no legal obligation to maintain a married daughter whose husband is living in Canada and having Canadian citizenship. The plea of the respondent that he does not have any source of income and he could not maintain the wife is no answer as he is mature and an able bodied person having good health and physique and he can earn enough on the basis of him being able bodied to meet the expenses of his wife. In this context, the observation made in Chander Prakash v. Shrimati Shila Rani, AIR 1968 Del 174 by this Court is relevant and reproduced as under:

"7.....an able bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in position to earn enough to be able to maintain them according to the family standard. It is for such ablebodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child."

82. The husband being an ablebodied person is duty bound to maintain his wife who is unable to maintain herself under the personal law arising out of the marital status and is not under contractual obligation. The following observation of the Apex Court in Bhuwan Mohan Singh v. Meena, AIR 2014 SC 2875, is relevant:

"3.....Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created where under she is compelled to resign to her

fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is ablebodied. There is no escape route unless there is an order from the court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.

(emphasis applied)

83. The respondent's mere plea that he does not possess any source of income ipso facto does not absolve himself of his moral duty to maintain his wife in presence of good physique along with educational qualification."

The view so taken by the High Court is unassailable. Indeed, the respondent has raised a plea to question the correctness of the said view, in the reply affidavit filed in this appeal, but in our opinion, the finding recorded by the High Court is unexceptionable.

15. The principle invoked by the High Court for determination of monthly maintenance amount payable to the appellant on the basis of notional minimum income of the respondent as per the current minimum wages in Delhi, in our opinion, is untenable. We are of the considered opinion that regard must be had to the living standard of the respondent and his family, his past conduct in successfully protracting the disposal of the maintenance petition filed in the year 2003, until 2015; coupled with the fact that a specious and unsubstantiated plea has been taken by him that he is unemployed from 2010, despite the fact that he is highly qualified and an ablebodied person; his monthly income while working in Canada in the year 2010 was over Rs.1,77,364/ and that this Court in Criminal Appeal Nos.23472349/ 2014 has prima facie found that the cause of justice would be subserved if the appellant is granted an interim maintenance of Rs.20,000/per month commencing from November 1, 2014. At this distance of time, keeping in mind the spiraling inflation rate and high cost of living index today, to do complete justice between the parties, we are inclined to direct that the respondent shall pay a sum of Rs.20,000/per month to the appellant towards the maintenance amount with effect from January 2010 and at the rate of Rs.25,000/per month with effect from 1st June, 2018 until further orders. We order accordingly."

10. In the case of **Jaiminiben Hirenbhai Vyas &Anr. vs. Hirenbhai Remeshchandra Vyas &Anr. (2015) 2 SCC 385**, after considering the definition of Section 125 of Cr.P.C., it has been held by the Apex Court in paragraphs 4, 5, 6 & 7 as under:

"4. ... ...

The provision expressly enables the Court to grant maintenance from the date of the order or from the date of the application. However, Section 125 of the Cr.P.C. must be construed with sub-section (6) of Section 354 Cr.P.C. which reads thus:

"354 (6) Language and contents of judgment. -

(6) Every order under Section 117 or sub-section (2) of Section 138 and every final order made under Section 125, Section 145 or Section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision."

Therefore, every final order under Section 125 Cr.P.C. [and other sections

referred to in sub-section (c) of Section 354] must contain points for determination, the decision thereon and the reasons for such decision. In other words, Section 125 and Section 354 (6) must be read together.

5. Section 125 Cr.P.C., therefore, impliedly requires the court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance. Thus, as per Section 354 (6) Cr.P.C., the Court should record reasons in support of the order passed by it, in both eventualities. The purpose of the provision is to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of the particular case.

6. In Shail Kumari Devi v. Krishan Bhagwan Pathak, (2008) 9 SCC 632, paras 39-41: (2008) 3 SCC (Cri) 839, this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In Shail Kumar Devi, this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such order. Thus, such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.

7. In the case before us, the High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife. We, therefore reverse the order of the High Court in this regard and direct that the respondent shall pay the amount of maintenance found payable from the date of the application for maintenance. As far as maintenance granted under Section 24 of the HM Act by the courts below is concerned, it shall remain unaltered."

11. From the above principles of law laid down by the Apex Court, it is quite apparent that husband while paying interim maintenance does not do any charity and it is his abandon duty to take care of his family and wife, they cannot be left at the mercy of the husband. If wife and children are not in a position to maintain themselves, it is the legal duty of the husband to maintain them irrespective of the fact whether he is earning more or less. In the case of sufficient income on the part of the husband, he has to pay interim maintenance to his wife and children as per standard of living and to ensure that they meet all the necessary requirements for their dignified survival.

12. Considering the position of law laid down in the aforesaid cases and also considering the status of respondent no.2, it is directed that revisionist no. 1 would be entitled to receive Rs.10,000/- per month as maintenance amount from respondent no.2 and likewise revisionist no. 2 would also be entitled to receive Rs.10,000/- per month. The revisionists shall be entitled for this amount excluding the amount of Rs.1500/- and Rs.750/- per month respectively awarded in their favour by the Magistrate under the Domestic Violence Act. The revisionists shall also be entitled cost of this litigation, which is determined as Rs.10,000/-.

13. The revision succeeds and is allowed.

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REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.08.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 1544 of 2017

Satyendra ...Revisionist
Versus
State of U.P. And Another ...Opposite Parties

Counsel for the Revisionist:
Sri Prem Shanker Prasad, Sri Bharat Singh.

Counsel for the Opposite Parties:
A.G.A., Sri Arimardan Singh Rajpoot, Sri Samrin Naaz, Sri Dinesh Kumar Singh.

A. Criminal Revision- Section 125 Cr.P.C.- Husband well posted in Indian Army- wife has no income - obligation of husband to maintain her - personal responsibility of husband to maintain her after divorce- revision dismissed.

Chronological list of Cases Cited: -

AIR 1975 SC 83 Bhagwandutt Vs. Kamla Devi (E-10)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Sri Prem Shankar Prasad, learned counsel for the revisionist, Sri Dinesh Kumar Singh, Advocate, holding brief of Sri Arimardan Singh Rajpoot, learned counsel for opposite party no.2, the learned A.G.A. for the State and perused the material brought on record.

2. The instant revision has been filed against the judgement and order dated 22.03.2017 passed by the Principal Judge, Family Court, Mahoba, in Case No.73 of 2016, under Section 125 Cr.P.C. (Smt Apurnima Vs. Satyendra) whereby the application moved by opposite party no.2 under Section 125 Cr.P.C. was allowed awarding Rs.8000/- per month towards maintenance to the opposite party no.2 from the date of filing of the application, which was to be paid by the revisionist by 10th day of each month.

3. Feeling aggrieved by the aforesaid order, revisionist has preferred this revision on the ground that the impugned order is totally unjust and incorrect as the fact that the husband has no income, has not been taken into consideration by the court below while awarding maintenance to opposite party no.2. Hence, the impugned order passed by the learned court below is illegal, perverse and based on no evidence.

4. Learned counsel for the revisionist submits that the revisionist has always been ready and willing to keep his wife with him but she herself has left her matrimonial house and is living in her parental home without any reasonable

cause. Thus, she is not entitled to get any maintenance from the revisionist.

5. Learned counsel for the revisionist simply stated that the financial status and earning of the husband is too poor to pay Rs.8000/- as awarded by the court concerned to the wife.

6. Per contra, learned A.G.A. has contended that the order impugned in the instant revision is just and consistence which requires no interference by this Court.

7. From the perusal of the record annexed with the revision as well as the impugned judgement, it transpires that both the parties performed their marriage on 18.04.2012 according to the Hindu rituals. It has been alleged from the side of the wife that lot of money was spent by her father. Incidentally, father of the wife was Engineer but the husband and his family members were not satisfied with the dowry given by the father of opposite party no.2. They used to say that sufficient dowry had not been given to them and they used to harass her for bringing more dowry. She lived with her husband at her matrimonial house for about 10 days and discharged her matrimonial obligation as wife. Thereafter, she came back to her parent's house.

8. It has been further alleged that husband and his family members started demanding additional dowryof Rs.10,00,000/- in cash by sending message on the mobile of father of opposite party no.2 - wife and they threatened to kill her, if demand of said dowry was not fulfilled. Therefore, F.I.R. was lodged against the husband and his family members whereupon husband and family members became angry, they threw her out of her matrimonial house after committing Marpeet with her and taking away stridhan and ornaments from her. Thereafter, again in the year 2014, husband and family members went to the house of her parents and committed Marpeet about which F.I.R was lodged again against the husband and family members. After the said incident, husband and family members came to her parental house and compromised the matrimonial dispute and further assured that they would not harass her at matrimonial house.

9. On assurance being given to parents of opposite party no.2 by the husband and family members, she was sent back to her matrimonial house by her parents and remained three months at her matrimonial house. During this period, husband and family members again started harassing her by committing marpeet with her on account of non-fulfilment of additional demand of dowry of Rs.10,00,000/-. When she opposed then they tried to kill her by burning . Finally on 06.03.2016. Her husband and his family members after badly beating her asked her to bring Rs.10,00,000/- from her father.

10. The wife - opposite party no.2 has neither any source of income nor skill to earn money, as such she is unable to maintain herself while her husband and his family members are having sufficient means for livelihood such as 25 Bighas of land, and they are also petty contractor of petrol and diesel by which they are earning Rs. 50,000/- per month. In addition to it, the husband is separately earning Rs.1,00,000/- per month.

Consequently, total income of her husband and family members came to Rs.1,50,000 /- per month. Therefore, demand of Rs. 10,000/- per month has been made as maintenance to be paid to opposite party no.2 by the revisionist.

11. The fact of earning has been totally denied by the husband in his written statement. On the contrary, he has stated that the wife left her matrimonial house at her own will and is living in her parental home. The father of wife was posted as Junior Engineer in Irrigation Department. The husband has further stated that his wife refused to have relationship with him. When she was asked to explain reason then she stated that her husband was not acceptable to her and she further stated that she has relations with someone and she will not permit anyone to touch her. Thereafter, father of the wife was called and in his presence, it was revealed that she was not at all ready to live with him. She also gave threats to end her life. She left her matrimonial house on her own sweet will and she is living with her parents. Both have no relationship as husband and wife. She is accustomed to luxurious life as his father earned lot of money, therefore, she is not able to adjust herself with his family. He has further stated that he has no regular means of earning but somehow he earned money by doing work as labourer.

12. The witnesses were examined from both the sides. In her statement, opposite party no.2 - wife stated that she was harassed and marpeet was committed on her. In support whereof, F.I.R. has been filed which was lodged by her parents against the husband and his family members as documentary evidence, therefore, on the basis of oral and documentary evidence, learned trial court concluded that for demand of dowry, wife was badly beaten and she was subjected to cruelty. After committing marpeet, she was thrown out of her matrimonial house and forced her to go to her parental home where she is living presently. Allegation has also been made that her husband was having relation with someone as result of which, she had to take such decision to live separately from him. There is no evidence to show that the wife has got earning capacity while she stated that she has no skill to earn.

13. The above discussions shows that marriage and wife living separately with her parents is admitted fact. It has been proved by the wife that dowry harassment and marpeet was committed with her by husband and her family family which is supported by F.I.R. lodged against them. Allegation from the side of husband that she had relations with someone else provides additional ground to wife to live separately. There is no evidence that she has any income.

14. It is pertinent to mention that Section 125 Cr.P.C is a measure of social justice and it is intended to protect the wife and her children who has no means to maintain herself. It has been held in **Bhagwandutt Vs. Kamla Devi, AIR 1975 SC 83,** that while assessing the amount of maintenance under Section 125 Cr.P.C, the Magistrate is required to consider the standard of living and background of the wife along-with the status of her family. The needs and requirements of the wife should be in consonance with her own income, if any, and the earning of the husband and his commitment as husband. In this case,

there is no dispute with regards to fact that the husband has sufficient means and income as he is highly posted in Indian Army. It is also pertinent to mention that object of Section 125 Cr.P.C is to prevent destitution in wife who may have been even divorced. The husband is under obligation to give maintenance to the divorced wife who by herself is not able to maintain herself. It is husband's moral obligation which he owes to the society in respect of his wife and children, so that they are not left beggared and to prevent destitution as without financial support she may be driven to a life of vagrancy, immorality and crime for her subsistence.

15. It is pertinent to mention here that maintenance of wife is the personal responsibility of the husband and the maintenance should be in consonance with the living status of wife. Admittedly, she is the daughter of Junior Engineer and she has no income and she is living separately from husband, considering this fact, the court below awarded Rs. 8000/- per month as maintenance to opposite party no.2. The husband is legally bound to provide maintenance to his wife as awarded by the court below to the tune of Rs. 8000/- per month which looking to the present price index can not be said to be excessive.

16. In view of the above, I find no illegality, infirmity and perversity in the impugned order passed by the learned court below. The instant revision is, accordingly, dismissed.

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REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 535 of 2017

Major Ankur Gupta ...Revisionist
Versus
State of U.P. And Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Uday Chandani

Counsel for the Opposite Parties:
A.G.A., Sri Amrendra Nath Rai, Sri Sanjay Singh.

A. Criminal Revision- Section 125 Cr.P.C.- Husband well posted in Indian Army- Claim of wife's earning - not proved by the husband - obligation of husband to maintain her - personal responsibility of husband to maintain her after divorce- revision dismissed.

B. Report of Pacific Detective Agency- wife a school teacher- drawing salary of Rs. 12,000/- per month. Held:- Report of a private detective is admissible in court but it need to be proved and examined in evidence.

Chronological list of Cases Cited: -
AIR 1975 SC 83 Bhagwandutt Vs. Kamla Devi (E-10)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Shri Uday Chandani, learned counsel for the revisionist, Shri Sanjay Singh, learned counsel for opposite party no. 2 and learned A.G.A for the State.

2. This revision has been filed against the impugned judgement and order dated 18.01.2017 in Criminal Misc. Case No. 1455 of 2014 passed by Principal Judge, Family Court, Bareilly by which opposite party no. 2 (wife) has

been awarded maintenance of Rs. 20,000/- per month since 15.12.2014.

3. Aggrieved by the impugned order this revision has been filed challenging the same, that the order is arbitrary, illegal and against the provisions of Section 125 Cr.P.C. No effective opportunity was provided to the revisionist before passing of the impugned order by the learned court below, order is unjust and unsustainable in the eyes of law. Income of the wife has not been considered and the evidence on that point has been ignored in a very cursory manner. There was no evidence against the revisionist husband but the maintenance was awarded to the wife which is liable to be set aside.

4. Before the learned court below, the wife filed an application under Section 125 Cr.P.C claiming that she was married on 07.03.2006 with the opposite party according to Hindu rituals and by their wedlock two daughters were born who are applicant nos. 2 and 3, in respect of whom the wife has made a request before learned court below for not awarding maintenance in favour of them as they are getting Rs. 15,000/- per month each from their father. The wife has stated that behaviour of the husband was not good and she was put to harassment and lastly she lived with him till 13.10.2014 in Gaya Bihar from where he was transferred to Nagpur. He left her in Bareilly saying that he would take her to Nagpur after making necessary arrangements. Thereafter, on 26.10.2014, the husband came along with his parents and announced his decision not to take her along with her children with him to Nagpur. Husband was not prepared to live with her and he sent an ex-parte divorce decree which was obtained by him on the basis of false and fake allegations. The wife has no means of livelihood whereas the husband is on a very good position in Indian Army and is drawing a salary of about Rs. 1,00,000/- per month and in addition to that he has several facilities in terms of subsidized fooding and travelling along with residence. He is liable to pay maintenance to her, therefore, Rs. 30,000/- be awarded in her favour as maintenance.

5. Husband has admitted marriage in his written statement with the applicant/opposite party no. 2 and birth of two daughters out of their wedlock. He has further stated that he is a permanent resident of Lucknow and his father Dr. Suresh Chand Gupta got retired from the post of C.M.O. Applicant after marriage came to his parents and he found that her behaviour with parents and his younger sister was very arrogant and cruel and she used to misbehave with them. He went with her to Goa for honeymoon but she continued insisting to come back to Bareilly and she also misbehaved with him. He was being mentally and physically harassed by his wife and even after the birth of two daughters, she used to quarrel with his family members and she made complaints to his superior officers. She is an educated women and has received education of B.Ed and M.B.A and she is working as a teacher in a school and earning Rs. 15,000/- per month and by tuition also she is earning and therefore, her income easily comes to Rs. 25,000/- per month, therefore, her application is liable to be rejected.

6. It appears from the pleadings of the parties that the marriage between the two is an admitted fact. It also appears that he has obtained divorce and at present the wife is living separately with her parents. It is also admitted fact that the husband is working on a very high post in Indian Army and it cannot

be doubted that he must be drawing a very handsome salary. So far as maintenance to the wife is concerned, it has been no where alleged by the husband that any maintenance is been provided by him to the wife. Wife is living with her parents, therefore, the financial ability of the husband to pay maintenance is established.

7. Only thing which has to be seen whether the wife has sufficient reason for living separately from her husband and whether she has her own income which is sufficient for her living and livelihood.

8. Once, it is admitted that the husband has divorced applicant/opposite party no. 2 (wife) and has entered into another marriage, it gives reasonable ground to the wife to live separately, her living separately with her parents is totally justified.

9. It is pertinent to mention that Section 125 Cr.P.C is a measure of social justice and it is intended to protect the wife and her children who has no means to maintain herself. It has been held in **Bhagwandutt Vs. Kamla Devi, AIR 1975 SC 83,** that while assessing the amount of maintenance under Section 125 Cr.P.C, the Magistrate is required to consider the standard of living and background of the wife along-with the status of her family. The needs and requirements of the wife should be in consonance with her own income, if any, and the earning of the husband and his commitment as husband. In this case, there is no dispute with regards to fact that the husband has sufficient means and income as he is highly posted in Indian Army. It is also pertinent to mention that object of Section 125 Cr.P.C is to prevent destitution in wife who may have been even divorced. The husband is under obligation to give maintenance to the divorced wife who by herself is not able to maintain herself. It is husband's moral obligation which he owes to the society in respect of his wife and children, so that they are not left beggared and to prevent destitution as without financial support she may be driven to a life of vagrancy, immorality and crime for her subsistence.

10. It has been alleged by the husband that the wife is working in school and her income is Rs. 25,000/- per month. This fact was to be proved by the husband. From the perusal of the impugned judgement, it appears that on the basis of evidence on record the learned court below found that the allegation that the wife is having income as a school teacher has not been proved by cogent evidence and in order to prove the same, no salary slip has been filed. He (husband) has relied on a photograph which appears to have been of a school, in which the wife's picture has been shown and on that basis the husband claims that his wife is a teacher in that particular school. Being a teacher in a school is one thing but she is a teacher on some payment as alleged by the husband is entirely a different thing. Only on the basis of picture of a school it cannot be established that she has her own income as a teacher as alleged by the husband. Merely because the wife is educated, it cannot be said that she is earning.

11. Husband has further relied on report of Pacific Detective Agency in which it has been mentioned that the wife is a teacher and is drawing Rs. 12,000/- per month but the detective who has submitted the report has not been examined in evidence. It is a report of a

private detective and by no means, it can be said that it is a document which is admissible in evidence without formal proof. Therefore, detective report could also not help the contention of the husband that the wife is a school teacher and is earning.

12. On the basis of above discussion, I find that in view of the status of the parties and the financial capacity of the husband, the wife has been awarded maintenance of Rs. 20,000/- per month which is by no means in higher side. It is personal responsibility of the husband to pay maintenance to the wife whether the marriage continues or dissolved. Therefore, I find no material irregularity or illegality in the impugned judgement nor there is any jurisdictional error. Revision has got no force and is liable to be dismissed.

13. Revision is dismissed accordingly.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2019

BEFORE
THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Revision No. 1463 of 2019

Puneet Gupta ...Revisionist
Versus
State of U.P. And Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri M.J. Akhtar, Sri V.M. Zaidi

Counsel for the Opposite Parties:
A.G.A., Sri Adesh Kumar.

A. Section 319 Cr.P.C.-trial court empowered to proceed against any person not shown as accused
The power envisaged under Section 319 of Cr.P.C. should be exercised based on evidence stronger than mere probability of his complicity against any person. (Para 16)

B. Indian Evidence Act- Section 65-B- admissibility of electronic record- highly risky to blindly rely

Chronological list of Cases Cited:-

1. 2014 (3) SCC 92 Hardeep Singh V State of Punjab

2. 2017 SCC, page 706 Brijendra Singh and other V State of Rajasthan

3. Criminal Appeal No. 1349 of 2018 arising out of S.L.P. (CRL.) No. 6392 of 2018 Labhuji Amratji and others Vs. State of Gujrat and other

4. Ciminal Appeal No. 456 of 2019 arising out of S.L.P. (Crl.) No. 208 of 2019 Periyasami and Ors. Vs. S. Nallasamy

5. 2019 LawSuit (SC) 818 Sugreev Kumar Vs. State of Punjab (E-10)

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Sri VM Zaidi, learned senior Advocate assisted by Sri MJ Akhtar for the revisionist, Sri Adesh Kumar, learned counsel for private opposite party, learned AGA and perused the record.

2. By means of the instant revisionist, the revisionist has targeted judgement and order dated 08.03.2019 passed by the II-Additional Session Judge/Special Judge (SC/ST Act), Meerut in S.T. No. 21 of 2018 (State v. Sonu and others), arising out of Crime No. 206 of 2018, under section 319 Cr.P.C. whereby the applicant Puneet Gupta s/o Harikishan Gupta and along with one Bharat Bhushan s/o Kailash Chand were summoned under sections 376-D IPC and 3(2)(V) of the Scheduled Castes and Scheduled Tribes

(Prevention of Atrocities) Act, P.S. Ganganagar, District Meerut.

3. Perusal of the record reveals that the genesis of the case ignites from the FIR lodged by none other but the victim herself, belonging to a depressed caste (Harijan) and Intermediate pass girl, aged about 18 years was in search of employment and later on she got employment in a big and well reputed business establishment known as M/s RT Motors/Jai Shree Marking, situated near Hapur Adda, Meerut on 05.07.2018, which was having business of sale and purchase of cars but on the very next date of her new appointment, one of her top hierarchies, claimed as "Boss", named Bharat Bhushan dropped her home by his car with the assurance that on the next date he will pick up from her residence. On 07.07.2018, the fateful day, around 12.00 to 1.30 hours, instead of taking her to the establishment, the accused Bharat Bhushan took her to a deserted place and there he ravished her modesty, thereafter, he invited his close friends namely; Punit Gupta (applicant) and Sonu Nayak, who also committed rape upon her one by one and Sonu Nayak made video clips of her with the threats that they will continue to do the same, otherwise aforesaid video would be made viral, if she informs anyone about it. FIR, dated 07.07.2018 at 21.30 hours was registered as Case Crime No. 206 of 2018, under the aforesaid offence at P.S. Ganganagar, District Meerut for the incident occurred on the same day at 14.00 hours. After lodging the aforesaid FIR, investigation of the case started rolling and on 07.07.2018 at about 11.10 P.M. she was produced for medico-legal examination before Dr. Shikha Tripathi, Medical Officer, CHC Jani Khurd (Panchli Khurd), Meerut wherein she stated before the aforesaid doctor, which is hereby extracted from the record:

''आज 7–7–18 लगभग 1.30 पी0एम0 पर भरतभूषण मुझे शनि मन्दिर गंगानगर से बहान से किसी अनजान जगह ले गया, वहॉ कमरे में मुझे बुलाया, वहॉ पहले से दो लड़के सोनू और विकी बैठे थे, थोड़ी देर में पुनीत भी आ गया आते ही उसने दरवाजा अंदर से बन्द किया, मैंने पूछा कि दरवाजा कन्ट क्यों किया, पुनीज और सोनू वीडियो बनाने लगे, भरत ने पहले मतेरे साथ गलत किाम किया, उसके बाद विक्की ने मेरे साथ गलत काम किया, फिर उन्होंने बोला कि अगर तुमने घर पर कुछ बताया तो तुम्हारी वीडियो घरवालों को भेज दूंगा, और पुनीत ने थप्पड़ मारा, उसके बाद भरत ने मुझे शनि मन्दिर, गंगानगर पर छोड़ दिया, घर आके मैंने बहन और मॉ को पूरी बात बात बताई फिर 6–6.30 बजे गंगानगर थाने गए।''

4. In the aforesaid statement, the alleged victim disclosed the name of the assailant has been referred as Bharat Bhushan, Puneet Gupta (claimed Bosses of the company), Sonu Tyagi (unknown) and Vicky (unknown). The doctor after conducting aforesaid medical examination opined that the alleged victim was having 'white discharge' and 'tenderness' over her 'vaginal area' though there was no sign of forcible sexual act at the time of the medical examination but sexual assault cannot be ruled out.

5. Thereafter, the police recorded statement under section 161 Cr.P.C. of the victim, which is annexed as annexure 9 to the affidavit, wherein she broadly reiterated the FIR version by giving vivid description of the incident specifically attributing specific role to the all the assailants, who ravished her modesty and snapped obscene pictures and shot videos. Thereafter, the alleged victim was put for

statement under section 164 Cr.P.C. on 23.07.2018 wherein she candidly stated that on 5th July, 2018 she joined in the show room of the company, referred herein above, and was working as a "Caller" therein. She further alleged, without mincing words, therein that the heinous of sexual assault upon her was committed by Bharat Bhushan, Puneet Gupta, Sonu Tyagi and one more person Vicky shot obscene video clips of her. Not only this, the alleged culprits committed unnatural sex by putting their male genitals in her mouth.

6. It is million dollars question and startling feature of the instant case that ignoring the text mentioned in the FIR, statement made before the doctor as well as the statements recorded under sections 161 and 164 Cr.P.C., by broadly corroborating the medical evidence, Sri Jitendra Kumar, Circle Officer, Sadar Dehat, District Meerut concluded the entire investigation, subtracting the involvement of accused persons namely Bharat Bhusan and Puneet Gupta (present revisionist) by relying upon the CCTV footage and the affidavits of the employees of their own company. Copy of the conclusion drawn by the aforesaid Circle Officer dated 14.08.2018, is annexed as annexure no. 4 to the affidavit, is self revealing which establishes that under the influence of these affluent and influential persons, who are claimed to be "Bosses" of the company and named as Bharat Bhushan and Puneet Gupta, have been conveniently won over the aforesaid Circle Officer, who after relying upon the above mentioned two documents, submitted the CLOSURE REPORT. Aggrieved by the closure report of the Investigation Officer, the informant filed application 31 Kha, dated 19.02.2018 against both the accused persons, Bharat Bhushan and Puneet Gupta who have been exonerated on the basis of the CCTV and affidavits filed by the employees of the company, who have certified the credentials as well as the characters of the aforesaid accused.

7. As the matter was triable by the Sessions court, it was committed to the court of sessions whereby the testimony of the alleged victim was recorded as P.W.-1 and her examination-in-chief has fully corroborated the allegation of gang rape committed upon her not only against Bharat Bhushan and Puneet Gupta but also against Sonu Tyagi and Vicky and having shot her porn film. She has stated in her examination-in-chief many more things, which would be reiteration of other things and thereafter, the application 31 Kha was allowed by II-Additional Session Judge/Special Judge (SC/ST Act), Meerut vide order dated 08.03.2019 and the same was challenged on the following grounds:

(a) case of false implications without any cogent evidence against the revisionist on the basis of which the order impugned was passed;

(b) there are three different versions of the alleged victim i.e., statements recorded under sections 161, 164 Cr.P.C. and her testimony as P.W.-1, which are contradictory to each other;

(c) the doctor has not given a definite opinion about rape by the victim;

(d) the CCTV footage installed in the office of the revisionist establishes his presence at the relevant of time;

(e) the evidence whether alleged victim was employed or worked in the firm or office of the revisionist or not;

(f) all the affidavits of the employees of Puneet Gupta, who unequivocally certified his character;

(g) the victim herself is an antagonist and not only this, the alleged victim and her entire family were earlier also indulged into such type of malpractices

(f) the affidavits filed by the co-villagers, annexed as annexure 6 to the petition, reveals that the entire family of the alleged victim has chequered family and they were also in a habit of such type of malpractices in the past.

8. On the aforesaid backdrop, learned counsel for the revisionist has tried to raise his castle of the arguments targeting the order impugned dated 08.03.2019.

9. This Court has carefully perused all the relevant documents. Submissions made by the rival parties in support of the contentions, it is trite that the provisions of section 319 Cr.P.C. are to achieve the objective that a real culprit should not get away unpunished by virtue of the provisions, the trial court is empowered to proceed against any person not shown as an accused, if it appears from evidence that such person has committed any offence for which is ought to be tried together with other accused persons. In the case of **Hardeep Singh v. State of Punjab [2014(3) SCC 92],** the constitutional bench of Apex Court has lucidly explained the objection and purpose behind te laudable provision of the aforesaid section, which are as follows:

(i) Section 319 Cr.P.C. springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319.

(ii) It is the duty of the Court to do justice by punishing the real culprit. Where any investigating agency for any reason does not array the real culprit as an accused, the court is not powerless in calling the said accused to face trial. The only question left is the satisfaction and degree of satisfaction of the court to exercise its power as contemplated in section 319 Cr.P.C.

10. Indeed, courts are the sole repository of justice and onerous duty is casted upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency.

11. In the instant case,the named accused persons namely, Bharat Bhushan and Puneet Gupta (the applicant), undoubtedly are the influential persons, who claimed them as "Bosses' of the establishment M/s RT Motors, having no dearth of money and resources, thus on this background of the case, the possibility to influence the investigation of the case cannot be ruled out. There is bundles of load of direct evidence, which are evident in the text of the FIR itself, victim's statements recorded under sections 161 and 164 Cr.P.C., coupled with the fact, medical treatment of the victim sufficiently indicating the involvement of these accused persons, including the applicant- Puneet Gupta. These vultures of flesh, mercilessly molested a girl of young age, shot her obscene videos for blackmailing and lastly in order to quench their lust, ravished her. But the obedient

Investigating Officer of the case moulded the entire case in favour of the applicant and his accomplice. The Investigating Officer of the case shockingly relied upon the affidavits of the employees, above whom the applicant ruled over as their Boss, certifying the respective characters of the accused persons and the so-called CCTV footage and eventually dropped the names of the amongst the array of the rest of the accused persons.

12. The power under section 319 Cr.P.C., though extraordinary and has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person/s might have committed the offence, there has to be strong and cogent evidence against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner. The attract the provision of section 319 Cr.P.C., it is necessary to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un-rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'.

13. On the principles of law laid down in the cases of **Brijendra Singh and other v. State of Rajasthan [2017 SCC, page 706]** followed in **Labhuji Amratji Thakor and others v. State of Gujarat and another decided on November 13, 2018 in Criminal Appeal No.1349 of 2018 arising out of SLP (CRL.) No.6392 /2018,** reiterated in the case of **Periyasami and Ors. Vs. S. Nallasamy [Criminal Appeal No. 456 of 2019 arising out of S.L.P (Crl.) No. 208 of 2019] decided on 14th March, 2019 and in the case of Sugreev Kumar v. State of Punjab [2019 LawSuit (SC) 818] decided on 15th March 2019** wherein Hon'ble the Apex Court has categorically held that mere disclosing the name of accused cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code.

14. Arriving home to the facts and circumstances of the instant case and keeping lien to the aforesaid guidelines laid down in the aforementioned cases, this Court finds that there is categorical and unequivocal allegation of outraging modesty of the informant, as mentioned in the FIR and her corroborating statements given at different stages (though admittedly with minor discrepancies), primarily attributes specific role to all the accused persons, including the revisionist. She has not budged an inch at any of the fora of her statements in the entire prosecution case, this Court is of the considered opinion that learned II-Additional Session Judge/Special Judge (SC/ST Act), Meerut has passed the

judgement and order dated 08.03.2019 in absolute consonance with the principles of law and no illegality/irregularity or perversity prevails therein while exercising his powers envisaged under section 319 Cr.P.C.

15. Much emphasis has been laid down by the learned counsel for the revisionist on the evidence of CCTV footage collected by the Investigating Officer during investigation, from the office of the revisionist, who happens to be the Boss of the establishment.

16. At this stage relying upon the evidence of the CCTV footage, without testing its authenticity is hit by section 65-B of the Indian Evidence Act, which speaks about its admissibility of the electronic record. It is highly risky to blindly rely upon the same. There is another aspect of the matter that subordinate employees of the establishment had given "character certificates" through their respective affidavits to the revisionist, which cannot be relied upon, if compared the same with the allegations made in the FIR and various statements given by the informant during investigation coupled with medical report of the doctor, which clearly indicates that the informant (victim) was subjected to mass molestation by all the accused persons, including the revisionist.

17. At the cost of repetition, this Court has no hitch in holding that the learned II-Additional Session Judge/Special Judge (SC/ST Act), Meerut while passing judgement and order dated 08.03.2019 has vividly disclosed, analyzed and critically examined of the aforesaid aspects on the issue and has recorded his satisfaction and he has held therein that there is enough material on record to try the applicant along with other co-accused persons to face trial in S.T. No. 21 of 2018 (State v. Sonu and others), arising out of Crime No. 206 of 2018, under sections 376-D IPC and 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, P.S. Ganganagar, District Meerut.

18. On the aforesaid score, the instant revision falls flat and is, accordingly, rejected.

19. However, if the revisionist has not been bailed out so far in the aforesaid trial and surrenders before the court concerned, applies for bail within a period of 30 days from the delivery of this order, the trial court is directed to given patient hearing to both the rival parties on the application for bail and pass appropriate, speaking and reasoned order in accordance with law, provided there is no other impediment in the case.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ- A No. 3240 OF 2002

Surya Prakash Mani Tripathi (Bhupendra Mani Tripathi) ...Petitioner
Versus
State Bank of India and Ors.
..Respondents

Counsel for the Petitioner:
Sri Anil Tiwari, Sri Harsh Gopal, Sri Jeevan Prakash Sharma, Sri Munna Kumar Singh, Sri Vinay Kumar Mishra

Counsel for the Respondents:
S.C., Sri Satish Kishore Kakkar.

A. "Scheme For Appointment on Compassionate Grounds For Dependents Of Deceased Employees/Employees Retired On Medical Grounds" - Clause 6(1) - Appointment on Compassionate grounds – Competent Authority has to examine financial condition of deceased employee and it is only if it is satisfied that without providing employment, family will not be able to meet the crisis, a job is to be offered to an eligible member of family who possesses required eligibility and qualifications

Petitioner's father, died in harness on 01.05.1998 - Bank has determined that family is not in penurious condition and declined to accept request of compassionate appointment of petitioner, Surya Prakash Mani Tripathi- During pendency of writ petition, petitioner Surya Prakash Mani Tripathi was substituted by his younger brother Bhoopendra Mani Tripathi. Family has already survived for 21 years, at this stage any direction for compassionate appointment will defeat the very objective of scheme of compassionate appointment, which is meant for providing immediate succor to deceased family for its survival and not providing employment by way of reservation on account of succession-Rule of compassionate appointment has an object to give relief against destitution and is not a provision to provide alternate employment or an appointment commensurate with the post held by the deceased employee. Writ petition dismissed.(Para 13,15,16,17,34,38)

Case law discussed/relied upon: -

1. General Manager (D & PB) and others Vs. Kunti Tiwary and another (2004) 7 SCC 271

2. Punjab National Bank and others Vs. Ashwani Kumar Taneja 2004 (7) SCC 265

3. State Bank of India Vs. Jaspal Kaur (2007) 9 SCC 571

4. In State Bank of India Vs. Ajay Kumar (Special Appeal No.14 of 2007)

5. Punjab National Bank Vs. Deepak Pandey (Special Appal No.867 of 2006)

6. Union of India Vs. Bhagwan 1995 (6) SCC 436,

7. Haryana State Electricity Board Vs. Naresh Tanwar, (1996) 8 SCC 23

8. In Managing Director, MMTC Ltd., New Delhi and Anr. Vs. Pramoda Dei Alias Nayak 1997 (11) SCC 390

9. Director of Education (Secondary) &Anr. Vs. Pushpendra Kumar &Ors. AIR 1998 SC 2230

10. State of U.P. &Ors. Vs. Paras Nath, AIR 1998 SC 2612

11. S. Mohan Vs. Government of Tamil Nadu and Anr. 1999 (I) LLJ 539

12. Sanjay Kumar Vs. The State of Bihar &Ors. AIR 2000 SC 2782

13. In Haryana State Electricity Board Vs. Krishna Devi JT 2002 (3) SC 485 - 2002 (10) SCC 246

14. Punjab National Bank &Ors. Vs. Ashwini Kumar Taneja AIR 2004 SC 4155

15. In National Hydroelectric Power Corporation &Anr. Vs. Nanak Chand &Anr. AIR 2005 SC 106

16. State of Jammu & Kashmir Vs. Sajad Ahmed AIR 2006 SC 2743

17. I.G. (Karmik) and Ors. v. Prahalad Mani Tripathi 2007 (6) SCC 162

18. Mumtaz Yunus Mulani Vs. State of Maharashtra & Ors, 2008 (11) SCC 384

19. M/s Eastern Coalfields Ltd. Vs. Anil Badyakar and others, (2009) 13 SCC 122- JT 2009 (6) SC 624

20. Santosh Kumar Dubey Vs. State of U.P. &Ors. 2009 (6) SCC 481

21. Union of India (UOI) &Anr. Vs. B. Kishore 2011(4) SCALE 308

22. Bhawani Prasad Sonkar Vs. Union of India and others (2011) 4 SCC 209

23. MGB Gramin Bank Vs. Chakrawarti Singh (2014) 13 SCC 583

24. Canara Bank and others Vs. M. Mahesh Kumar and others (2015) 7 SCC 412 (E-3)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Vinay Kumar Mishra, learned counsel for petitioner. None appeared on behalf of respondents.

2. The writ petition under Article 226 of Constitution of India has been filed against order dated 15.07.1999 issued by Chief Manager, State Bank of India, Zonal Officer, Deoria (hereinafter referred to as "Bank") declining to accept the request of compassionate appointment of petitioner, Surya Prakash Mani Tripathi, on an application submitted by petitioner's mother, Smt. Phoolmati Devi. During pendency of writ petition, an Amendment Application was filed stating that Surya Prakash Mani Tripathi was 27 years of age in 2002 when writ petition was filed, and now he is 43 years of age, and maintaining his family from his own income, therefore, for the purpose of compassionate appointment, petitioner Surya Prakash Mani Tripathi may be allowed to be substituted by his younger brother Bhoopendra Mani Tripathi. This Amendment Application was allowed vide Court's order dated 10.01.2019 and that is how, now petitioner Bhoopendra Mani Tripathi is before Court to press this writ petition claiming compassionate appointment.

3. Facts in brief, giving rise to the present writ petition, are that father of petitioner, Late Surendra Mani Tripathi was working as Assistant Cashier in Bank and died in harness on 01.05.1998 leaving behind his widow, mother, two sons and three unmarried daughters. Petitioner Bhoopendra Mani Tripathi, was aged about 11 years and three daughters were aged about 17, 15 and 13 years respectively. Petitioner's mother Smt. Phoolmati Devi filed an affidavit and submitted an application dated 10.10.1998 requesting for compassionate appointment to Surya Prakash Mani Tripathi, eldest son on compassionate ground.

4. It is not in dispute that compassionate appointment in Bank in 1998 was being governed by "Scheme For Appointment on Compassionate Grounds For Dependents Of Deceased Employees/Employees Retired On Medical Grounds" and for the purpose of determining "financial condition of the family", Clause 6(l) thereof provides as under:

"Financial condition of the family

Appointments in the public services are made strictly on the basis of open invitation of applications and merit. However, exceptions are made in favour of dependents of employees dying in harness and leaving their family in penury and without any means of livelihood. Determining the financial condition of the family is, therefore, an important criterion for deciding the proposals for compassionate appointment. The following factors should be taken into

account of determining the financial condition of the family:

i) family pension

ii) gratuity amount received

iii) employee's / employer's contribution to Provident Fund

iv) any compensation paid by the Bank or its Welfare fund

v) proceeds of LIC Policies and other investments of the deceased employee

vi) income of family from other sources

vii) income of other family members from employment, or otherwise.

viii) size of the family and liabilities, if any."

5. In the case in hand, from record it is evident that the gross salary of deceased at the time of death was Rs. 11,155.12/- and after deductions, carry home pay was Rs. 6435.72/-. Considering financial conditions of family of deceased, Bank noticed that family was paid Provident Fund of Rs. 2,29,852/-, Gratuity of Rs. 1,57,892/-, besides monthly pension and family also possess agricultural land of 1 acre, therefore, it was not in penurious conditions justifying compassionate appointment, hence, rejected application by impugned order.

6. In the counter affidavit filed by Bank, it is pointed out that deceased's family is being paid family pension of Rs. 5,421/- per month. Besides a sum of Rs. 4.8 lacs was payable towards Provident Fund, Gratuity, Leave Encashment etc and liability was around Rs. 1.28 lacs. Thus, after deduction of liability, a sum of Rs. 3.71 lacs was payable to the family. In these facts and circumstances, family was not found living in indigent conditions justifying compassionate appointment.

7. With respect to State Bank of India and some other Banks, I find that there are authorities, which have upheld denial of compassionate appointment when similar financial benefits were available to comparative number of family members of deceased employee.

8. **General Manager (D & PB) and others Vs. Kunti Tiwary and another (2004) 7 SCC 271** was a case arising in the matter of State Bank of India. The employee Kunti Tiwary died in-harness on 16.01.1998. Application for compassionate appointment was made when deceased's son was minor. He attained majority on 25.02.2000. Thereafter he applied for compassionate appointment. Financial condition of family was examined by Bank and it was found that deceased employee's family was paid Provident Fund of Rs.3,33,410/-, Gratuity of Rs.1,73,987/- and Leave Encashment of Rs. 1,01,344/-. The deceased employee had an investment of Rs. 66,000/- in share of State Bank of India, etc. Family was paid a pension of Rs.5,583/- per month. The application, therefore, was rejected on the ground that possessed assets and monthly income was such as not to hold family in penury condition. The family also consisted of a widow, two sons and a daughter. Rejection of application was challenged in Writ Court and a learned Single Judge dismissed writ petition. In intra Court appeal judgment of learned Single Judge was set aside and direction was issued to Bank to give compassionate appointment. This order came to be challenged in Supreme Court, who allowed appeal and

restored judgment of learned Single Judge.

9. In **Punjab National Bank and others Vs. Ashwani Kumar Taneja 2004 (7) SCC 265,** father of Ashwani Kumar Taneja, a Class IV employee, died in harness on 03.12.1999 leaving behind his mother, widow, two sons and one daughter. Request for compassionate appointment was declined by Bank, whereagainst writ petition was allowed by learned Single Judge of Rajasthan High Court and Letters Patent Appeal was dismissed by Division Bench. The High Court held that for considering application for compassionate appointment, amount paid towards gratuity, provident fund etc. cannot be looked into. The matter went in appeal to Supreme Court and it held that the said amount can be taken into consideration and judgment of High Court was reversed holding that benefit paid after death can be considered for judging financial hardship.

10. In **State Bank of India Vs. Jaspal Kaur (2007) 9 SCC 571,** again a matter relating to State Bank of India, one Sukhbir Inder Singh, husband of Jaspal Kaur died in harness on 01.08.1999 while working as Record Assistant. An application for compassionate appointment of widow was rejected by Bank. In writ petition filed by Jaspal Kaur, High Court directed Bank to reconsider the application, which was again declined. The matter again came to High Court, which took a view that retiral benefits of Rs.4,57,607/- paid to the family as terminal benefits cannot be said to be a sufficient amount to bring away family from financial hardship. Supreme Court found that family of deceased consisted of a widow, two daughters and a son. Terminal benefits were paid as Rs.4,57,607/- and monthly pension was Rs.2,055/- and held that in the above facts and circumstances denial of compassionate appointment on the ground that family was not in penurious condition was justified.

11. In **State Bank of India Vs. Ajay Kumar (Special Appeal No.14 of 2007),** decided on 21.11.2017 a Division Bench of this Court found that terminal benefits of Rs.3.79 lakhs, Rs.1 lakh from LIC policy and gross monthly income of Rs.4,000/- justify denial of compassionate appointment on the ground that family is not in penurious condition.

12. Similarly, in **Punjab National Bank Vs. Deepak Pandey (Special Appal No.867 of 2006),** decided on 21.11.2013, this Court found that family pension of Rs.4,807/- per month after death of deceased employee justify denial of compassionate appointment on the ground that family is not in penurious condition.

13. In the present case, petitioner's father, late Surendra Mani Tripathi, died in harness on 01.05.1998 leaving behind his widow, mother, two sons and three unmarried daughters. The Bank has determined financial condition of family of deceased and in para 19 of counter affidavit has stated that besides family pension of Rs. 5,421/- , amount of Rs. 3.71 lacs paid to family which if invested in Bank, would earn more than Rs. 3092/- per month and therefore, it cannot be said that family is in penurious condition.

14. Learned counsel for petitioner, at this stage, sought to argue that in the matter of some other employees,

compassionate appointment was provided hence same treatment be given to the petitioner's case also.

15. However, I find no force in the submission for the reason that this Court is also satisfied that in order to consider penurious condition, individual advantage, disadvantage, income and liability of family of deceased have to be taken into account and different conditions of different families will not be guiding factor.

16. Competent Authority has to examine financial condition of deceased employee and it is only if it is satisfied that without providing employment, family will not be able to meet the crisis, a job is to be offered to an eligible member of family. This is further subject to the condition that such person possess required eligibility and qualifications, etc. Considering the total funds and means available to petitioner's family and also law discussed above, I do not find any error in the decision of Bank in denying compassionate appointment to petitioner.

17. Even otherwise, petitioner's father died in May, 1998. Today we are in 2019. More than 21 years have passed. At this stage, it will not be appropriate on the part of this Court to exercise jurisdiction under Article 226 of Constitution with respect of relief of compassionate appointment to petitioner, inasmuch as, if family has already lived for 21 years, at this stage any direction for compassionate appointment will defeat the very objective of scheme of compassionate appointment, which is meant for providing immediate succor to deceased family for its survival and not providing employment by way of reservation on account of succession.

18. An appointment on compassionate basis claimed or directed after a long time has seriously been deprecated by Court in **Union of India Vs. Bhagwan 1995 (6) SCC 436, Haryana State Electricity Board Vs. Naresh Tanwar, (1996) 8 SCC 23.** In the later case, Court said:

"compassionate appointment ***cannot be granted after a long lapse of reasonable period*** *and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment,* ***is intended to meet the immediate financial problem*** *being suffered by the members of the family of the deceased employee. ..... the very object of appointment of dependent of deceased-employee who died in harness is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for years."*

(Emphasis added)

19. In **Managing Director, MMTC Ltd., New Delhi and Anr. Vs. Pramoda Dei Alias Nayak 1997 (11) SCC 390,** Court said:

"As pointed out by this Court, the object of compassionate appointment is to enable the penurious family of the deceased employee to tied over the sudden financial crises and not to provide employment and that ***mere death of an employee does not entitle his family to compassionate appointment.****"* (Emphasis added)

20. In **Director of Education (Secondary) &Anr. Vs. Pushpendra Kumar &Ors. AIR 1998 SC 2230,** Court said:

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood."

21. In **State of U.P. &Ors. Vs. Paras Nath, AIR 1998 SC 2612,** Court said:

"The purpose of providing employment to a dependent of a government servant dying in harness in preference to anybody else, is to mitigate the hardship caused to the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family, such appointments are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased government servant. ***None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case."***

(Emphasis added)

22. In **S. Mohan Vs. Government of Tamil Nadu and Anr. 1999 (I) LLJ 539,** Court said:

"The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the ***compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."***

(Emphasis added)

23. In **Sanjay Kumar Vs. The State of Bihar &Ors. AIR 2000 SC 2782** it was held:

"compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood"

24. In **Haryana State Electricity Board Vs. Krishna Devi JT 2002 (3) SC 485 = 2002 (10) SCC 246,** Court said:

"As the application for employment of her son on compassionate ground was made by the respondent ***after eight years of death of her husband, we are of the opinion that it was not to meet the immediate financial need of the family …."***

(Emphasis added)

25. In **Punjab National Bank &Ors. Vs. Ashwini Kumar Taneja AIR 2004 SC 4155,** court said:

"It is to be seen that the ***appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits.*** *Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crisis."* (Emphasis added)

26. In **National Hydroelectric Power Corporation &Anr. Vs. Nanak Chand &Anr. AIR 2005 SC 106,** Court said:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic

intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. ***The object is to enable the family to get over sudden financial crises."***

(Emphasis added)

27. In **State of Jammu & Kashmir Vs. Sajad Ahmed AIR 2006 SC 2743,** Court said:

"Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the set back. ***Once it is proved that in spite of death of bread earner, the family survived and substantial period is over,*** *there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution."*

(Emphasis added)

28. In **I.G. (Karmik) and Ors. v. Prahalad Mani Tripathi 2007 (6) SCC 162,** Court said:

"Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. ***When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner.*** *When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion."*

(Emphasis added)

29. In **Mumtaz Yunus Mulani Vs. State of Maharashtra & Ors, 2008 (11) SCC 384,** Court held that now a well settled principle of law is that appointment on compassionate ground is not a source of recruitment. The reason for making such a benevolent scheme by the State or public sector undertakings is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over sudden financial crises.

30. Following several earlier authorities, in **M/s Eastern Coalfields Ltd. Vs. Anil Badyakar and others, (2009) 13 SCC 122 = JT 2009 (6) SC 624,** Court said:

"The principles indicated above would give a clear indication that the ***compassionate appointment is not a vested right which can be exercised at any time in future.*** *The compassionate employment* ***cannot be claimed and offered after a lapse of time and after the crisis is over."***

(Emphasis added)

31. In **Santosh Kumar Dubey Vs. State of U.P. &Ors. 2009 (6) SCC 481,** Court said:

"The very concept of giving a compassionate appointment is to tide over the financial difficulties that is faced by the family of the deceased due to the

death of the earning member of the family. There is immediate loss of earning for which the family suffers financial hardship. The benefit is given so that the family can tide over such financial constraints. The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the family of the deceased who has died in harness. But this, however, cannot be another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in Government service."

32. Court considered that father of appellant **Santosh Kumar Dubey (supra)** became untraceable in 1981 and for about 18 years, family could survive and successfully faced and over came the financial difficulties. In these circumstances it further held:

"That being the position, in our considered opinion, this is not a fit case for exercise of our jurisdiction. ***This is also not a case where any direction could be issued for giving the appellant a compassionate appointment as the prevalent rules governing the subject do not permit us for issuing any such directions."***(Emphasis added)

33. The importance of penury and indigence of family of deceased employee and need to provide immediate assistance for compassionate appointment has been considered in **Union of India (UOI) &Anr. Vs. B. Kishore 2011(4) SCALE 308.** This is relevant to make the provisions for compassionate appointment valid and constitutional else the same would be violative of Articles 14 and 16 of the Constitution of India. Court said:

"If the ***element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be reservation in favour of the dependents of an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the Constitution."***

(Emphasis added)

34. It is thus clear that rule of compassionate appointment has an object to give relief against destitution. It is not a provision to provide alternate employment or an appointment commensurate with the post held by the deceased employee. It is not by way of giving similarly placed life to the dependents of the deceased.

35. In **Bhawani Prasad Sonkar Vs. Union of India and others (2011) 4 SCC 209,** Court said that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our Constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of Constitution of India. No other mode of appointment is permissible. Nevertheless, concept of

compassionate appointment has been recognized as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, scheme has to be strictly construed and confined only to the purpose it seeks to achieve.

36. In **MGB Gramin Bank Vs. Chakrawarti Singh (2014) 13 SCC 583,** Court has said that compassionate appointment cannot be granted as of right and application for compassionate appointment need be decided as expeditiously as possible. Compassionate appointment is not a vested right. Courts should not stretch the scheme for compassionate appointment by liberal interpretation on humanitarian grounds beyond permissible limits so as to allow compassionate appointment after a long time from the date of death. Either such appointments are made immediately or within a reasonable time of death and if appointment is not claimed for long time or made, it would be travesty of justice to compassionate appointment after a long time.

37. This has been followed in **Canara Bank and others Vs. M. Mahesh Kumar and others (2015) 7 SCC 412.** Court stressed upon aforesaid recent authorities that every appointment to public office must strictly adhere to the mandatory requirement of Articles 14 and 16 of Constitution of India. Compassionate appointment is an exception so as to provide employment to remove financial constraints suffered by bereft family of a government servant who die in harness and family has lost its bread earner. However, it was held that mere death of a government employee in harness does not entitle the family to claim compassionate appointment.

38. In the entirety of the facts of this case and discussion made above, I do not find any manifest error in the decision taken by Bank denying compassionate appointment to petitioner.

39. Dismissed.

40. Interim order, if any, stands vacated.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Writ- A No. 9868 of 2019

Anurudh Kumar &Ors. ...Petitioners
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioners:
Sri Puneet Bhadauria

Counsel for the Respondents:
C.S.C.

A. The Constitution of India Articles 14, 19 and 21 – Vires and Validity of Rule 222(D) of the U.P. Motor Vehicles Rules, 1998 as amended by the 26th Amendment - Direction for issuance of fitness certificate and permit in respect of the petitioners vehicles beyond 10 years up to 15 years as has been provided for the educational institutions bus/vehicle.

The legislature in its wisdom has categorised the vehicles into two categories i.e. the educational/institutional vehicles and the other private/commercial or contract vehicles. This categorisation is for the reason that these two categories of vehicle form a separate class and cannot be equated. The use and running of educational institutional vehicles is very limited whereas other private/commercial or contract vehicles have a very wide and expensive use resulting in their speedy wear and tear. Therefore, the life of the two categories of vehicle has been provided differently.
(Para 6)

B. Reasonable Classification - The classification of the two categories of vehicles is a reasonable and valid classification.

Accordingly, there is no arbitrariness or discrimination in the period fixed for the running of the aforesaid two categories of vehicles. The vehicles owned and used by the petitioners are not the vehicles owned by the college/school or any educational institutions and, therefore, mere hiring of said vehicles by the educational institutions would not bring them within the purview of educational institutional buses as defined under the Act. Writ Petitions dismissed. (Para 7 and 8) (E-3)

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Saral Srivastava, J.)

1. Heard Sri Punet Bhadauria, learned counsel for the petitioners and learned Standing Counsel for the respondents-State.

2. The petitioners who are drivers and probably the owners of buses are running them on contract basis for the purposes of carrying school children to and fro. According to them, their buses are being used solely for school purposes.

3. The petitioners are challenging the validity of Rule 222(D) of the U.P. Motor Vehicles Rules, 1998 as amended by the 26th Amendment and wants it to be declared ultra vires to Articles 14, 19 and 21 of the Constitution of India. At the same time, they are seeking a direction that they should be issued fitness certificate and permit in respect of their vehicles beyond 10 years up to 15 years as has been provided for the educational institutions bus/vehicle.

4. It appears that for the educational institutions buses/vehicles, the rule provides that they can be used on road for 15 years from the date of their initial registration under a valid permit and fitness certificate whereas other diesel/CNG private bus/contract vehicles can only be used for a period of ten years from the date of initial registration.

5. Accordingly, the submission is that the period of use of the vehicles for 15 years and 10 years from the date of initial registration vis-a-vis the educational institutional buses and the other buses is arbitrary and discriminatory in nature.

6. The legislature in its wisdom has categorised the vehicles into two categories i.e. the educational/institutional vehicles and the other private/commercial or contract vehicles. This categorisation is for the reason that these two categories of vehicle form a separate class and cannot be equated. The use and running of educational institutional vehicles is very limited whereas other private/commercial or contract vehicles have a very wide and expensive use resulting in their speedy wear and tear. Therefore, the life of the two categories of vehicle has been provided differently.

7. In view of above, the classification of the two categories of

vehicles is a reasonable and valid classification. Accordingly, we do not find that there is any arbitrariness or discrimination in the period fixed for the running of the aforesaid two categories of vehicles.

8. The submission that the vehicles of the petitioners are being solely used under a contract for school purposes and as such are not different from educational institution vehicles/buses cannot be accepted for the simple reason that the educational institutional bus has been defined under Section 2 (11) of the Motor Vehicles Act which means an omnibus, which is owned by college, school or other educational institutions and used solely for the purpose of transporting students or the staff of the educational institution in connection with any of its activities. The vehicles owned and used by the petitioners are not the vehicles owned by the college/school or any educational institutions and, therefore, mere hiring of said vehicles by the educational institutions would not bring them within the purview of educational institutional buses as defined under the Act.

9. In view of aforesaid facts and circumstances, we are of the opinion that the writ petition is devoid of merit and is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2019

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 47122 of 2016

Raj Kishori Devi ...Petitioner

Versus

State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Singh, Sri Aisharya Kumar Singh

Counsel for the Respondents:
C.S.C.

A. The Constitution of India Article 226- U.P. Government Servant (Discipline and Appeal) Rules, 1999 and Article 351 A of the Civil Services Regulations - punishment provided under the Disciplinary Rules cannot be imposed upon the family members of the government servant since an incumbent ceases to be a government servant upon his death hence no penalty under the rules could have been imposed upon him.

The deceased/employee was placed under suspension two days prior to his retirement and thereafter the employee died during pendency of the disciplinary proceedings - the alleged loss caused to the government, which was subject matter of departmental enquiry, was directed to be recovered from the heirs of the deceased employee from his post retiral dues.

Held:- that By the impugned order, recovery was sought to be made from the post retiral dues from the legal heir for the misdemeanour and misconduct of the delinquent employee, which was not permissible in view of Rule 54-B of the Fundamental Rules.

Writ Petition Allowed.

Case Law discussed/relied upon:-

1. Hirabai BhikAnr.ao Deshmukh v. State of Maharashtra and others, (1985) ILLJ 469 Bom

2. Neeraj v. Air India Ltd.,2017 XAD (Delhi) 245

3. Rajeshwari Devi v. State of U.P. and others, 2011(2) ADJ 643 (E-3)

(Delivered by Hon'ble Suneet Kumar, J.)

1. Civil Misc. Substitution Application No. 382501 of 2016

1. Heard the learned counsel for the parties.

2. The application to substitute the legal heir is allowed.

Necessary substitution to be carried out during course of the day.

2. Order on Memo of Petition.

3. Heard the learned counsel for the parties.

4. Petitioner is the wife of the deceased/government employee, namely, Baidya Nath Pandey, a Junior Clerk with the U.P. Food and Civil Supplies Department. He was subsequently regularized on the post of Marketing Inspector by the Regional Food Controller Varanasi, Region Varanasi. Service conditions of the deceased/employee is governed by the U.P. Foods and Civil Supplies (Marketing Branch) Subordinate Service Rules, 1980. U.P. Government Servant (Discipline and Appeal) Rules, 1999 and Civil Services Regulation govern the departmental enquiry against the government servant. The deceased/employee retired on attaining the age of superannuation on 31 January 2000, however, two days prior to retirement, he was placed under suspension vide order dated 29 January 2000, by the fourth respondent-Regional Food Controller Allahabad, Region Allahabad. The employee died on 15 February 2001 during pendency of the disciplinary proceeding initiated in terms of Article 351A of the Civil Service Regulations. During pendency of the writ petition, petitioner died on 8 November 2016, thereafter, the legal heir (son) was substituted.

5. The short question involved in the instant writ petition is as to whether the alleged loss caused to the government which was subject matter of departmental enquiry can be recovered from the heirs of the deceased employee from the post retiral dues.

6. The facts, inter se, parties are not in dispute. It is admitted by the respondent that the deceased/employee was a government servant and came to be placed under suspension pending enquiry two days prior of his retirement on the allegation of causing loss of Rs.4,60,243/- to the government. It is admitted that as per the provisions of Article 351A, an enquiry in respect of a retired government employee is deemed to have commenced/instituted if the officer is placed under suspension from an earlier date prior to his retirement. The charge sheet levelling four charges was issued to the deceased/employee after retirement. He did not respond and before he could submit his reply, he died, consequently, by the orders of the third respondent-Commissioner, Foods and Civil Supplies, Lucknow, enquiry was dropped.

7. Petitioner by the instant writ petition seeks the following reliefs:

(i) Issue a writ order or direction in the nature certiorari quashing the impugned order dated 17.6.2016 in respect of deduction of amount to trhe tune of Rs. 1,50,939.00 from pension, Rs. 1,36,068.00 from gratuity and Rs. 1,19,236.00 from the commutation amount. Total amount comes to the tune of Rs. 4,06,243.00 from the post retirement benefit of the late husband of

petitioner, on account of proposal/recommendation made by the Regional Food Controller Allahabad Region Allahabad on 18.12.2015 (Annexure no 9 to the writ petition).

(ii) Issue a writ order or direction in the nature of mandamus directing the respondents to release the amount of Rs. 4,06,243.00 which was illegally deducted by the pension, Gratuity and commutation of the post retirement benefit of late husband of petitioner vide letter dated 17.6.2016 along with 12% interest thereof as well as interest @ 12% on the late payment of paying the Family pension vide order dated 13.7.2016 for the period December 2000 to May 2016 a sum of Rs. 8,44,988/ forthwith.

8. It is not disputed by the respondents that before the enquiry could be concluded the employee died. The departmental enquiry did not proceed beyond the issue of the charge-sheet. This factual position is reflected from the averments of the respondents made in the counter affidavit.

9. Paragraphs-4, 7 & 8 of the counter affidavit is extracted:

4. That the contents of paragraph 3 of the writ petition are not admitted and in reply thereto, it is most respectfully submitted that the amount of Rs. 4,06,243/- deducted from post retiral dues of husband of the petitioner, namely, Late V.N. Pandey, is perfectly just and in accordance with law. It is submitted that during service tenure of husband of the petitioner under departmental proceedings, government dues of Rs. 4,04,863 against the husband of the petitioner, has been informed by the Regional Food Controller, Allahabad. Similarly government dues of Rs. 1380/- as against the husband of the petitioner were also informed by the Regional Food Controller, Varanasi. Therefore, total government dues of Rs. 4,06,243/- against the petitioner as has been informed by the authorities concerned, was rightly deducted from the post retiral dues of husband of the petitioner pursuant to the order dated 22.1.2015 passed by the Food Commissioner, which is perfectly just and legal and is in the interest of public money.

7. That the contents of paragraph 11 of the writ petition are baseless hence denied and in reply thereto it is submitted that after the retirement of the husband of the petitioner, due to pendency of departmental proceedings, he was granted provisional pension under the order of Regional Food Controller, Allahabad dated 7.12.2000. It is submitted that due to certain irregularities committed by the husband of the petitioner, a departmental proceeding was instituted against him which remained pending due to non-cooperative attitude of husband of the petitioner as in his case, an Enquiry Officer was appointed by the Food Commissioner who proceeded with the enquiry and issued charge sheet against the petitioner which was duly received by husband of the petitioner Shri Pandey on 28.7.2000 but the same was not replied by him only with a view to linger onthe matter.

8. That the contents of paragraphs 12 to 15 of the writ petition are not admitted and in reply thereto, it is most respectfully submitted that due to some serious irregularities committee by husband of the petitioner viz. disobedience of the orders of the authorities concerned, mis-appropriation

of huge quantity of government foodgrains etc., he was placed under suspension by means of an order dated 29.1.2000 passed by the Regional Food Controller, Allahabad during the contemplation of departmental enquiry and said order of suspension was also communicated to the Food Commissioner. The Food Commissioner by his order dated 4.7.2000 appointed Regional Food Controller, Kanpur Region as Enquiry Officer. The husband of the petitioner was not cooperating in the said enquiry rather he has filed a writ petition No. 20406 of 2000 in this Hon'ble Court in which an order was passed on 2.5.2000 for taking appropriate decision on the representation of the petitioner, in compliance of which the Food Commissioner scrutinized the matter in detail and passed the order dated 7.2.2007 deciding the claim and representation of petitioner's husband dated 15.10.2000 by which Shri Pandey was directed to file reply of the charge sheet within 15 days and the Enquiry Officer was also directed to complete the enquiry and send the enquiry report to the office of Food Commissioner within next 15 days, in pursuance of which, the Regional Food Controller, Kanpur Region, by his letter dated 16.3.2002 has informed that Shri B.N. Pandey, the husband of the petitioner already died on 15.2.2001 and he has not replied the approved charge sheet issued against him. Thereafter, it appears that due to non-payment post retiral dues of late Pandey, the petitioner, the wife of deceased employee filed writ petition No. 43664 of 2007 in this Hon'ble Court in which an order was passed on 13.9.2007 directing therein to complete enquiry within time, in pursuance of which, the Regional Food Controller, Allahabad Region, Allahabad by his letter dated 31.10.2007 followed by another reminder letter dated 23.5.2014, made a request to the Enquiry Officer/Regional Food Controller, Kanpur Region, Kanpur to complete the enquiry anearly date and send the enquiry report, in response to which the Regional Food Controller, Kanpur Region by his letter dated 3.6.2014 has informed that the husband of the petitioner Shri pandey already died on 15.2.2001 and the charge sheet related to present matter in dispute, was duly served upon which but the same was not replied by him, therefore, now no action was required to be taken at his level. It is submitted that on the basis of aforesaid report of Regional Food Controller, Kanpur Region, the department proceeding instituted against the husband of the petitioner, was dropped under the order passed by the Food Commissioner by which it was also directed that if any financial loss has been caused by the husband of the petitioner, the said amount be adjusted from his post retiral dues, in pursuance of which government loss of Rs. 4,06,243/- caused by Shri Pandey, has been informed by the Regional Food Controller, Allahabad/Varanasi Region, which has been adjusted/deducted from the post retiral dues of Shri Pandey and rest of amount related to post retiral dues has been paid to the petitioner being wife of late Pandey.

10. In the backdrop of the averments, it is urged by learned counsel for the petitioner that recovery of the alleged loss of government dues, which was subject matter of the disciplinary enquiry, could not have been recovered from the post retiral dues of the deceased/employee as the departmental inquiry abated on the death of the employee. It is not in dispute that the inquiry was not

concluded before his death. Petitioner is, therefore, entitled to the sum recovered along with interest thereon.

11. Once a person came to an end by reason of death, the provisions for Fundamental Rule 54-B Sub-Rule (2) states that notwithstanding anything contained in Rule 53, where a government servant under suspension dies before the disciplinary proceedings are concluded, the period between the date of suspension and the date of death has to be treated as duty for all purposes and the family of such civil servant is required to be paid full allowances for that period subject to adjustment in respect of subsistence allowance already paid. Fundamental Rule 54-B of Sub-Rule (2) is extracted:

"Notwithstanding anything contained in rule 53, where as Government servant under suspension dies before the disciplinary or court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid."

12. In similar facts, the Bombay High Court in **Hirabai BhikAnr.ao Deshmukh v. State of Maharashtra and others**1, upon considering the rule applicable to government servant in Maharashtra, which is pari materia with Rule 54-B of the Fundamental Rule, held as follows:

"The provisions with regard to dismissal, removal and suspension of the civil servant do not permit holding of any further enquiry into the conduct of such a civil servant after hid death. Such proceedings are intended to impose departmental penalty and would abate by reason of the death of civil servant. The purpose of proceedings is to impose penalty, if misconduct is established against the civil servant. That can only be achieved if the civil servant continues to be in service. Upon broader view the proceedings are quasi-criminal in the sense it can result in fault finding and further imposition of penalty. The character of such proceedings has to be treated as quasi-judicial for this purpose. In the light of the character of the proceedings and the nature of penalty like dismissal or removal, or any other penalties, minor or major, it has nexus to the contract of service. Therefore, if the person who has undertaken that contract is not available, it should follow that no proceedings can continue. Thus when the proceedings are quite personal in relation to such a contact of service, the same should terminate upon death of the delinquent. By reason of death, such proceedings would terminate and abate. We think that such a result is also inferable from the provisions of Rule 152-B of the Bombay Civil Service Rules."

13. In a case where after issuance of charge sheet to the delinquent employee, enquiry officer upon enquiry submitted the enquiry report holding the employee guilty of the charges levelled against him but unfortunately he expired before any decision could be taken by the Disciplinary Authority on the enquiry report. In other words, before the enquiry report could be acted upon by the Disciplinary Authority, the employee expired. The Delhi High Court held that it is settled law that disciplinary proceedings culminate with the issuance of final order by the Disciplinary

Authority. Since the authority could not pass final order, the enquiry would stand abated and the employer is precluded from making any recovery from the retiral dues of the deceased/employee.

(Ref: Neeraj v. Air India Ltd.2)

14. Learned Single Judge of this Court in Rajeshwari Devi v. State of U.P. and others3, in the similar facts, held as follows:

"Holding of departmental enquiry and imposition of punishment contemplates a pre-requisite condition that the employee concerned, who is to be proceeded against and is to be punished, is continuing an employee, meaning thereby is alive. As soon as a person dies, he breaks all his connection with the worldly affairs. It cannot be said that the chain of employment would still continue to enable employer to pass an order, punitive in nature, against the dead employee..... all the punishments contemplated under the rules are such which can be imposed on a person who is still continuing to be an employee."

15. It follows that punishment provided under the Disciplinary Rules can be imposed upon the government servant and not on the family member of the government servant. As soon as an incumbent ceases to be a government servant upon death, no penalty under the rules could have been imposed upon him. That being so, the question of passing an order, which may have the effect of punishing legal heirs of the deceased employee would not arise. In the facts of the instant case, disciplinary proceeding was initiated against the employee immediately before his retirement and before the disciplinary enquiry could conclude he died. The disciplinary enquiry, thereafter, could not have been proceeded under Section 351A of the Civil Service Regulations, accordingly, the competent authority dropped the enquiry. By the impugned order, recovery was sought to be made from the post retiral dues from the legal heir for the misdemeanour and misconduct of the delinquent employee, which was not permissible in view of Rule 54-B of the Fundamental Rules.

16. Learned standing counsel, in rebuttal, does not dispute the fact that the enquiry was dropped as the employee died and the enquiry could not be concluded before death of the employee. In the circumstances, no recovery could have been made from the post retiral dues without a finding being recorded against the deceased/employee under the Rules that he was responsible for having caused loss to the government.

17. The order dated 17 June 2016 passed by the second respondent-Finance Controller and Chief Accounts Officer, Foods and Civil Supplies, Lucknow, is unsustainable, accordingly, set aside and quashed.

18. The recovered sum of the post retiral dues shall be released to the petitioner by the second respondent-Finance Controller and Chief Accounts Officer, Foods and Civil Supplies, Lucknow, within two months from the date of filing of certified copy of this order along with interest @ 7% per annum on the sum from the date of recovery.

19. The writ petition stands allowed.

20. No Cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2019

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 30661 of 2007

Lakhan Singh ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Bhushan, Sri Adarsh Bhushan, Miss Rashmi Tripathi, Sri Amit Srivastava

Counsel for the Respondents:
C.S.C., Sri P.C. Shukla

A. Constitution of India Article 226-Article 311 of the Constitution - U.P. Government Servant (Discipline and Appeal) Rules, 1991-Termination-directly without following the procedure as provided under Rule 7 of the Rules 1991. No enquiry contemplated nor charges framed - major penalty of termination imposed straight away was not permissible under the Rules.
The services of the petitioner came to be terminated by the impugned order, without conducting any inquiry or framing any charges, for the reason that the petitioner had not reported at the place of posting/attachment at Mainpuri. (Para 7,13)

B. Provisions of rule 7 and 9 of the Rules, for imposition of major penalty are mandatory. Where the statute provides to do a thing in a particular manner that thing has to be done in that manner. (Para 12)

C. Even if it is a question of automatic termination of service for being continuously absent over a period of five years, Article 311 applies to such cases where the authority chooses to terminate the services of the employer. Impugned order stands vitiated and hence quashed, Petitioner entitled for his post-retiral dues along with 7% interest. (Para 18,19,20 and 21)

Case law relied upon/discussed: -
1. Smt. Parmi Maurya vs. State of U.P. and others, (2014) 2 UPLBEC 1060

2. Union of India vs. K.V. Jankiraman, AIR 1991 SC 2010

3. Union of India V. Anil Kumar Sarkar 2013 (4) SCC161

4. State of Andhra Pradesh v. C.H. Gandhi, 2013 (5) SCC 111

5. Mathura Prasad v. Union of India and others,(2007) 1 SCC (L&S) 292

6. Dr. Subhash Chandra Gupta v. State of U.P. & ors, 2012(1) ESC 279 (ALL) (DB)

7. Jeewanlal (1929) Ltd, Calcutta v. Its Workmen, AIR 1961 SC 1567

8. Jai Shankar Vs. State of Rajsthan, AIR SC 492

9. Deokinandan Prasad Vs. State of Bihar, AIR 1971 SC 1409

10. B.N. Tripathi Vs. State of U.P, AIR 1971 ALL 346 (E-3)

(Delivered by Hon'ble Suneet Kumar, J.)

1. Heard Sri Anil Bhushan, Senior Counsel assisted by Sri Amit Srivastava, learned counsel for the petitioners and learned Standing Counsel for the State-respondents.

2. Petitioner came to be appointed Stenographer in 1982. By the instant writ petition, petitioner is assailing the order of termination dated 14 May 2007, passed by the fourth respondent, Executive Engineer, Minor Irrigation Division, District Firozabad. It is noted in the

impugned order that petitioner vide order dated 18 November 2006, came to be attached to the office of Assistant Engineer, Mainpuri, and was relieved on 9 January 2007 for the place of posting/attachment. Petitioner neither reported at Mainpuri nor did he furnish any application for his absence. It appears that the petitioner was engaged in the electioneering of his wife who was contesting from Samta Party, consequently, the fourth respondent terminated the services of the petitioner.

3. Learned counsel for the petitioner makes two fold submission: (i) that the petitioner being a permanent government employee could not have been terminated by order simpliciter; (ii) provisions of U.P. Government Servant (Discipline and Appeal) Rules, 19991, was not followed; (iii) the principle of abandonment of service enshrined in Fundamental Rule 18 is not applicable in the instant case.

4. Learned Standing Counsel submits that (i) the petitioner abandoned his service, consequently, the service of the petitioner came to be terminated; (ii) the procedure under Rules 1999, was not required to be followed.

5. Rival submissions fall for consideration.

6. Facts, inter se, parties are not in dispute.

7. It is admitted by the respondents that the petitioner was permanent employee of the State Government and the provisions of Article 311 of the Constitution is applicable. The services of the petitioner came to be dispensed with by the impugned order for the reason that the petitioner had not reported at the place of posting/attachment at Mainpuri. Admittedly, the procedure prescribed under Rule 7 of Rules, 1999 was not followed while terminating the services of the petitioner. The services of the petitioner was terminated without framing the charges disclosing the imputation of the allegations against him. Rule 7 of Rules, 1999, reads thus:

"7. Procedure for imposing major penalties. - Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner :

(i) The disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority :

Provided that where the appointing authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary; as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than

15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, alongwith the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation :

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence :

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority

having regard to the circumstances of the case so permits :

Provided that this rule shall not apply in following cases :

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

8. The Division Bench of this Court in **Smt. Parmi Maurya vs. State of U.P. and others** held that the provisions of Rule 7 of the U.P. Government Servant (Discipline and Appeal) Rules 1999 is mandatory and it is obligatory for the employer to frame charge/conduct disciplinary enquiry by applying the principles of natural justice and prove the allegations, without adopting such procedure order passed terminating the delinquent employee is illegal. Paragraph 7 is as follows:-

"7. On these facts, the learned Single Judge, in our view, was clearly in error in arrogating to the Court the task of determining whether the certificate and mark sheets submitted by the appellant were genuine or otherwise. This, with respect, was no part of the jurisdiction of the writ Court under Article 226 of the Constitution. When a substantive charge of misconduct is levied against an employee of the State, the misconduct has to be proved in the course of a disciplinary inquiry. This is not one of those cases where a departmental inquiry was dispensed with or that the ground for dispensing with such an inquiry was made out. The U.P. Government Servants (Discipline and Appeal) Rules, 1999 lays down a detailed procedure in Rule 7 for imposing a major penalty. Admittedly, no procedure of that kind was followed since no disciplinary inquiry was convened or held."

9. Rule 2(d) defines departmental enquiry and means "departmental inquiry" under Rule 7 of the rules. Rule 7 provides the procedure for imposing major penalty which states that before imposing major penalty an enquiry shall be held in the manner provided in the rule. Sub-rule (ii) provides the fact constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges.

10. The Supreme Court in **Union of India vs. K.V. Jankiraman, Union of India V. Anil Kumar Sarkar4 and State of Andhra Pradesh v. C.H. Gandhi**, held that the enquiry commences from the date of issue of charge-sheet. Framing of the charge-sheet is the first step taken for holding enquiry into the allegations on the decision taken to initiate disciplinary proceedings. Service of charge-sheet on the Government servant follows decision to initiate disciplinary proceedings and it does not precede and coincide with that decision. (Vide Delhi Development Authority v. H.C. Khurana6).

11. The Supreme Court in **Mathura Prasad v. Union of India and others**7, held that when an employee is sought to be deprived of his livelihood for alleged misconduct,

the procedure laid down under the rules are required to be strictly complied with:

"When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedure laid down under the sub-rules are required to be strictly followed: It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in the manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact, for sufficient reasons may attract the principles of judicial review."

12. The Division Bench of this Court in **Dr. Subhash Chandra Gupta v. State of U.P. and others8** while dealing with the provision of rule 7 and 9 of the Rules, held that the procedure for imposition of major penalty is mandatory and where the statute provides to do a thing in a particular manner that thing has to be done in that manner. Paras 15 and 16 is as follows:-

"15. It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgment of the Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541.

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667 (All)(DB), held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceedings including the order of punishment has observed as under:

"10.....Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P. Cooperative Spinning Mills and others, 2001(2) UPLBEC 1475 and Laturi Singh v. U.P. Public Service Trinunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

13. Applying the law, stated herein above, on the facts of the case at hand, it is admitted by the respondents that the petitioner was terminated directly without following the procedure as provided under rule 7 of the Rules. Enquiry against the petitioner was never contemplated nor charges was framed, major penalty of termination was imposed straight away which was not permissible under the Rules.

14. It is not a case of abandonment of service in terms of Fundamental Rule 18 as is being urged by the learned counsel for the respondents. Fundamental Rule 18 reads thus:

"18. Unless the Government, in view of the special circumstances of the case, shall otherwise determine, after five years' continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, a government servant ceases to be in Government employ."

15. It is settled law that a Government servant cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be misconduct but when absence is for a very long period, it may amount to voluntarily abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.

16. In **Jeewanlal (1929) Ltd, Calcutta v. Its Workmen9**, the Apex Court held:

".....if an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time that an inference may reasonably be drawn from such absence that by his absence he has abandoned service, then such long unauthorised absence may legitimately be held to cast a break in continuity of service..... We would like to make it clear that..... there would be class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."

17. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action of the employee and the employer has no role in it.

18. The discharge from service of an individual by way of punishment amounts to removal from service and the constitutional protection cannot be taken away in any manner without affording opportunity and show cause to the incumbent. Even if it is a question of automatic termination of service for being continuously absent over a period of five years, Article 311 applies to such cases where the authority chooses to terminate the services of the employer. (Refer: **Jai Shankar Vs. State of Rajsthan10; Deokinandan Prasad Vs. State of Bihar11 and B.N. Tripathi Vs. State of U.P12**)

19. In the facts of the case in hand, Fundamental Right 18 would not apply. It is not a case of unilateral abandonment of service. Petitioner admittedly came to be terminated for misconduct i.e. unauthorized absence without following the prescribed statutory procedure. The impugned order stands vitiated.

20. During the pendency of the writ petition, petitioner retired on 31 December 2016 on attaining the age of superannuation. It is informed by the respective counsels that the impugned order of termination came to be stayed by

this Court on 20 November 2007. Petitioner pursuant thereof, continued in service, however, has not been paid post retiral dues due to the pendency of the instant writ petition.

21. Having due regard to the facts and circumstances of the case, the impugned order dated 14 May 2007, passed by the fourth respondent is set aside and quashed. The writ petition is allowed. Petitioner is entitled to post retiral benefits, to be released by the fourth respondent within three months from the date of filing of certified copy of this order, failing which, petitioner shall be entitled to interest @ 7% on the entire amount from the due date.

22. No cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 3288 of 2017

Chandra Kali ...Petitioner
Versus
The State of U.P.&Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Prasad Mishra, Sri Santosh Kumar Upadhyay, Sri Vinod Kumar Upadhyay

Counsel for the Respondents:
C.S.C., Sri Mahadeo Singh Chandel, Sri V.S. Chauhan

A. Hindu Marriage Act, 1956 - Civil Service Regulations- U.P. Retirement Benefit Rules, 1961- U.P. Government Servant Conduct Rules, 1956 – The second wife, not being a member of the family, is not eligible to family pension, as long as, the first wife survives. Second marriage with the eighth respondent after the commencement of the Hindu Marriage Act, was void and a nullity in the eye of law.
Second wife would have no right of being a legally wedded wife and would not fall within the definition of "family' of the employee. The sixth and seventh respondent being nephews of the deceased employee are also not family of the employee within the definition of "family' under the Rules, 1961. Release of family pension to the first wife of deceased employee refused due to pending litigations between the petitioner and nephews and second wife of the deceased employee. (Para 20,24,25,26,27)

Writ Petition allowed.

Case Law discussed/relied upon:-
1. Nutan Kumar versus IInd Additional District Judge, Banda and others, AIR 1994 ALL 298

2. Shubham Shukla and others vs. State of U.P.) 2018 (8) ADJ 709

3. Shakuntala Devi (Smt.) Versus Executive Engineer, Electricity Transmission Ist U.P. Electricity Board, Allahabad and another, (2001) 1 UPLBEC 869

4. Rameshwari Devi Versus State of Bihar and others, 2000(1) ESC 577 (SC)

5. Manno Singh vs. State of U.P. and others, 2014 (9) ADJ 701 (E-3)

(Delivered by Hon'ble Suneet Kumar, J.)

1. Heard Sri Vinod Kumar Upadhyay, learned counsel for the petitioner, learned standing counsel for the State-respondents, Sri V.S. Chauhan, learned counsel appearing for the sixth, seventh and eighth respondent.

2. The husband of the petitioner, Sri Baijnath Gupta was appointed Assistant Teacher in an Intermediate Institution in

1972, he retired on 30 June 2015 on attaining the age of superannuation. He, however, died on 26 November 2015, leaving behind his sole legal heir i.e. petitioner. It appears that a dispute arose between the petitioner and other claimants i.e. sixth, seventh and eighth respondent claiming right and title to the movable and immovable property of the petitioner, including, family pension. The sixth and seventh respondent claim to be the nephew, sons of the elder brother of the deceased/employee, whereas, eighth respondent Smt. Gayatri Devi claims to be the second wife of Baijnath Gupta.

3. Family pension of the petitioner was not released due to the dispute, inter se, parties. Aggrieved, petitioner approached this Court by filing a petition bearing Writ-A No. 46447 of 2016 (Chandra Kali vs. State of U.P. and 4 others) which was disposed of directing the fifth respondent Senior Treasury Officer, Banda, to consider and decide the representation of the petitioner with regard to her entitlement of family pension. Pursuant thereof, by the impugned order dated 5 December 2016, the fifth respondent declined to release the family pension in favour of the petitioner due to the pending litigations, inter se, contesting parties in various forums including this Court and the Civil Court.

4. Learned counsel for the petitioner submits that it is not in dispute between the contesting parties that petitioner is the legally wedded wife of the deceased/employee, the dispute has been raised by the nephews and a stranger (eighth respondent) to deny the petitioner of her right to family pension. It is, further, urged that the eighth respondent claiming to be the second wife is not entitled to family pension. The marriage solemnized after 1956 by a Hindu having a living spouse is void marriage and would not confer any right upon the eighth respondent. The sixth and seventh respondent being nephew do not fall within the definition of "family' under the Pension Rules, therefore, are not entitled to family pension. It is, further, urged that the sixth and eighth respondent had filed a petition bearing Writ-A No. 32931 of 2016 (Ajay Kumar and another vs. State of U.P. and others) claiming pension and other retiral dues of the deceased/employee, however, the writ petition came be dismissed as not pressed (Withdrawal Application No. 275502 of 2016). The sixth and seventh respondent have instituted a civil suit being Suit No. 231 of 2016 before the Court of Civil Judge (Junior Division), Banda, seeking mandatory prohibitory/injunction and declaration in respect of the right and title of movable and immovable property of Baijnath Gupta, the deceased/employee. The pension and other post retiral dues admissible to Baijnath Gupta has also been claimed.

5. In this backdrop, it is urged by the learned counsel for the petitioner that the pending suit instituted by sixth and seventh respondent would have no bearing on the entitlement of the petitioner to family pension as the contesting private respondents do not fall within the definition of "family', and the second wife of the employee is not entitled to family pension under the Rules, further, she has withdrawn her writ petition and no suit has been instituted by her.

6. Learned counsel for the State-respondent submits that due to pendency of the litigations between the parties in

various forums, the fifth respondent by way of caution denied the family pension to the petitioner, and has made the impugned order subject to the outcome of the pending litigations.

7. Learned counsel appearing for the private respondents does not dispute the fact that the petitioner is the legally wedded wife of Baijnath Gupta but submits that there was no relationship between the petitioner and Baijnath as man and woman after marriage, the petitioner left the matrimonial home and was residing with her parents, thereafter, as per the custom prevalent amongst members of the community of the caste to which Baijnath Gupta belonged, he contracted second marriage with the eighth respondent as the petitioner failed to fulfil her obligation as a wife towards him. The contesting respondents, therefore, are entitled to the family pension and other retiral dues of the deceased/employee.

8. On specific query, learned counsel for the private respondents admits that the marriage of Baijnath and the petitioner was solemnized as per Hindu custom; the alleged marriage with the eighth respondent came to be solemnized after the promulgation of the Hindu Marriage Act, 1956, as is evident from the document filed by the eighth respondent in the writ petition filed by her earlier, the date of birth of the eighth respondent is recorded 1965. It is, further, not being disputed that in the service record of the employee, petitioner is recorded nominee and wife. The sixth and seventh respondents are sons of the brother of the deceased employee.

9. In the backdrop of admitted facts, the question for determination is as to whether the sixth, seventh and eighth respondents, being nephew and second wife of the deceased/employee, are entitled to family pension, including, gratuity under the Rules.

10. The facts, inter se, parties are not in dispute. The family pension is governed by the provisions of the Civil Service Regulations and the U.P. Retirement Benefit Rules, 19611. "**Family**' is defined under Sub-Rule (3) of Rule 3, which reads thus:

"(3) "Family" means the following relatives of an officer:

(i) wife, in the case of any male officer;

(ii) husband, in the case of a female officer;

(iii) sons (including step-children and adopted children)

(iv) unmarried and widowed daughters. (Including step-children and adopted children)

(v) brothers below the age of 18 years and unmarried and widowed sisters (including step-brothers and step-sisters);

(vi) father;

(vii) mother;

(viii) married daughters (including step-daughters), and

(iv) children of a pre-deceased son"

11. Rule 6 provides for nomination of one or more persons the right to receive any gratuity that may be sanctioned. The proviso clarifies that at the time of making nomination if the officer has a family, the nomination shall not be in favour of any person other than one or more members of the family. Rule 6 is extracted:

"6. Nomination. − (1) A Government Servant shall, as soon as he acquires or if

he already holds a lien on a permanent pensionable right to receive any grauity that may be sanctioned under sub-rule (2) or sub-rule (3) of rule 5 and gratuity which after becoming admissible to him under sub-rule (1) of that rule is not paid to him before death :

Provided that if at the time of marking the Nomination the officer has a family, the nomination shall not be in favour of any person other than one or more of the members of the family."

12. Rule 7 of Part-III of the Rules provides that family pension may be granted to the family of the officer who dies, whether after retirement or while still in service after completion of not less than twenty years' qualifying service. Sub-Rule (4) of Rule 7 provides who shall be entitled to receive pension in the event the deceased employee had two wives. Sub-rule (4) is extracted:

(4) "Except as may be provided by a nomination under sub-rule (5) below:

(a) a pension sanctioned under this Part shall be granted—

(i) to the eldest surviving widow, if the deceased was a male officer or to the husband, if the deceased was a female officer;

(ii) failing the widow or husband, as the case may be, to the eldest surviving son;

(iii) failing (i) and (ii) above, to the eldest surviving unmarried daughter;

(iv) these failing, to the eldest widowed daughter; and

(b) in the event of the pension not becoming payable under clause (a) the pension may be granted—

(i) to the father;

(ii) failing the father, to the mother;

(iii) failing the father and mother both, to the eldest surviving brother below the age of 18;

(iv) these failing, to the eldest surviving unmarried sister;

(v) these failing (i) to (iv) above, to the children of a predeceased son in the order it is payable to the children of the deceased officer under clause (a) (ii), (iii) and (iv), above.

Note.—The expression "eldest surviving widow" occurring in clause (a) (i) above, should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows."

13. It is noted in the impugned order that the competent Revenue Authority issued succession certificate to the petitioner being the legally wedded wife of Baijnath; her name is recorded in the Family Register, whereas, name of the eighth respondent is not recorded in the Family Register. It is further noted that the documents pertaining to pension & gratuity, including, the service record of the employee does not record the name of the eighth respondent. From the extract of the service book placed on record it reflects that the employee in Column-23 recorded the name of the sixth and seventh respondents alongwith the petitioner as heirs to provident fund & salary, but that would also not help the contesting private respondents insofar it pertains to family pension/gratuity. The pending suit would have no bearing on the entitlement of family pension and other retiral dues to the petitioner. Claim of the sixth, seventh and eighth respondent towards family pension/gratuity can be considered

provided they fall within the scope and ambit of the definition "family' as defined in Rules, 1961. Petitioner is the eldest surviving widow, even if it is taken that the eighth respondent is the second wife of the employee.

14. A bare perusal of the Rules, 1961, is indicative that the definition of "family' does not include the second wife, it only refers to 'wife', and family pension, as per Rule 7(1), is granted to the member of the 'family' of an officer, sub-rule 3(e) of Rule 7 provides that pension is not payable to a person who is not a member of the deceased/officer's family, sub-rule 4(a)(i) provides that pension shall be sanctioned under Part III to the eldest surviving widow and the note appended to the rule clarifies the expression "eldest surviving widow" should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows.

15. Sub-rule (5) requires the Government Servant to make nomination indicating the order in which pension sanctioned would be payable to the members of his 'family', provided the nominee is not ineligible, on the date on which the pension may become payable to him or her to receive the pension under the provisions of sub-rule (3) of rule 7. Thus, the scheme of the Rules provide that in case the Government Servant leaves behind two wives, the second wife, not being a member of the family, is not eligible to family pension, as long as, the first wife survives. Further, there could not have been any nomination in favour of the second wife as she was ineligible to have been nominated under sub-rule (5), being not a member of the family of the employee, thus, ineligible to receive pension under sub- rule (3) of Rule 7.

16. Taking a case that there was nomination in favour of the second wife, the pension would have been payable in accordance to such nomination provided the nominee is not ineligible, on the date on which the pension became payable to her under sub-rule (3) of Rule 7. In the facts of the present case, since the first wife is alive on the date on which the family pension became due, the second wife cannot set up a claim for family pension even on the consent of the first wife, further, nomination in favour of second wife would be invalid as she being not a member of the government servants family [sub-rule (3)(e) of Rule 7].

17. The Hindu Marriage Act, 19562 came into force on 18 May 1955, the Act amended and codified the law relating to marriage among Hindus. Section 4 provides that the Act has an overriding effect. Section 4 is extracted:

"4. Overriding effect of Act.-Save as otherwise expressly provided in this Act.-

(a) any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

18. Section 5 provides the the conditions for Hindu marriage between two Hindus and one of the condition provides that neither party should have a

spouse living at the time of marriage. Section 5(i) is reproduced:-

"5. Conditions for a Hindu marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of marriage;"

Section 11 provides for void marriages. Section 11 reads thus:

"11. Void Marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."

19. Section 29 of the Hindu Marriage Act saves the marriages performed between Hindus before the commencement of the Act. Section 29(1) is reproduced:-

"29. Savings.-(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste."

20. Thus as per the scheme of the Hindu Marriage Act, marriage between two Hindus solemnized before the commencement of the Hindu Marriage Act, which was otherwise legal and valid, would be saved under Section 29 of the Act and would not be void under Section 11. The marriage between the deceased government servant and the petitioner came to be solemnized after the enactment of the Hindu Marriage Act. The Government Servant contracted the second marriage with the eighth respondent after the commencement of the Hindu Marriage Act, the marriage, therefore, is void and a nullity in the eye of law, second wife would have no right of being a legally wedded wife.

21. In a Full Bench decision of this Court in the case of **Nutan Kumar versus IInd Additional District Judge, Banda and others**; in paragraph 8 of the majority judgement, the Court has observed as under:

"The appellation 'void' in relation to a juristic act, means without legal force, effect or consequence; not binding; invalid; null; worthless; cipher; useless; and ineffectual etc."

(Refer: Shubham Shukla and others vs. State of U.P.)

22. This Court in **Shakuntala Devi (Smt.) Versus Executive Engineer, Electricity Transmission Ist U.P. Electricity Board, Allahabad and another**, while dealing with two wifes wherein the nomination was in favour of the second wife it was held that it cannot defeat the claim of the legally wedded wife, only legally wedded wife is entitled to retiral benefits, provident fund and appointment under Dying-in-Harness Rules.

23. In **Rameshwari Devi Versus State of Bihar and others**, where the Government servant being a Hindu having two wives died while in service, Supreme Court held that the second marriage was void under the Hindu law, hence, the second wife having no status

of widow is not entitled to anything, however, children from the second wife would equally share the benefits of gratuity and family pension as per law.

(**Refer: Manno Singh vs. State of U.P. and others**)

24. Further, the U.P. Government Servant Conduct Rules, 1956, which came into force on 28th July, 1956, Rule 29 prohibits a Government Servant from bigamous marriage. Rule 29 reads thus:

"29. Bigamous marriages-(1) No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him."

25. Thus, Hindus cannot contract marriage after the enforcement of the Hindu Marriage Act, if any of them is having a living spouse, the marriage would be a nullity and would also not be protected under the Conduct Rules, as well as, the pension rules, therefore, it follows that the "second wife" as referred to under the Rules, 1961 would only include second wife whose marriage was otherwise permissible under the personal law or law prevalent at the time of marriage, but in the case of Hindus the second wife will have no right, whatsoever, as the law prohibits second marriage, as long as, the government servant has a spouse who is alive. Thus for harmonious construction of the Rules governing pension, wherever, the rule provides for wives, it has to be interpreted as per the law governing marriage as applicable to the government servant and in cases where the second marriage is void under the law, second wife will have no status of a widow of the government servant. In the facts of the case in hand admittedly the second marriage was contracted after enforcement of the Hindu Marriage Act, therefore, the marriage is void. The second wife would have no right in law to claim family pension.

26. As regards, eligibility to family pension, the pension is to be disbursed as per the provisions of the Rules, 1961. The Rules clearly state that only eligible person is entitled to receive family pension but where pension awarded ceases to be payable on the death or marriage of the recipient or for any other reason, it will be regranted to the persons next lower in the order mentioned in sub-rule (4) of Rule 7. The Hindu second wife would not be eligible for family pension as long as the first wife is alive and has not remarried. There is no provision in the Rules for relinquishment of family pension in favour of another person. The eighth respondent would not fall within the definition of "family' of the employee. The sixth and seventh respondent being sons of the deceased employees brother are also not family of the employee within the definition of "family' under the Rules, 1961.

27. In the circumstances, the writ petition is allowed by passing the following orders:

i) the impugned order dated 5 December 2016 passed by the fifth respondent-Senior Treasury Officer, District Banda, is set aside and quashed;

ii) the respondents are directed to release the family pension/gratuity to the petitioner within two months from date of filing of certified copy of this order, failing which, petitioner shall be entitled to interest @ 7% per annum on the entire sum from the due date.

28. It is clarified that the observations made herein above would have no bearing in the pending suit instituted by the sixth and seventh respondent in respect to the other reliefs claimed therein.

29. No cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 17904 of 2018

Dr. Anupma Mehrotra ...Petitioner
Versus
The Hon'ble Chancellor, MahatmaJyotibaPhuleRohilkhandUniversity,Bareilly&Ors. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
Sri Neeraj Tripathi, Sri Arvind Srivastava. C.S.C., Sri Kshitij Shailendra Khare, Sri Vivek Verma, Sri Manish Tandon

A. U.P. Higher Education Service Commission Act- Inter-se seniority- Petitioner appointed on substantive post of lecturer-private respondents appointed on ad-hoc basis but subsequently regularized - Chancellor held that as under Statute 15.08 (e) of the University, the respondents are entitled to seniority from the date of their initial appointment, they are senior to the petitioner-representation of the Petitioner challenging regularization of the petitioner barred by limitation.

In view of provision of Statute 15.01 (c) the seniority of the Petitioner has to be reckoned by the length of her continuous service from the date of appointment in substantive capacity- private respondents No. 8 to 11 though appointed earlier to the petitioner, their said appointments were not in substantive capacity rather on ad-hoc basis under Section 16 of the Commission Act and were regularized under Section 31-C (2) of the Commission Act and hence, their substantive appointment would be from the date of their regularization/substantive appointment- Regularization of the contesting private respondents No. 8 to 11 not under Section 31 (3) (b) of the Act but under Section 31-C (2) of the Commission Act- Clause (e) of Statute 15.08 would not apply for determining the continuous length of service of the respondents and their seniority- The Statute 15.08 (e) wrongly applied by the Vice Chancellor to the case of the private respondents No. 8 to 11 for determining their seniority- The cause of action for deciding the matter of seniority is a recurring cause of action which survives till the person or the persons with whom a seniority is disputed retires or leaves the job- Petition allowed.
(Para18,21,22,25,26,27,30,31,39,45,52,54,59)

Case Law discussed/relied upon:-
1.Secretary, Minor Irrigation Department and R.E.S. vs. Narendra Kumar Tripathi, 2015 (11) SCC 80

2.Direct Recruit Class-2 Engineering Officers' Association Vs. State of Maharashtra, AIR 1990 SC1607

3. Keshav Chand Joshi and others vs. Union of India and others,AIR 1991 SC 284 (E-3)

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Saral Srivastava, J.)

1. Under challenge in this writ petition is the order of the Chancellor, Mahatma Jyotiba Phule Rohilkhand University, Bareilly dated 06.08.2018 by which the representation of the petitioner filed under Section 68 of the U.P. State Universities Act (hereinafter referred to as "Act") has been rejected.

2. The dispute which was referred to the Chancellor under Section 68 of the Act was with regard to the validity/correctness of the order of the Vice Chancellor of the University dated 23.09.2016 in context to interse seniority of the petitioner qua contesting private respondents No. 8 to 11 who are all teachers in the Dayanand Arya Kanya Mahavidyalaya, Moradabad affiliated to the above university.

3. Admittedly, the petitioner was duly selected and recommended by the U.P. Higher Education Service Commission (hereinafter referred to as "Commission") on 28.01.1991 as Lecturer (Home Science) and was allotted the above institution. Consequently, the Committee of Management of the institution issued appointment letter to her and the petitioner joined services on 20.06.1991. Thus, she is holding a substantive post of Lecturer, Home Science at the institution w.e.f. 20.06.1991 after due selection by the Commission.

4. The contesting private respondent Nos. 8 to 11 were appointed on ad-hoc basis by the Committee of Management of the institution on their selection by the Selection Committee constituted by the institution and approvals of the University granted to their appointments on 10.10.1988, 22.02.1991, 25.02.1991, 11.03.1991 and 22.03.1991 respectively. All of them except respondent No.10 were subsequently regularized on their respective posts on different dates in June, 1992 under Section 31-C (2) of the U.P. Higher Education Service Commission Act (hereinafter referred to as "Commission Act") by the Directorate of Higher Education, U.P., Allahabad.

5. In view of the above respective joining of the petitioner and the contesting private respondents No. 8 to 11, the Chancellor held that as under Statute 15.08 (e) of the First Statutes of the University, the respondents are entitle to seniority from the date of their initial appointment, they are senior to the petitioner. Secondly, as the representation of the petitioner also disputes the regularization of the contesting private respondents No. 8 to 11, the challenge to the same after more than 26 years is not acceptable and the representation in that regard is barred by limitation.

6. We have heard Dr. Anupma Mehrotra, petitioner in person, Sri L.K. Tripathi, learned counsel for Chancellor, Sri Rohit Pandey, learned counsel for University, learned Standing Counsel for the State authorities, Sri Kshitij Shailendra, learned counsel for the Committee of Management and the Principal of the institution, Sri Arvind Srivastava, learned counsel for Dr. Jolly Garg, respondent No.8 and Sri Ashok Khare, Senior Counsel on behalf of Dr. Shobha Gupta and Dr. Shubha Goyal, respondent Nos. 9 and 10 (wrongly mentioned as respondent Nos. 8 and 9 in the writ petition). No one has appeared for Dr. Vimal Sharma, respondent No.11 (wrongly mentioned as respondent No.10 in the writ petition).

7. The petitioner alleges that she was shown as senior to the contesting private respondents No. 8 to 11 in the record of the institution, but in circulating the tentative seniority list on 02.04.1996, the Principal of the institution incorrectly showed her junior to these persons. Therefore, she objected to the said seniority but without considering her

objections, a final seniority list was allegedly notified on 27.07.1996 without any information or copy to her. The petitioner when raised her dispute regarding interse seniority, the Registrar of the University vide letter dated 05.06.1999 informed that the said dispute can be raised by her by means of a representation before the Principal of the institution. Accordingly, petitioner represented to the Principal for deciding about her seniority and declaring her to be senior to the above persons vide letters dated 21.06.1999, 28.06.1999 and 08.05.2000 but the Principal of the institution, to the best of her knowledge, never took any decision thereon and informed about her seniority, if any determined thereupon.

8. The petitioner ultimately filed Writ Petition No. 51034 of 2015 raising her grievance regarding the incorrect determination of her seniority which was disposed off vide order dated 12.10.2015 with the direction to the Vice Chancellor to consider the matter and to decide her representation in that regard.

9. The Vice Chancellor, in pursuance of the above directions of the Court, considered the matter of interse seniority of the petitioner with contesting private respondents No. 8 to 11 vide order dated 23.09.2016 and held them to be senior on the basis of their length of service with effect from the date of their initial joining as ad-hoc teachers.

10. The aforesaid order was challenged by the petitioner by making a representation under Section 68 of the Act which reference came to be decided by the Chancellor by the impugned order dated 06.08.2018 and the representation of the petitioner has been rejected upholding the order of Vice Chancellor.

11. The petitioner alleges that she had raised the issue of her seniority before the authorities concerned, right from the Principal to the Vice Chancellor and the Chancellor well within time. The Principal at no point of time determined her seniority by any speaking order and communicated it to her. She was never communicated with the order, if any taken on her objections filed against the tentative seniority list or the final seniority list alleged to have been finalized on 27.07.1996. The petitioner is senior to the contesting private respondents No. 8 to 11 as her date of substantive appointment is 20.06.1991 and that of the others is June, 1992. The seniority has to be determined from the date of substantive appointment and not from the date of ad-hoc appointment even if ad-hoc appointments/services were later regularized.

12. All counsel on behalf of respondents contended that the seniority of the petitioner qua the other teachers especially private respondents No. 8 to 11 was finally determined vide seniority list dated 27.07.1996. The said seniority list is not liable to be disturbed after such a long gap of more than 20 years. The reference to the said dispute to Vice Chancellor in 2014-15 wherein the order passed on 23.09.2016 by the Vice Chancellor was assailed before the Chancellor, was highly belated and was not maintainable in law. The petitioner has not challenged the order of the Vice Chancellor dated 23.09.2016 and as such is not entitle to any relief. Since the services of the contesting private respondents No. 8

to 11 were regularised, the services rendered by them on ad-hoc basis are also to be counted for the purposes of their seniority.

13. Sri Kshitij Shailendra and Sri Arvind Srivastava have urged that despite direction of the University to raise the dispute of seniority before the Principal who is the competent authority, the petitioner never raised any such dispute before him and it was only in the year 2003 that she made representation in this regard for the first time and got the matter reopened by obtaining directions from the Hon'ble Court. She cannot be permitted to reopen the stale matter which had attained finality long before.

14. Sri Rohit Pandey on behalf of Chancellor additionally submitted that for the purposes of determining seniority of the teachers appointed on ad-hoc basis but subsequently given substantive appointments Statute 15.08 of the Statutes would apply and the entire length of their service is to be counted.

15. In the light of the aforesaid facts and circumstances and the submissions of the parties, the controversy centers around three points.

16. The first is regarding inter-se seniority of the petitioner qua contesting private respondent Nos. 8 to 11. Secondly, if the seniority list dated 27.07.1996 prepared by the Principal of the institution is liable to be disturbed at this stage when a considerable time has elapsed and the petitioner failed to raise the same before the Principal who was the competent authority at the relevant time despite direction of the University contained in the letter dated 05.06.1999 of the Registrar. Lastly, whether the petitioner is entitle to any relief when she has not challenged the order dated 23.09.2016 passed by the Vice Chancellor.

17. The dispute of seniority of the petitioner is with contesting private respondent Nos. 8 to 11. The respective joining of all of them in substantive capacity or ad-hoc basis and the date of their regularization is as under-:

Sl. No.	Name	Subject	Date of Ad-hoc appointment	Date of substantive appointment	Date of regularization
1	Dr. Anupma Mehrotra	Home Science-	-	20.06.1991	
2	Dr. Jolly Garg	Botany	10.10.1988	-	28.06.1992
3	Dr. Shobha Gupta	Chemistry	22.02.1991	-	28.06.1992
4	Dr. Vimla Sharma	Zoology	25.02.1991	-	28.06.1992
5	Dr. Shubha Goyal	Home Science	11.03.1991	-	28.06.1992
6	Dr. Rita Jaitley	Psychology	22.03.1991	-	28.06.1992

18. In view of the above, it is evident that the petitioner was substantively appointed on 20.06.1991 whereas the contesting private respondents No. 8 to 11 were appointed on ad-hoc basis prior to the petitioner but their services were regularized in June,

1992 under Section 31-C (2) of the Commission Act.

19. There is no dispute to the respective dates of appointments of the petitioner and the contesting private respondents No. 8 to 11 as stated above.

20. The seniority of the teachers of affiliated colleges is required to be determined in accordance with Chapter 15 of the Statutes. Statute 15.01 is relevant and material. It reads as under-:

"15.01 - The following rules shall be followed in determining the seniority of Principals and other teachers of affiliated colleges :-

(a) .....

(b) .....

(c) the seniority of Principals and teachers of the affiliated colleges shall be determined by the length of continuous service from the date of appointment in substantive capacity;

(d) service in each capacity (for example, as Principal or as a teacher), shall be counted from the date of taking charge pursuant to substantive appointment;

(e) service in a substantive capacity in another University or another degree or post-graduate college whether affiliated to or associated with the University or another University established by law shall be added to his length of service."

21. Statute 15.01 (c) specifically provides that seniority of teachers of the affiliated colleges shall be determined by the length of their continuous service from the date of appointment in substantive capacity. The use of the words "the date of appointment in substantive capacity" is very material and relevant. The said phrase leaves no room for determining the seniority of the teachers by adding their past services rendered, if any, prior to their substantive appointment in any form.

22. In the case at hand, petitioner was substantively appointed on 20.06.1991. Therefore, her seniority has to be reckoned from the said date. On the other hand, contesting private respondents No. 8 to 11 though appointed earlier to the petitioner, their said appointments were not in substantive capacity rather on ad-hoc basis under Section 16 of the Commission Act. Their services were regularized on 28.06.1992 under Section 31-C (2) of the Commission Act. This is implicit on the plain and simple reading of the regularization order. Therefore, in all fairness, their substantive appointment would be from the date of their regularization/substantive appointment i.e. 28.06.1992.

23. Now comes the Statute 15.08 which also deals with the seniority of the teachers in general. It provides that the seniority of a teacher shall be determined according to length of his continuous service in his substantive capacity but clause (e) of Statute 15.08 provides that continuous service on a temporary post to which a teacher is appointed after selection, followed by appointed in a substantive capacity under Section 31 (3) (b) of the Act, shall be counted towards seniority.

24. The said Statute 15.08 (b) and (e) are reproduced hereinbelow-:

"15.08 - The following rules shall be followed in determining the seniority of teachers :-

(a) .....

(b) In the same cadre, seniority of a teacher shall be determined according to the length of his continuous service in a substantive capacity in such cadre :

Provided that where more than one appointment to posts in a cadre have been made at the same time, and an order of preference or merit was indicated by the Selection Committee or by the Management, the seniority of the persons so appointed shall be governed by the order so indicated.

(c) .....

(d) .....

(e) Continuous service in a temporary post to which a teacher is appointed after reference to a Selection Committee, if followed by his appointment in a substantive capacity to that post under Section 31 (3) (b) shall count towards seniority."

25. A bare reading of the aforesaid provision would make it crystal clear that ordinarily the seniority of a teacher is to be determined on the basis of continuous service in substantive capacity but where a teacher is appointed after reference to selection committed in a temporary capacity and is followed by regularization under Section 31 (3) (b) of the Act, the service rendered prior to his substantive appointment shall also be counted in his length of service for the purposes of determination of seniority.

26. The above benefit of service rendered prior to substantive appointment would be available where the regularization is under Section 31 (3) (b) of the Act not where the regularization is under a different provision or Section 31-C (2) of the Commission Act.

27. The provisions of Section 31 (3) (b) of the Act and Section 31-C (2) of the Commission Act operates in completely different situations. Section 31 (3) (b) of the Act applies where the appointment is on a temporary post and is subsequently regularized. On the other hand, Section 31-C (2) of the Commission Act applies where the appointment is on ad-hoc basis and not a temporary post.

28. Section 31 (3) (b) of the Act reads as under-:

"31 - Appointment of Teachers-:

(1) .....

(2) .....

(3) .....

(a) .....

(b) Where before or after the commencement of this Act, any teacher is appointed (after reference to a Selection Committee) to a temporary post likely to last for more than six months, and such post is subsequently converted into a permanent post or to a permanent post in a vacancy caused by the grant of leave to an incumbent for a period exceeding ten months and such post subsequently becomes permanently vacant or any post of same cadre and grade is newly created or falls vacant in the same department, then unless the Executive Council or the management, as the case may be, decides to terminate his services after giving an opportunity to show cause, it may appoint such teacher in a substantive capacity to that post without reference to a Selection Committee:

Provided that this clause shall not apply unless the teacher concerned holds the prescribed qualifications for the post at the time of such substantive appointment, and he has served continuously, for a period of not less than

one year after his appointment made after reference to a Selection Committee:

Provided further that appointment is a substantive capacity under this clause of a teacher who had served, before such appointment, continuously for a period of less thantwo years, shall be on probation for one year which may be extended for a period not exceeding one year, and the provisions of sub-section (2) shall apply accordingly."

29. Section 31-C of the Commission Act is as follows-:

"31-C. Regularisation of other ad hoc appointments. - (1) Any teacher, other than a principal who -

(a) was appointed on ad hoc basis after January 3,1984 but not later than [November 22, 1991] on a post -

(i) which after its due creation was never filled earlier, or

(ii) which after its due creation was filled earlier and after its falling vacant, permission to fill it was obtained from the Director; or

(iii) which came into being in pursuance of the terms of new affiliation or recognition granted to the College and has been continuously serving the College from the date of such ad hoc appointment up to the date of commencement of the Uttar Pradesh Higher Education Services Commission (Amendment) Act, 1992;

[(b) was appointed on ad hoc basis under sub-section (1) of Section 16 as it stood before its omission by the Act referred to in clause (a), whether or not the vacancy was notified by the Commission.]

(c) possessed on the date of such commencement, the qualifications required for regular appointment to the post [or was given relaxation from such qualification] under the provisions of the relevant Statutes in force on the date of such ad hoc appointment;

(d) [* *]*

(e) has been found suitable for regular appointment by a Selection Committee constituted under sub-section (2);

may be given substantive appointment by the Management of the College, if any substantive vacancy of the same cadre and grade in the same department is available on the date of commencement of the Act referred to in clause (a).

(2) The Selection Committee consisting, the following members namely -

(i) a member of the Commission nominated by the Government who shall be the Chairman;

(ii) an officer not below the rank of Special Secretary, to be nominated by the Secretary to the Government of Uttar Pradesh in the Higher Education Department;

(iii) the Director;

shall consider the cases of every such ad hoc teacher and on being satisfied about his eligibility in view of the provisions of sub-section (1), and his work and conduct on the basis of his record, recommended his name to the Management of the College for appointment under sub-section (1).

(3) Where a person recommended by the Commission under Section 13 before the commencement of the Act referred to in sub-section (1) does not get an appointment because of the appointment of another person under sub-section (1) in the vacancy for which he was so recommended, the State Government shall make suitable order for his appointment in a suitable vacancy in any College and the provisions of sub-sections (5) and (6)

of Section 13 and of Section 14 shall mutatis mutandis apply.

(4) A teacher appointed on ad hoc basis referred to in sub-section (1) who does not get a substantive appointment under that sub-section and a teacher appointed on ad hoc basis who is not eligible to get a substantive appointment under sub-section (1) shall cease to hold the ad hoc appointment after [June 30, 1992],

[(5) Notwithstanding anything to the contrary in sub-section (4), the selection committee constituted under sub-section (2), shall in view of the amendments made in clauses (b) to (d) of sub-section (1), of the Uttar Pradesh Higher Education Service Commission (Amendment) Act, 1997 reconsider the case of every teacher who ceased to hold appointment under sub-section (4) and if as a result of reconsideration any such teacher is found suitable for substantive appointment, he may be given substantive appointment as provided in sub-section (1), and shall be deemed never to have ceased to hold appointment.]"

30. A comparison of the above provisions reveals that they operate in different situations. The regularization under Section 31-C (2) of the Commission Act can not be compared with that under 31 (3) (b) of the Act. Statute 15.08 (e) of the Statutes is applicable only where the regularization is under Section 31 (3) (b) of the Act and not to cases where the regularization is done by invoking any other provision of law.

31. Admittedly, the regularization of the contesting private respondents No. 8 to 11 is not under Section 31 (3) (b) of the Act rather the regularization order clearly spells out that it is under Section 31-C (2) of the Commission Act. Therefore, clause (e) of Statute 15.08 would not apply for determining the continuous length of service of the respondents and their seniority. The Chancellor failed to make out this distinction in according the benefit of past services rendered by the contesting private respondents No. 8 to 11 for the purposes of seniority. He simply applied the general proposition to add the services rendered prior to the substantive appointment to their substantive services as their services were subsequently regularized ignoring the fact that general proposition is not applicable where the statutory rule provides otherwise.

32. Sri Arvind Srivastava has placed reliance upon **Secretary, Minor Irrigation Department and R.E.S. vs. Narendra Kumar Tripathi** and has argued that the past services rendered by ad-hoc appointee before regularization are to be counted in the length of his service so as to determine his seniority.

33. The aforesaid case was in relation to the appointment of an engineer in the Department of Minor Irrigation of the State of U.P. His services were regularized under the U. P. Regularization of Ad Hoc Appointments (On Posts Within the Purview of the Public Service Commission) Rules, 1989, as amended from time to time. The said Rules specifically provided that the persons regularized under the said Rules shall be entitled to seniority from the date of the order of appointment. It was in context with the above Rules that the Hon'ble Supreme Court held that as the Rule provides that ad-hoc appointments have to be regularized and the seniority is to be counted from the date of the appointment,

they cannot be deprived of the benefit of the past service rendered by them before the date of regularization.

34. The aforesaid decision was rendered in context with the aforesaid Rules and not in connection with the Rules which specifically provides that the seniority has to be counted as per the date of substantive appointment as in the present case. Therefore, in our opinion, the aforesaid decision in no way helps.

35. No doubt, in **Direct Recruit Class-2 Engineering Officers' Association Vs. State of Maharashtra**, the Hon'ble Supreme Court has held that as a general rule, once a person is appointed to a post according to Rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation, but this again would not apply where the Statutes specifically provides otherwise to the contrary.

36. In **Keshav Chand Joshi and others vs. Union of India and others**, the 3 judges of the Hon'ble Supreme Court with reference to the U.P. Forest Service Rules, 1952 in the matter of seniority held that for the purposes of computing seniority, the length of service has to be counted only from the date of substantive appointment. It was further held that if ad-hoc appointment is not in accordance with the Rules and was made as a "stop gap arrangement", the period of officiation on such post cannot be considered for computing seniority.

37. The aforesaid decision is sought to be distinguished by Sri Khare, Senior Counsel on the ground that the appointment of all the respondents was after selection in accordance with the Rules and as such the criteria laid down in the above decision would not apply to the case of the respondents.

38. Even if the above criteria is not applied or that the appointment of the contest private respondents No. 1 to 8 on ad-hoc basis is treated to be in accordance with the Rules, their working as ad-hoc teachers would not be counted for determining their seniority for the simple reason that it cannot be determined contrary to the statutory provision. The Statute 15.01 (c) and 15.08 (b) clearly provides that the seniority of the teachers has to be determined from the date of their substantive appointment, meaning thereby services rendered by any teacher on ad-hoc basis whether irregularly appointed or appointed in accordance with the Rules would not be counted except in cases covered by Statute 15.08 (e) of the Statutes.

39. The Statute 15.08 (e) as applied by the Vice Chancellor is not applicable to the case of the contesting private respondents No. 8 to 11 for determining their seniority as their services were never regularized under Section 31 (3) (b) of the Act rather their regularization was under Section 31-C (2) of the Commission Act.

40. The submission of the petitioner that initially she was shown senior to the contesting private respondents No. 8 to 11 and that it was only for the first time by the tentative seniority list dated 02.04.1996 circulated by the Principal that she was shown junior to the contesting private respondents No. 8 to 11 does not stand established from the record of the writ petition.

41. There is no material or document on record which may show that the

petitioner was ever shown senior to the contesting private respondents No. 8 to 11. The letter of the Principal of the institution dated 04.03.1997 reveals that on account of the dispute of the Committee of Management of the institution, the entire records of the institution have been misplaced and are not available. The submission that the said record is presently available has no bearing inasmuch as despite it nothing has been brought on record to establish that the petitioner was ever shown senior to the contesting private respondents No. 8 to 11 prior to the circulation of the tentative seniority list dated 02.04.1996 or the final seniority list dated 27.07.1996.

42. There is no dispute to the fact that against this tentative seniority list dated 02.04.1996, petitioner had raised objections on 04.06.1996 in writing before the Principal whereupon she was required to submit certain documents vide letter dated 24.06.1996. The record reveals that as the petitioner kept on taking time, the Principal proceeded and finalized the seniority list on 06.05.1996 whereupon final seniority list dated 27.07.1996 was issued. There is no material on record to show that the order finalizing the interse seniority or the final seniority list of the teachers was supplied to the petitioner. The said order and the seniority list was sent to the Vice Chancellor/University and not to the petitioner at any point of time.

43. As far as the copy of the order finalizing the seniority list is said to have been endorsed to the petitioner in the absence of any document or averment that it was sent to the petitioner, it does not mean that it was actually served upon her to enable her to dispute it.

44. Even if it is accepted that the seniority was finally determined as per the aforesaid list, the petitioner had represented to the Principal who is the competent authority under Statute 15.05 to reconsider the same vide her representations dated 21.06.1999, 28.06.1999 and 08.05.2000, copies of which are on record as enclosures to the rejoinder affidavit. All these representations were submitted by the petitioner pursuant to the reply of the University dated 05.06.1999 to the seniority dispute raised by her before the Vice Chancellor. The University had informed the petitioner to raise the dispute before the competent authority i.e. the Principal. There is no denial at any stage that such representations were not made by the petitioner or that they were not received by the Principal.

45. In view of the above, it can hardly be said that the petitioner had not raised the dispute of her seniority before the competent authority within time. Thus, the dispute of seniority was raised by her but it was not decided and if decided no order thereof was communicated to her.

46. None of the respondents have brought on the record any material to show that subsequent to the direction of the University and the petitioner's representations to redetermine her seniority, the Principal ever took any decision in the matter and communicated it to the petitioner.

47. The cause of action for the petitioner to file this petition arose with the decision taken by the Chancellor on 16.08.2018 rejecting her representation under Section 68 of the Act.

48. The said representation of the petitioner was directed against the order of the Vice Chancellor dated 23.09.2016. The representation under Section 68 was made promptly within 3 months of the said order and as such was not beyond time as prescribed under Section 68 of the Act.

49. There is no averment or material that the representation under Section 68 of the petitioner regarding her interse seniority was not made by her within 3 months from the date of the decision of the Vice Chancellor.

50. In view of the aforesaid facts and circumstances, the cause of action regarding the seniority of the petitioner was surviving and was alive all through till the decision of the Vice Chancellor and the Chancellor.

51. The contention that the direction of the High Court dated 12.10.2015 disposing off writ petition No. 51034 of 2015 would not confer any right upon the Vice Chancellor to revive the stale matter of seniority is neither here nor there as no time limit is provided for raising such a claim before the Vice Chancellor.

52. Moreover, the cause of action for deciding the matter of seniority is a recurring cause of action which survives till the person or the persons with whom a seniority is disputed retires or leaves the job.

53. This apart, the Vice Chancellor took the decision on the representation of the petitioner on the directions of the Court and once he has so passed the order it means that the authorities were alive to the controversy and have not allowed it to have died down otherwise the Vice Chancellor would have rejected it as barred by limitation. The said order of Vice Chancellor had certainly revived the cause of action of the petitioner regarding her seniority even if it had become stale.

54. In view of the aforesaid facts and circumstances, in our opinion, the claim of the petitioner to seniority would not stand defeated and it would be too harsh not to disturb the seniority list if it is not otherwise legally tenable in law.

55. The last aspect for our consideration is the relief to which the petitioner is entitle as she has not specifically challenged the order dated 23.09.2016 passed by the Vice Chancellor.

56. The Vice Chancellor by the order dated 23.09.2016 has decided the inter-se dispute of seniority of the petitioner qua contesting private respondents No. 8 to 11. The petitioner was not satisfied by the said order and as such has preferred a reference under Section 68 of the Act before the Chancellor. The Chancellor answered the reference against the petitioner.

57. The order of the Vice Chancellor as such stood merged in the order of the Chancellor. Therefore, the challenge to the order of the Chancellor is sufficient and it is not legally necessary to challenge the order of the Vice Chancellor independently.

58. The submission of Sri Khare, Senior Counsel that the doctrine of merger would not apply with regard to administrative orders is bereft of merits for the reason that the decision of the Vice

Chancellor and the Chancellor are not orders of administrative nature but quasi-judicial orders adjudicating valuable rights of the parties.

59. In view of the aforesaid facts and circumstances, in our opinion, the order of the Chancellor as well as that of the Vice Chancellor are unsustainable in law and the petitioner is entitle to her seniority from the date of her substantive appointment i.e. 20.06.1991 whereas the contesting private respondents No. 8 to 11 are entitle to their seniority from the date of the regularization of their services i.e. 28.06.1992 and not with any other interior date as their regularization was not under Section 31 (3) (b) of the Act so as to attract Statute 15.08 (e) of the Statute.

60. All the respondents are accordingly directed to amend the seniority list qua the petitioner and contesting private respondents No. 8 to 11 only and to proceed accordingly for the purposes of seniority and for ancillary purposes.

61. The writ petition is allowed with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-A No. 1513 of 2019
with Writ-A No. 6048 of 2019

Santosh Singh &Ors. ...Petitioners
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioners:
Sri Arun Kumar Singh, Sri Vinod Kumar Singh Parmar

Counsel for the Respondents:
C.S.C., Sri Satya Prakash Mishra

A. Refusal by the D.I.O.S, Azamgarh to grant approval to the appointment of petitioners on Class IV Posts.

Held:-In Writ A No.12642 of 2007 the matter was remanded to the District Inspector of Schools for reconsideration only on the issue of verification of the records in order to verify the exact sanctioned strength of Group D employees in the Institution and in case of sufficient vacancies, the DIOS was directed to consider the question of granting of approval to the petitioners. The DIOS while considering the above-mentioned issue has travelled beyond the direction of this Court and taken note of the other issues such as pendency of another writ petition, appointment by outsourcing only and Janshakti 2013 in order to reject the claim of the petitioners.

The DIOS vide impugned order has come to the conclusion that there are five vacant posts of Class IV in the Institution. Therefore, substantial justice will be done to five petitioners out of total seven petitioners, who are raising their cause since 2004, if they are adjusted against the said five vacant posts. Petition partly allowed to that extent. (E-3)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Petitioners in the present writ petition have earlier approached this Court by way of filing Writ A No.12642 of 2007 (**Santosh Singh and others Vs. State of UP**), challenging the order dated 13.12.2006 whereby the financial approval to the selection of the petitioners as Class-IV employees at the respondent's college was declined. The said writ petition was disposed of with the following observation and directions :-

"I further find from the discussion part coming in the impugned order that

the District Inspector of Schools has not been able to give any cogent and convincing finding as to how 13 vacancies come to be recorded as sanctioned strength of Group D positions even as per the financial Survey 1988-89 if in the subsequent report of the year 2008, the District Inspector of Schools has come to record that there were 14 posts sanctioned. Such findings by District Inspector of Schools must have been after due verification. However, in the present impugned order he does not state as to what is the source of the verification. It is clearly established that the financial survey is not ultimate verdict on the question of the sanctioned strength. Sanctioned strength means is the strength sanctioned by the State Government or by the Competent Authority. The financial survey subsequently carried out is only relating to the strength of the students and requirement but by that the real sanctioned strength cannot be washed away and the District Inspector of Schools is hide bound in law to record categorical findings of fact regarding sanctioned strength. Apart from this, the District Inspector of Schools has come to consider that there were at least 6 sanctioned posts available then the entire selection cannot go. On the date of consideration of approval, he has to consider whether the persons who have been selected and whose appointment is proposed can be appointed in the Institution or not unless and until he comes to record a finding that there were serious procedural flaw in the selection procedure and that selection process was do hors the rules and that selection was violating the procedure in matter of public employment being offered to the principles authorized under Article 14 and 16 of the Constitution. In absence of any such findings being recorded, the District Inspector of Schools ought to have considered the present strength of Group-'D' positions in the Institutions even going by the factor of 13 as determined by him in the impugned order.

In view of the fact that the subsequent report, 2008 records that there were only class-III employee working in the Institution, I am of the considered opinion that the District Inspector of Schools while considering the question of approval shall take pragmatic view of the entire circumstances of the case prevailing at present. The question of prior approval for the purposes of recruitment in selection and the constitution of Selection Committee having been answered in affirmative in favour of the petitioners, I am while quashing the order of the District Inspector of Schools dated 13th December, 2006 remitting the matter for the limited consideration on the issue of sanctioned strength only. The District Inspector of Schools shall reconsider the matter and shall verify the records as to what is the exact sanctioned strength of the Group-D employees in the Institution. He will also consider as to what number of employee is actually working in the Institution. In case, he finds that there are sufficient vacancies, he shall consider the question of granting approval to the petitioners from that angle as well.

With the aforesaid observations and directions the writ petition is allowed."
(emphasis supplied)

2. In compliance of above-mentioned order dated 21.05.2018, the District Inspector of Schools, Azamgarh vide order dated 26.10.2018 declined to grant approval of the petitioners as well as

of three other persons (Petitioners in the connected Writ Petition No.6048 of 2019, Santosh Kumar Singh vs. State of U.P. and others)on the post of Class IV employees. The said order is under challenge in both the writ petition.

3. Shri Anil Bhushan, learned Senior Advocate assisted by Shri Arun Kumar Singh, Advocate and Shri Vinod Kumar Singh Parmar, Advocate on behalf of the petitioners submitted that this Court vide order dated 21.05.2018 has directed the District Inspector of Schools to reconsider the matter only on the limited issue to verify the record as to what is the exact strength of the Group D employees in the Institution. However, the respondent - DIOS has travelled beyond the said direction and declined the approval of petitioners and others on the ground that the appointment on the post of Class-IV in such colleges have to be made only by way of outsourcing. The other ground for rejection is Janshakti (Student-Teacher ratio) dated 22.02.2013.

4. Learned counsel further submitted that the maters was remanded back to the DIOS for reconsideration only on the limited issue to verify the record as to what is the sanctioned strength of the Group D employees in the Institution. The DIOS has also wrongly considered the effect of pendency of Writ Petition No.15913 of 2018 (Ajesh Soni Vs. State of UP) which was relating to the appointment made in the year 2016 on the post of Class-IV employees. The further submission made by learned Senior Counsel is that presently 9 vacant posts of Class-IV employees are available in the college.

5. Learned Senior Counsel also submitted that this Court in the judgement passed in the matter of **Principal Abhyanand College and another Vs. State of UP and others reported in 2018 Law Suit (LSS) 4099** wherein it has held that the order of the Government to the effect that Class IV posts can be filled only by way of outsourcing is bad in law and further ratio of strength of students to availability of posts (Janshakti) which was determined in the year 2013 cannot be made applicable retrospective as the appointments in the present matter are of the year 2006. On the basis of these submissions, learned counsel submitted that impugned order is illegal, arbitrary and is liable to be rejected.

6. Shri R.P. Dubey, Additional Chief Standing Counsel appearing on behalf of respondents No. 1 to 3 has relied upon the counter affidavit filed on behalf of the said respondents and relied upon contention of para 8 of the counter affidavit that

"That the contents of paragraph-12 and 13 of the Writ Petition are not admitted as stated, hence denied. In reply thereto it is submitted that in absence of any clarity in respect of availability of vacant posts of Class IV Employees in the Institution in question, therefore, it was not legally permissible to grant approval to the appointment of alleged 7 Peons in the Institution."

7. Learned counsel further stated that at present only 5 posts are vacant. Therefore, financial approval to 7 posts cannot be granted. Learned counsel further submitted that as per the Janshakti of 2013, only 5 posts are vacant.

8. Shri Satya Prakash Mishra, learned counsel appearing on behalf of respondent no. 4 - College has relied upon

a communication made by the College to the concerned DIOS wherein it has been specifically mentioned that in the year 2004, in all 7 Class IV employees were superannuated and as such in the year 2007, there were 7 clear vacancies. Learned Counsel further submitted that this communication was not taken note of by the DIOS in the impugned order.

9. Considered the submissions, short notes filed on behalf of the parties and perused the record. It is clear from the order dated 21.05.2018 passed in the Writ A No.12642 of 2007 that the matter was remanded to the District Inspector of Schools for reconsideration only on the issue of verification of the records in order to verify the exact sanctioned strength of Group D employees in the Institution and in case of sufficient vacancies, the DIOS was directed to consider the question of granting of approval to the petitioners. The DIOS while considering the above-mentioned issue has travelled beyond the direction of this Court and taken note of the other issues such as pendency of another writ petition, appointment by outsourcing only and Janshakti 2013 in order to reject the claim of the petitioners. Though the DIOS has come to the specific conclusion that presently 5 posts of Class IV employees are vacant, however, the DIOS has not considered to grant approval to at least five petitioners out of seven petitioners of the two writ petitions. This approach of the DIOS is not correct.

10. The stand taken by State in their counter affidavit filed in the present writ petition that there was absence of clarity in respect of the availability of vacant list of Class IV employees in the Institution-in-question is contrary to the decision taken by the DIOS vide impugned order that at present, 5 posts are vacant on the basis of the record available. Therefore, the ground of not granting approval for at least 5 posts by the DIOS is unsustainable. The DIOS has travelled beyond the direction given by this Court. As per the case of the respondent's college in the year 2004, there were seven posts of Class IV employees and the DIOS vide impugned order has come to the conclusion that there are five vacant posts of Class IV in the Institution. Learned counsel for the petitioners has not able to point out any error in the finding arrived by the DIOS on the number of vacant posts. Therefore, substantial justice will be granted at least to the five petitioners out of total seven petitioners in the writ petitions, who are raising their cause since 2004, if they are adjusted against the said five vacant posts.

11. The details of the 7 writ petitioners in both the writ petitions according to their marks obtained in the interview are as follows :-

Sl. No.	Names of selected candidates	Marks in interview	Qualifying Category
1.	Dharamraj Jaiswara	25	S.C.
2.	Ramesh Yadav	28	O.B.C.
3.	Ram Sevak Yadav	34	General
4.	Jaya Singh	33.5	General
5.	Abhishek Singh	33	General
6.	Santosh Singh	32	General
7.	Santosh Kumar Singh	31.5	General

12. In view of the above discussion, this writ petition is partly allowed by

setting aside the impugned order 26.10.2018 to the extent that DIOS after coming to the conclusion that there are five vacant posts but has not opted to pass order for approval to any of the petitioners. Accordingly, the DIOS is directed to grant approval to petitioners at serial nos.1 to 5 (chart mentioned above) towards the five vacant post of Class IV employees within a period of four weeks from the date of a certified copy of this order is produced before him. The appointed petitioners shall be granted salary from the date of grant of approval. In case, any of the above-mentioned five writ petitioners failed to join the post of Class IV employees in terms of directions passed by the DIOS, the DIOS shall grant the appointment to the remaining two writ petitioners namely at serial No.6 and 7 as per the merit towards the post which remain vacant due to non-joining of any of the petitioners mentioned in paragraph no.11.

13. Accordingly, the writ petition is partly allowed with the aforesaid directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2019

BEFORE
THE HON'BLE PANKAJ MITHAL , J.
THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 29607 of 2013

Anupati Ram Yadav ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Prem Prakash, Sri Arvind Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Manish Goyal

A. Article 235 and Rule 4 of Chapter III of the High Court Rules, 1952- Rule 3 of the U.P. Government Servants Rule, 1956- Judicial Officer-Adverse Remarks-Representation Rejected-Compulsory Retirement. Not punishment. No requirement of opportunity of hearing.

Compulsory retirement not a punishment and involves no penal consequences - In regard to judicial officers, power of compulsory retirement can be exercised at any time by Administrative Judge by invoking Article 235 of the Constitution of India which is not circumscribed by any Rule or Order- Awarding annual entries either by the District Judge or the Administrative Judge, the principles of natural justice have no place at all- Delay in recording annual entry by the Administrative Judge is merely an administrative work and would not vitiate the entry- Delay in deciding the representation of the petitioner would have no adverse impact upon the order of his compulsory retirement inasmuch as it was decided prior to the meeting of the Screening Committee -U.P. Government Service Rules, 1995, are not applicable upon judicial officers- Shifting of the entry from one particular year to another would not wipe off its vigour or sting so long as it remains to be in the zone of the consideration for the purposes of compulsory retirement.

Writ Petition Dismissed.

Case Law discussed/relied upon: -

1. (1992) 2 SCC 299, Baikuntha Nath Das v. Chief Medical Officer, Baripada & another.

2. (1998) 4 SCC 92, State of Punjab v. Gurdas Singh.

3. (2011) 10 SCC 1, Rajendra Singh Verma (Dead) thru LRS. & Ors v. Lt. Governor (NCT of Delhi) &Ors.

4. (2002) 3 SCC 641, State of U.P and Others v. Vijay Kumar Jain.

5. (2010) 10 SCC 693, Pyare Mohan Lal v. State of Jharkhand and Others (E-3)

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Prakash Padia, J.)

1. The petitioner Anupati Ram Yadav, after serving Indian Air Force for 15 years from 10.08.76 till 31.08.1991 was appointed on 19.03.1996 on the post of Civil Judge, Junior Division in the State of U.P. on the basis of selection in the competitive examination.

2. In the year 2007-08 when he was posted as C.J.M. Ambedakar Nagar, the District Judge recorded certain adverse remarks in his Annual Confidential Report. The petitioner's representation dated 09.07.08/14.07.2008 against the said adverse remarks was rejected as communicated to him vide letter dated 24.03.2009 by the High Court. In the same year his integrity was withheld by the Administrative Judge and his judgements were held to be very poor. Accordingly, he was assessed as a poor officer. The petitioner represented on 06.03.2009 for expunging the above remarks of the Administrative Judge but the representation was rejected vide order dated 17.01.2013 by the High Court as communicated to him.

3. On the basis of his past service record specially the above entries, the High Court recommended for the compulsory retirement of the petitioner and the Chief Secretary State of U.P. by the office order dated 01.03.2013 directed for the compulsory retirement of the petitioner.

4. The petitioner in the above circumstances has preferred this writ petition challenging not only the order of compulsory retirement but also the rejection of his representation against the adverse entry given by the Administrative Judge for the year 2007-08 and has prayed that he may be allowed to discharge his duties as Additional District and Sessions Judge the post which he was holding at the time of compulsory retirement and to pay him salary and all arrears accordingly.

5. The parties having exchanged pleadings agreed for the final disposal of the writ petition at the stage of admission.

6. Sri Anupati Ram Yadav, who appeared in person, submitted that the then District Judge and the Administrative Judge were annoyed with him and as such they have awarded adverse entry so as to ruin his career.

7. The Administrative Judge was not competent to withhold his integrity for the relevant year as the District Judge had certified it. The withholding of the integrity by the Administrative Judge amounts to down grading his entry which could not have been done without following the principles of natural justice. The term of the then Administrative Judge had expired on 31.03.2008 and as such he could have awarded entry to him within six months thereof i.e. by the end of September, 2008 whereas his integrity was withheld vide order dated 03.02.2009 which was illegal.

8. The adverse entry for the year 2007-08 was on the basis of the inspection report of 05.07.2008 which could have been relevant only for the year 2008-09.

9. The petitioner had represented against the aforesaid withholding of integrity immediately on 06.03.2009 by filing a representation and the same was decided after about four years though

under the U.P. Government Servants (Disposal of Representation against Adverse Annual Confidential Report and Allied Matters) Rules, 1995, such a representation ought to have been decided within four months or 120 days.

10. Lastly, he submits that his entire service record which was otherwise unblemished was not taken into consideration before retiring him compulsorily.

11. Sri Ashish Mishra, learned counsel appearing for the Allahabad High Court in response to the above arguments submitted that in view of Article 235 and Rule 4 of Chapter III of the High Court Rules, 1952 (hereinafter referred to the High Court Rules) the Administrative Judge has independent power to record entries in the character roles of the officers of the subordinate judiciary. Thus, there is no question of down grading of the entry of the petitioner and to follow the principles of natural justice in that regard.

12. The award of entry by the Administrative Judge after the expiry of his term though a little late would not invalidate the entry so awarded. The representation of the petitioner against the said adverse entry was dealt with in all promptness and the reasons for the delay have been suitably explained and as such there is no willful or deliberate delay in deciding the same. Moreover, the representation stood decided prior to the decision taken for the compulsory retirement of the petitioner.

13. The entire past service record of the petitioner was duly considered and in the light of the entries recorded for the year 2007-08 and 2011-12, a conscious decision to retire him compulsorily was taken. There is no arbitrariness or malafidely in taking the said decision. It is thus beyond the judicial review.

14. In order to deal with the aforesaid submissions advanced by the parties it would be appropriate to highlight some additional basic facts leading to the compulsory retirement of the petitioner.

15. The petitioner joined as Additional Civil Judge, Junior Division on 19.03.1996. He was promoted as Additional District and Sessions Judge on 15.12.2008. He was compulsorily retired vide order dated 01.03.2013.

16. The aforesaid order of compulsory retirement is said to have been passed on the basis of the entry awarded to him for the year 2007-08 by the District Judge and the Administrative Judge as well as in view of the entry for the year 2010-11.

17. The annual confidential remarks recorded by the District Judge for the said year when the petitioner was posted as Chief Judicial Magistrate, Ambedakar Nagar reveals that according to him the integrity of the petitioner was beyond doubt. His disposal of cases was reported to be poor with the remark that he needs improvement in disposal of old cases and cases under Section 258 Cr.P.C. In over all assessment the petitioner was assessed as a good officer by him.

18. The petitioner had submitted a representation dated 09.07.2008 through the District Judge against the aforesaid

remarks which was forwarded to the High Court on 14.07.2008. The said representation of the petitioner was considered by the High Court and was rejected. This was communicated to the petitioner vide letter dated 24.03.2009 of the Registrar (Confidential).

19. The annual remarks so recorded by the District Judge for the said year as such attained finality as no further action was taken by the petitioner thereafter.

20. Simultaneously, the Administrative Judge, Ambedakar Nagar while reviewing the work of the petitioner for the aforesaid year assessed the petitioner as a poor officer. His judgements were reported to be very poor and his integrity was withheld till it is cleared after due enquiry.

21. The Administrative Judge further recorded that according to the report of the District Judge a surprise inspection of the office of the Chief Judicial Magistrate i.e. the petitioner was made on 05.07.2008 and it was found that paper books of 90 cases were kept in his Almirah but with incomplete records as either the order sheets were not signed or were not written. In many cases statements of the accused were not recorded and dates were fixed without recording the proceedings. An explanation was called from the petitioner but he declined to submit any. He was further given time to submit his explanation but he failed to obey the repeated directions in that regard even that of the High Court on the administrative side. Thus, the Administrative Judge records that his conduct reflects insubordination in performing duty which amounts to misconduct under Rule 3 of the U.P. Government Servants Rule, 1956.

22. The petitioner represented on 06.03.2009 against the aforesaid entry made by the Administrative Judge. The said representation was placed before the appropriate Committee and was considered in the meeting held on 31.07.2009. Since the integrity of the petitioner was withheld till he is cleared in the enquiry, the Committee directed to call for a report from the District Judge as to the out come of the enquiry and to put up the representation again after receiving the report.

23. The representation of the petitioner was again placed before the relevant Committee along with the letter dated 08.02.2010 of the District Judge and the note of the Registrar Lucknow Bench Lucknow. The Committee resolved that as no formal enquiry is pending against the officer and since the officer has not given any explanation called for by the District/Administrative Judge, the matter be deferred and be placed again after the submission of the explanation by the petitioner or the decision of the Administrative Judge.

24. The matter again came up before the said Committee in its meeting held on 03.01.2013 and it was found that the officer had by then submitted his explanation. The Committee on consideration of the entire material on record held that the integrity of the officer for the year 02.07.2008 stands withheld for cogent reasons and there are no good reasons to expunge the remarks and thus recommended for rejecting the representation.

25. The aforesaid resolution of the Committee was considered and approved

by the Administrative Committee vide its resolution dated 11.01.2013. Accordingly, the representation was rejected and the petitioner was informed of the rejection vide communication dated 17.01.2013.

26. The second representation made by the petitioner in this regard dated 25.01.2013 was also rejected and due information of it was given to him vide letter dated 10.05.2013.

27. In the year 2011-12 adverse remarks were recorded against the petitioner by the District and Sessions Judge, Ghazipur in the annual confidential report of the petitioner but the same were expunged on the representation of the petitioner. However, the Administrative Judge for the same year in assessing the petitioner rated him simply as an average officer.

28. In short, it transpires from the above facts and circumstances that the integrity of the petitioner stood withheld by the Administrative Judge for the year 2007-08 and he was rated to be a poor officer. In the year 2011-12, he was rated as an average officer by the Administrative Judge. At the same time, it was also observed by the Administrative Judge in recording entry of the year 2007-08 that he was not maintaining proper records and is guilty of insubordination. The aforesaid said entries primarily forms the basis for retiring the petitioner compulsorily.

29. A screening Committee was constituted on 17.12.2012 for the purposes of picking officers for compulsory retirement. The petitioner was also included in the list of officers placed for consideration. The Committee held its meeting on 22.01.2013. The said Committee in regard to the petitioner observed that he has been adjudged as an average officer in the year 2011-12 whereas in the year 2007-08 he was assessed as a poor officer. His integrity also stands withheld for that year. The quality of his judgements was also very poor. The representation submitted by him against the said adverse remarks stands rejected on 11.01.2013. Thus, on his over all service record, it was recommended that the petitioner be retired compulsorily.

30. The aforesaid minutes of the screening Committee were considered by the full court in its meeting on 02.02.2013 and it was resolved to retire the petitioner compulsorily along with some other officers.

31. It is on the basis of the aforesaid full court decision that the impugned office order has been issued retiring the petitioner compulsory.

32. The aforesaid facts clearly reflect that a complete procedure as provided under law was followed in considering the case of the petitioner both with regard to expunging the adverse remarks and retiring him compulsorily.

33. It is trite to mention that compulsory retirement from service is not considered to be a punishment. It is neither a dismissal nor a removal. It is not a form of punishment prescribed and involves no panel consequences inasmuch as despite such retirement the person is entitled to pension and other retiral dues as well as right to employment elsewhere. It does not have any adverse consequence.

34. Thus, once the appropriate authority forms a bonafide opinion that the compulsory retirement of an officer specially the Judicial Officer is in the interest of the department/judiciary and is in public interest, the scope of judicial review is very narrow. It is confined and permissible only on the ground of non-application of mind, mala fides or want of material particulars.

35. In **Baikuntha Nath Das** the Supreme Court laid down certain principles for the purposes of compulsory retirement which interalia are as under:-

(i) an order of compulsory retirement is not a punishment or a penalty. It implies no stigma and has no adverse consequences;

(ii) the order of compulsory retirement has to be passed in public interest on the subjective satisfaction of the employer;

(iii) principles of natural justice have no place in context of an order of compulsory retirement though judicial scrutiny is not altogether excluded and may be permissible if the order is passed malafidely and in an arbitrary manner in the sense that no reasonable person would form the requisite opinion on the given material;

(iv) the opinion should be based on consideration of the entire service record which includes entries in the confidential records/character rolls and if the government servant is promoted to the higher post, the adverse entries recorded earlier would lose their sting; and

(v) the order of compulsory retirement is not liable to be quashed by the court only for the reason that it is based upon uncommunicated adverse remarks.

36. In **Gurudas Singh** one of the principles that the adverse remark recorded loses its effect if the employee/officer is subsequently promoted was overturned and it was held any adverse entry prior to earning promotion or crossing of efficiency bar or picking up for higher rank is not wiped out and can be taken into consideration while considering the over all performance of the employee so as to form opinion if it is in public interest to retain him in service. The whole record of service of the employee will include uncommunicated adverse entries as well.

37. It is to be remembered that judicial service is not a service in the strict sense of employment as is commonly understood as judges discharge sovereign judicial power of the State where integrity is expected to be beyond doubt which has to be reflected in their over all reputation.

38. In such a situation, judiciary cannot afford to continue in service persons with doubtful integrity or persons with baggage. Persons with unnecessary baggage have to be left behind in the march ahead of the judiciary. Therefore, in the case of a judiciary, there is a constant necessity to keep vigil on the officer of the subordinate judiciary with the view to pick out the black-sheep or to weed out the dead wood.

39. In regard to judicial officers power of compulsory retirement can be exercised at any time by invoking Article 235 of the Constitution of India which in no manner is circumscribed by any Rule or Order. The said Article enables the High Court to asses the performance of

any judicial officer at any time by scrutinizing his service record to keep the stream of justice unpolluted.

40. In this factual background and the legal position, we consider it proper to first deal with the adverse entry or the withholding of the integrity of the petitioner by the Administrative Judge for the year 2007-08 and the award of adverse remarks of the year 2010-11 of the Administrative Judge.

41. The Administrative Judge for the year 2007-08 assessed the petitioner as a poor officer and has withheld his entry till it is cleared after due enquiry. The integrity was withheld though it was certified by the District Judge. The Administrative Judge has further remarked adversely against the petitioner with regard to incomplete records and insubordination amounting to misconduct. The representation of the petitioner against the above entries recorded by the Administrative Judge was rejected and the rejection was communicated to the petitioner vide letter dated 17.01.2013.

42. One of the submissions of the petitioner is that when the District Judge had certified his integrity for the year 2007-08 it was not open for the Administrative Judge to withhold the same.

43. The argument is completely misconceived as the power to report on the working of the petitioner is vested independently both in the District Judge and the High Court. Even otherwise the entry or remark made by the District Judge merges with that of the Administrative Judge. Thus, the entries or remarks made by the Administrative Judge prevails over that of the District Judge.

44. Article 235 of the Constitution of India specifically provides that the High Court is vested with the power to control District Court and subordinate court in the matters of posting, promotion and grant of leave to persons of the judicial service. The said power vested in the High Court has been interpreted by the Supreme Court in **Rajendra Singh Verma** (Dead) and it has been held that the control over the subordinate judiciary vested in the High Court by virtue of Article 235 of the Constitution of India is exclusive and comprehensive and apart from the other things includes disciplinary jurisdiction, suspension from service with the view to hold disciplinary enquiry, transfer, promotion and confirmation, deputation award of selection grade and pre-mature or compulsorily retirement.

45. Thus, High Court alone is the sole authority competent to initiate disciplinary proceedings against the subordinate judicial officers or to impose various punishments and passing of order of compulsory retirement and that the Governor of the State has to act on the basis of the recommendation so made by the High Court.

46. Chapter III Rule 4 of the High Court Rules provides for the matters which are to be dealt with by the Administrative Judge which include review of judicial work of subordinate courts and their officers so as to record entries in the character rolls of the officers. The said power of the Administrative Judge in the light of Article 235 is independent and can be exercised any time. Therefore,

withholding of the integrity of the petitioner by the Administrative Judge and rating him as the poor officer for the year 2007-08 is independent of the entry/remarks given by the District Judge.

47. The certification of integrity of the petitioner by the District Judge and withholding of the same by the Administrative Judge does not amounts to down grading the entry of the petitioner. The entry of the Administrative Judge is independent of the District Judge. He has assigned specific reasons for withholding the entry till the petitioner is cleared in the enquiry. Subsequently, it was informed that no enquiry was pending against the petitioner and therefore, there was no question of his being cleared in the enquiry. Accordingly, the integrity of the petitioner stood withheld for the year 2007-08.

48. It may be remided that in the context of awarding annual entries either by the District Judge or the Administrative Judge the principles of natural justice have no place at all.

49. The petitioner next submitted that the term of the Administrative Judge had expired on 31.03.2008 and as such he could not have recorded any entry for the year 2007-08 after more than 6 months of the expiry of his term.

50. The object of writing confidential report and awarding annual entries is to give opportunity to the officer to improve upon his working and is primarily and essentially an administrative job where opportunity of hearing is not necessary even if some adverse remarks are being recorded as such remarks do not constitute a punishment or a penalty.

51. The delay in recording annual entry by the Administrative Judge as stated earlier is merely an administrative work and would not vitiate the entry by itself. It at best is a mere irregularity which ought to be avoided.

52. In **Rajendra Singh Verma (Dead) (Supra)** a note of caution was sounded that ordinarily ACRs of several years should not be recorded at one point of time and that entry should be made within a specified time soon following the end of the period in question generally within three months and that recording of entries after more than a year should be avoided but at the same time merely for the reason ACRs were recorded otherwise would not wipe off the effect of those entries specially for the purpose of compulsory retirement.

53. In view of the above, only for the reason that the Administrative Judge recorded the entry after about six months of the expiry of his term does not have any adverse effect on the said entry specially for the purpose of compulsory retirement.

54. The next submission of the petitioner is that there was a huge delay in deciding his representation made against the adverse remarks recorded by the Administrative Judge. This delay vitiates the order.

55. The reason for the delay has been suitably explained in the narration of the facts and from it we find that the said representation was initially considered by the appropriate Committee in its meeting on 31.07.2009 and ultimately was recommended to be rejected in the meeting held on 03.01.2013 which

resolution was duly approved on 11.01.2013 by the Administrative Committee.

56. The delay in taking action or deciding the said representation of the petitioner would have no adverse impact upon the order of his compulsory retirement inasmuch as it was decided prior to the meeting of the screening Committee that considered the case of the petitioner for compulsory retirement. The information of its rejection was on record before the screening committee.

57. The submission that under the U.P. Government Service Rules, 1995, the representation ought to have been decided within 120 days is completely misconceived inasmuch as the said Rules are applicable only upon the government servants and not upon the judicial officers. The High Court has not adopted the said Rules in its applicability to the judicial officers under its control and superannuation. Thus, the submission is bereft of any merit.

58. In view of the aforesaid facts and circumstances, we find no merit in the challenge made by the petitioner to withholding of his integrity by the Administrative Judge for the year 2007-08 and in assessing him as a poor officer as well as in the rejection of his representation thereof.

59. It may also be relevant to mention that the submission that the petitioner has earned wrath of the District Judge and the Administrative Judge as he had espoused the cause of some Class III/Class-IV of the court and as such they have acted malafidely against him is of no consequence as the comparison of the entries and the remarks recorded by the District Judge and the Administrative Judge would reveal that the District Judge had certified the integrity of the petitioner whereas it was only the Administrative Judge who had withheld the same for the reasons recorded. The District Judge would not have certified his integrity if he was annoyed with the petitioner.

60. The representation of the petitioner against the entry of Administrative Judge was considered by larger committee of three High Court Judges and then by the Administrative Committee and all those persons comprising the Committee and the Administrative Committee have unanimously rejected the same approving of the remarks of the Administrative Judge. All these persons would not have acted with any bias or mala fide intention against the petitioner. There is no allegation to that effect also.

61. The contention of the petitioner that the Administrative Judge in awarding entry of the year 2007-08 has relied upon the inspection note of the District Judge dated 05.07.2008. The said inspection note was not relevant for the entry of 2007-08 rather it would have been material for the entry of the year 2008-09.

62. The above submission is bereft of merit as shifting of the said entry from one particular year to another would not wipe off its vigour or sting so long as it remains to be in the zone of the consideration for the purposes of compulsory retirement.

63. In **Vijay Kumar Jain** it has been held that shifting of the entry awarded to a different period of service or

beyond 10 years of passing the order of retirement does not mean that its effect stand wiped off and that the said entry by itself is not sufficient to retire the officer compulsory.

64. In **Pyare Mohan Lal** a single entry touching to the integrity of the officer was held to be enough to retire him compulsory.

65. Now, we turn to examine the validity of the order of the compulsory retirement passed against the petitioner.

66. In this connection, the submission is that the entire service record of the petitioner was not taken into account which would have otherwise revealed that the petitioner had an unblemished career and therefore, retiring him prematurely is not legally tenable.

67. First of all, there is no material on record to establish that the entire service record of the petitioner was notexamined by the screening Committee in recommending for his compulsory retirement. The screening Committee constituted for pin pointing the officers for compulsory retirement considered the case of the petitioner in its meeting held on 22.01.2013. The said Committee in view of the fact that his integrity stood withheld for the year 2007-08 and his representation against the same had been rejected coupled with the fact that he was assessed as a poor officer in the said year and as an average officer in the year 2011-12 on the basis of his over all service record opined to retire him compulsory.

68. The aforesaid recommendations of the screening Committee were placed before the full court of the High Court in its meeting dated 02.02.2013 and upon deliberation, it was finally resolved to retire the petitioner compulsorily. Accordingly, recommendations were made leading to the impugned office order dated 01.03.2013 issued by the Chief Secretary State of U.P.

69. In **Rajendra Singh Verma (Dead) (Supra)** the Apex Court observed that where before passing the orders of compulsory retirement, the whole service record of the officer is taken into consideration by the screening Committee and that the matter is deliberated by the full court on the basis of the record of the work, conduct, general reputation of the officer and since the order of compulsory retirement is not punitive in nature, the evaluation made by the Screening Committee/Full Court can neither be termed as arbitrary or capricious nor can be said to be so irrational so as to shock the conscious of the court to warrant or justify any interference.

70. In the view of the above, we are of the opinion that it is not a case where any arbitrary or irrationally decision has been taken by the High Court on the administrative side in recommending for the compulsory retirement of the petitioner and in retiring him so.

71. The Writ Petition as a whole lacks merit and is accordingly dismissed with no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2019

BEFORE
THE HON'BLE AJAY BHANOT, J.

Writ-A No. 8681 of 2019

Deepak Kumar ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Pram Shankar Pandey

Counsel for the Respondents:
C.S.C.

A. U.P. Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974 - Appointment on Compassionate grounds- Claim of Petitioner rejected by Respondent No.2 on the ground of delay.

Appointment on Compassionate grounds- The only justifiable ground for such appointments, is to provide an employment to a member of such family to tide over the immediate financial crisis- Delay in making a claim on compassionate grounds dilutes the case of immediate financial penury and consequently negates the entitlement for appointment on compassionate grounds. Writ petition dismissed.

Case Law discussed/relied upon: -
1. Umesh Kumar Nagpal Vs. State of Haryana, (1994) 4 SCC 138

2. Director of Education (Secondary) v. Pushpendra Kumar, (1998) 5 SCC 192

3. Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384

4. State of Haryana v. Ankur Gupta, (2003) 7 SCC 704

5. Bhawani Prasad Sonkar Vs Union of India and Others, (2011) 4 SCC 209

6.of V. Sivamurthy Vs. State of Andhra Pradesh, (2008) 13 SCC 730

7. Sanjay Kumar Vs. State of Bihar and Others, 2000 (7) SCC 192

8. Smt. Sonal Laviniya and another vs. Union of India and another, 2003 (5) AWC 4070

9. Sanjeev Kumar Vs. Food Corporation of India and Others, Writ A No. 11083 of 2018

10. Shiv Kumar Dubey Vs. State of U.P. 2014 (2) ADJ 312 (E-3)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The claim of the petitioner for appointment under the Dying in Harness Rules/Compassionate grounds has been rejected by order dated 26.09.2018 passed by respondent no. 2, Director, Panchayat Raj, U.P., Lucknow on the foot that the application is highly belated and barred by limitation.

2. Thus aggrieved, the petitioner has assailed the order dated 26.09.2018 passed by respondent no. 2, Director, Panchayat Raj, U.P., Lucknow in the instant writ petition.

3. The petitioner has also prayed for the following reliefs in the instant writ petition:

"a. issue a writ, order or direction in the nature of certiorari quashing impugned order dated 26.09.2018 passed by respondent no. 2.

b. Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to re-consider the application of the petitioner for appointment on the compassionate ground and time limit for appointment may be dispensed with and benefit or relaxation may be given."

4. The order dated 26.09.2018 impugned in the writ petition records that the claim of the petitioner for appointment under the Dying in Harness Rules was made five

years after the death of his father. The application was found to be barred by limitation. Accordingly, the order dated 26.09.2018 invalidated the claim of the petitioner for appointment under the Dying-in-harness Rules as applicable to the respondent Gram Panchayat.

5. Sri Dharmendra Kumar Mishra, learned counsel holding brief of Sri Prem Shankar Pandey, learned counsel for the petitioner submits that the claim of the petitioner has been wrongly rejected. He could not be appointed on compassionate grounds in the immediate aftermath of the death of his father as he was a minor at that point in time. The petitioner had not secured requisite educational qualifications in the period proximate to the death of his father. The petitioner cannot be penalized for any delay on his part as he made the application for appointment immediately after he attained majority and passed the Intermediate examination.

6. Learned Standing Counsel for the State respondents submits that the claim of the petitioner for the appointment on the compassionate ground has rightly been rejected by the respondent no. 2 on 26.09.2018. He submits that the delay in making the appointment was not liable to be condoned and the family of the petitioner did not face any immediate financial crisis upon the death of his father.

7. Heard learned counsel for the petitioner and learned Standing Counsel for the State.

8. Certain facts relevant for the judgment are established beyond the pale of dispute.

9. The father of the petitioner namely Sri Keshavdev was a Gram Panchayat Adhikari, Block Chhata, District Mathura. He died in harness on 23.03.1994. The petitioner was minor at the time of the death of his father Late Keshavdev. Petitioner claims that he attained majority in the year 2008.

10. The mother of the petitioner had made a representation for grant of compassionate appointment for the first time on 20.10.1994 with a prayer to keep the post reserved till her son attains majority. The petitioner submitted his claim for appointment under the Dying-in-harness Rules to the competent authority on 19.05.2016. The respondent authorities did not act upon his claim and failed to appoint him under the Dying-in-Harness Rules.

11. The petitioner approached this Court by instituting a writ petition No. 11515 of 2018, Deepak Kumar vs. State of U.P. and Others. The writ petition was disposed of finally by judgment and order entered on 10.05.2018. The operative portion of the judgment is extracted hereunder:

"In view of the submissions of learned counsel for the parties and considering the fact reflected from the record that the District Panchayat Raj Officer has forwarded the application of the petitioner to the respondent No.4 for taking final decision, this Court thinks it proper to dispose of the present petition, without expressing any opinion on the merits of the claim of the petitioner. A direction is, therefore, issued to the respondent No.1 to take a final decision under due communication to the petitioner expeditiously, preferably within a period of two months from the date of submission of certified copy of this order.

The writ petition is, accordingly, disposed of."

12. In pursuance of the order dated 10.05.2018 passed by this Court in Writ Petition No. 11515 of 2018, the respondent no. 1 passed the order dated 26.09.2018 which is assailed in the instant writ petition.

13. The petitioner moved an application for appointment on compassionate grounds after a period of 22 years of the death of his father on 19.05.2016.

14. This is the admitted case of the petitioner.

15. Grant of appointment on compassionate grounds in the respondent corporation is regulated and governed by the **Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974** (hereinafter referred to as the "Rules").

16. The concept of dying in harness is unique to Service Law Jurisprudence.

17. The validity of the concept of appointments on the basis of an employee dying in harness was called in question before the courts. The constitutional validity of the aforesaid appointments soon came to be tested. The compassionate ground appointments passed the test of constitutional validity by a slender margin. The justification to make compassionate ground appointments was provided on the footing that the kin of the deceased stood on the brink of financial penury or faced an immediate financial crisis on account of the death of working member of the family. This feature alone constituted the kin of a deceased employee into one class and on the footing alone, the rationale of compassionate ground appointments was justified.

18. It would be apposite to reinforce the narrative with good authority.

19. The purpose of compassionate appointments provides their justification. The death of a bread winner forces the family of the deceased into penury. The immediacy of the financial crisis creates the requirement for urgent redressal. The concept of compassionate appointments is created only to enable the bereaved family to tide over the immediate financial crisis.

20. The Hon'ble the Supreme Court in **Umesh Kumar Nagpal Vs. State of Haryana, reported at (1994) 4 SCC 138**, explained the purpose of compassionate in following terms:

"2.The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved

out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

21. A similar sentiment was echoed by the Hon'ble Supreme Court in the case of **Director of Education (Secondary) v. Pushpendra Kumar, reported at (1998) 5 SCC 192** in the following terms:

"8.The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main

provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee. InUmesh Kumar Nagpalv.State of Haryana[(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the Court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in Classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual categories. It was observed: (SCC p. 140, para 2)

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

22. However, there is a caution. Compassionate ground appointments are an exception and cannot be made the rule. The exception can be maintained only by strictly adhering to the pre-conditions of the appointment in a strict fashion. A relaxation in the aforesaid pre-conditions would open a floodgate of appointments on compassionate grounds. It will turn the compassionate ground appointments into a regular source of recruitment. The constitutionally accepted mode of appointment to public office or any other post under the State Government or its instrumentalities is by open and transparent recruitment process. Such recruitment process would invite eligible persons from the open market to compete for appointment. This process is consistent with the mandate of Article 14 and Article 16 of the Constitution of India.

23. It was with this constitutional mandate in mind that the Hon'ble Supreme Court in the case of **Mumtaz Yunus Mulani v. State of Maharashtra,** reported at **(2008) 11 SCC 384** cautioned that compassionate appointment were not an alternative mode of recruitment to public employment, by laying down the law thus:

"However, it is now a well-settled principle of law that appointment on compassionate grounds is not a source of recruitment. The reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over the sudden financial crisis."

24. The Hon'ble Supreme Court reiterated the purpose and limitations of compassionate ground appointment in the case of **State of Haryana v. Ankur Gupta, reported at (2003) 7 SCC 704** held thus:

"6.As was observed inState of Haryanav.Rani Devi[(1996) 5 SCC 308 : 1996 SCC (L&S) 1162 : JT (1996) 6 SC 646] it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-Harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. InRani Devi case[(1996) 5 SCC 308 : 1996 SCC (L&S) 1162 : JT (1996) 6 SC 646] it was held that the scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. InLIC of Indiav.Asha Ramchhandra Ambekar[(1994) 2 SCC 718 : 1994 SCC (L&S) 737 : (1994) 27 ATC 174] it was pointed out that the High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted inUmesh Kumar Nagpalv.State of Haryana[(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] that as a rule, in public service appointments should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

7.InDirector of Education (Secondary)v.Pushpendra Kumar[(1998) 5 SCC 192 : 1998 SCC (L&S) 1302] it was observed that in the matter of compassionate appointment there cannot be insistence for a particular post. Out of

purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for grant of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased employee. As it is in the nature of exception to the general provisions, it cannot substitute the provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision.

25. It was in the experience of the State Government that a large number of applications for compassionate ground appointments were made much after the death of the government servants. Rule 5 of the said Rules provides for the said contingency. Rule 5 authorizes the State Government to condone the delay in making of an application for an appointment on compassionate grounds. The State Government undoubtedly has the power to condone the delay in filing of an application for appointment on compassionate grounds. However, while considering the scope of such power, purpose of compassionate ground appointments can not be lost sight of. The stated purpose which is the only justifiable ground for such appointments, is that the family which is facing immediate financial crisis, should be supported by providing an employment to a member of such family to tide over the crisis.

26. Only present and imminent financial crisis provides the sole justification for making appointments on compassionate grounds. Delay in making such applications for appointment on compassionate grounds raises a presumption that the immediate financial crisis has been tided over. Lifting of the immediate financial penury, denies the justification for making an appointment on compassionate grounds.

27. The criteria of financial hardship faced by the family of the deceased caused by his death, provides a thin membrane of legitimacy to compassionate appointments. Bereft of this thin cover of legitimacy or if any other criteria is employed to make compassionate appointments, the appointments would become vulnerable to a constitutional challenge. Appointments based on descent or claims of appointment which rest on heredity, invite the wrath of Article 16 of the Constitution of India.

28. It would be apposite to fortify the narrative with good authority.

29. The Hon'ble the Supreme Court set its face against appointments based on descent in the case of **Bhawani Prasad Sonkar Vs Union of India and Others**, reported at **(2011) 4 SCC 209**. The Hon'ble the Supreme Court in Bhawani Prasad Sonkar (supra), spoke as follows:

"Now, it is well settled that compassionate employment is given solely

on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognised as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve."

"InUmesh Kumar Nagpalv.State of Haryana[(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] , while emphasising that a compassionate appointment cannot be claimed as a matter of course or in posts above Classes III and IV, this Court had observed that: (SCC p. 140, para 2)

"2. ... The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

"Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make

compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts.

30. A similar stand against impermissibility of appointments based on descent was taken at an earlier point in time in the case of **V. Sivamurthy Vs. State of Andhra Pradesh**, reported at **(2008) 13 SCC 730**, hereunder:

"18. (a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well-recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies."

31. Delay in making a claim for compassionate grounds appointment dilutes the case of immediate financial penury and consequently negates the entitlement for appointment on compassionate grounds.

32. Appointments on compassionate grounds cannot wait for the claimants to attain majority or to enable them to acquire additional qualifications and get a better deal in appointments. Infact, such grounds militate against claim for compassionate grounds appointment.

33. The Hon'ble Supreme Court in the case of **Sanjay Kumar Vs. State of Bihar and Others** reported at **2000 (7) SCC 192** reiterated the purpose of a compassionate grounds appointments to tide over the sudden crisis resulting from the death of the earner in a family. However, the reservation of a vacancy to enable such person to attain majority was negatived by the Hon'ble Supreme Court by holding thus:

"3.We are unable to agree with the submissions of the learned Senior Counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the breadearner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner inDirector of Educationv.Pushpendra Kumar[(1998) 5 SCC 192 : 1998 SCC (L&S) 1302 : (1998) 2 Pat LJR 181] . It is also significant to notice that on the date when the first application was made by

the petitioner on 2-6-1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

34. A Division Bench of this Court after citing good authority, also concluded that financial penury ceased to exist in case an application was made long years after the death of the employee in the case of **Smt. Sonal Laviniya and another vs. Union of India and another** reported at **2003 (5) AWC 4070:**

"38.The purpose of providing such an employment has been to render the financial assistance to the family, which has lost the bread earner immediately after the death of the employee. If the application has been filed after expiry of 9½ years the element of immediate need stood evaporated and there was no occasion for the respondents to consider the case of the petitioner for such a relief. The observation made by the learned Tribunal are in consonance with the law laid down by the Hon'ble Apex Court and no exception can be taken out."

35. A similar view was taken by learned Single Judge of this Court in the case of **Sanjeev Kumar Vs. Food Corporation of India and Others,** registered as **Writ A No. 11083 of 2018,** entered on 03.05.2018:

"In a case of compassionate appointment, it is the immediacy of appointment that is of prime consideration to ameliorate the financial hardship be falling the bread winner of the family. If the family of the bread winner or the claimant has managed to survive for 27 years after the death of the government servant, it cannot be said that there is any immediacy of the appointment. Compassionate appointment is an exception to the well established Rule of equality in the matter of recruitment to government service and therefore exceptional grounds must exist to justify such appointment. "

36. The question of delay in filing applications for appointment under Dying-in-harness Rules and the consequences of such delay on the right to be appointed on compassionate grounds was posed to a Full Bench of this Court in the case of **Shiv Kumar Dubey Vs. State of U.P**. reported at **2014 (2) ADJ 312**. For ease of reference, the relevant part of the judgment in Shiv Kumar Dubey (supra) is reproduced hereunder:

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

[emphasis supplied]

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;
[emphasis supplied]

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;
[emphasis supplied]

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;
[emphasis supplied]

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time withinwhich an application has to be made, the operation of the rule is not suspended during the minority of a member of the family." (emphasis supplied).

37. The facts of the case found earlier shall now be considered in the light of the judicial authority stated in the preceding part of the judgment.

38. The father of the petitioner died in harness on 23.03.1994. The petitioner made an application for

grant of appointment on compassionate grounds on 19.05.2016. Delay in making the application for appointment on compassionate grounds is defended on the sole ground that on the date of death of the father of the petitioner, the petitioner was minor. The mother of the petitioner had submitted an application for reserving a post for the petitioner till he attain majority. The petitioner applied for appointment on compassionate grounds when he attained majority. On these established facts and in view of the legal narrative in the preceding paragraphs, the claim of the petitioner is untenable in law.

39. There are other aspect to the contrary as well.

40. In the writ petition, it is stated that the date of birth of the petitioner is 15.08.1990. According to which, petitioner was 26 years at the time of submission of the application for compassionate grounds appointment.

41. In view of the delay in filing the application for grant of appointment on compassionate grounds, this Court consistent with the narrative in the earlier part of the judgment, finds that the financial crisis, if any, occasioned by the death of the father of the petitioner was not existing when the application for grant of compassionate grounds appointment was made by the petitioner. There is no lawful basis for grant of appointment on compassionate grounds to the petitioner.

42. Moreover, in the light of the discussion in the earlier part of the judgment, post cannot be kept reserved for the kin of an employee till they attain majority.

43. Emotional distress and financial penury are two distinct facts. Emotional distress is not relevant for appointment on compassionate grounds. It is only immediate financial penury which is relevant for such appointment.

44. There is no justification for grant of compassionate appointment to the petitioner. The rejection of the claim of the petitioner is lawful. There is no infirmity in the impugned order dated 26.09.2018 passed by the respondent no. 2 dismissing the claim of the petitioner for appointment under the Dying-in-Harness Rules.

45. The writ petition is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 10489 of 2008

Ram Charan ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri R.C. Maurya, Sri D.B. Maurya, Sri D.B. Yadav, Sri S.K.S. Baghel, Sri R.P. Mishra

Counsel for the Respondents:
C.S.C.

A. Appointment made on compassionate basis is a regular appointment and not "temporary appointment"; hence order appointing Petitioner on temporary basis to be treated as having been made on Substantive basis. Since impugned order passed without notice, therefore set aside. (Para 14,15,16,17)

B. Regularization on temporary basis - Subsequently regularization order cancelled.

Writ Petition allowed.

Case law discussed/relied: -

1. Dhirendra Pratap Singh vs. District Inspector of Schools and others 1991 (1) UPLBEC 427

2. Gulab Yadav vs. State of U.P. and others 1991 (2) UPLBEC 995

3. Budhi Sagar Dubey vs. District Inspector of Schools and others 1993 ESC 21

4. Ravi Karan Singh vs. State of U.P. and others 1999(3) UPLBEC 2263

5. Sanjai Kumar vs. Dy. Director General (NCE), Directorate and others, 2002(3) UPLBEC 2748.

6. Ram Chandra vs. State of U.P. and others, 2008(2) UPLBEC 1431

7. Sr. General Manager, Ordnance Factory vs. Central Administrative Tribunal and others, 2016(2) ADJ 751

8. Vikas Mishra vs. State of U.P. and others 2019(3) ADJ 486

9. D.N.Upadhiya and another Vs The State of U.P. and another 1985 UPLBEC 1112 (E-3)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri R.P.Mishra, Advocate, holding brief of Sri S.K.S. Baghel, learned counsel for petitioner, learned Standing Counsel for respondents and perused the record.

2. Petitioner's father Sri Ram Singh Beldar was working in U.P.P.W.D. and died in harness whereupon vide order dated 30.3.1983 Executive Engineer, National Highway, Construction Division, U.P.P.W.D., Agra appointed petitioner on temporary basis as Beldar in Work Charge Establishment. Thereafter on 04.08.1999, an order was issued by Chief Engineer, Agra Region, P.W.D., Agra that those Work Charge Employees, who have worked continuously for five years may be regularized. Pursuant thereto Executive Engineer, Provincial Division, P.W.D., Agra passed an order dated 11.05.2000 regularizing petitioner on temporary basis with effect from 01.05.2000.

3. Subsequently, order dated 04.08.1999 issued by Chief Engineer, Agra and dated 11.05.2000 issued by Executive Engineer, Provincial Division, Agra, have been cancelled vide impugned order dated 22.7.2000.

4. It is contended that firstly compassionate appointment is given in substantive capacity and, therefore, there is no occasion for regularization on temporary basis and, secondly even otherwise when regularization order was already passed, it could not have been cancelled in violation of principles of natural justice and without any show cause notice.

5. The first question need to be considered in this case is, "whether compassionate appointment made under U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "Rules, 1974") could have been temporary or it is always substantive appointment?"

6. I find that there are three authorities on the subject in which it was held that an appointment made under

Rules, 1974 is always a permanent appointment. First of all there were three Single Judge decisions in **Dhirendra Pratap Singh vs. District Inspector of Schools and others 1991 (1) UPLBEC 427; Gulab Yadav vs. State of U.P. and others 1991 (2) UPLBEC 995** and **Budhi Sagar Dubey vs. District Inspector of Schools and others 1993 ESC 21**. Thereafter, a Division Bench consisting of Hon'ble Markandey Katju (as His Lordship then was) and Hon'ble Kamal Kishore, JJ, in **Ravi Karan Singh vs. State of U.P. and others 1999(3) UPLBEC 2263** took the same view.

7. A learned Single Judge, taking a different view than what was taken in earlier three Single Judges' judgments, referred the question to Larger Bench and considering such reference, Division Bench in Ravi Karan Singh (supra), said as under :

*"2. In our opinion, **an appointment under the Dying-in-Harness Rules has to be treated as a permanent appointment** otherwise if such appointment Is treated to be a temporary appointment, then it will follow that soon after the appointment, the service can be terminated and this will nullify the very purpose of the Dying-in-Harness Rules because such appointment is intended to provide immediate relief to the family on the sudden death of the bread earner. We, therefore, hold that the appointment under Dying-in -Harness Rules is a permanent appointment and not a temporary appointment, and hence the provisions of U. P. Temporary Government Servant (Termination of Services) Rules. 1975 will not apply to such appointments. " (Emphasis added)*

8. The above Division Bench was followed in another Division Bench consisting of Hon'ble S.K.Sen, C.J. and Hon'ble Ashok Bhushan,J. (as His Lordship then was) in **Sanjai Kumar vs. Dy. Director General (NCE), Directorate and others, 2002(3) UPLBEC 2748.**

9. Again another Division Bench in **Ram Chandra vs. State of U.P. and others, 2008(2) UPLBEC 1431** following Division Bench judgment in Ravi Karan Singh (supra), said that appointments made under Rules, 1974 are of permanent nature.

10. In the context of Central Government employees, all the above judgments have been examined by a Full Bench of this Court in **Sr. General Manager, Ordnance Factory vs. Central Administrative Tribunal and others, 2016(2) ADJ 751**. Following three questions were referred to the Full Bench :

"1. Where a person is granted compassionate appointment as a member of the family of a deceased employee of the government who has died in harness in relaxation of the normal rules for recruitment, is it not necessary that even a compassionate appointee be placed on probation in the first instance, in the same manner as any other direct recruit, since the provision pertaining to appointment on probation has not been excluded or exempted in the case of a compassionate appointment;

2. Since an appointment on compassionate grounds on probation is also a regular appointment and a person appointed as such is not offered a temporary appointment, whether there is any violation of law or principle in appointing a person in this category on probation in the first instance;

3. In view of the clear distinction in service jurisprudence between a regular and a temporary appointee, whether the appointment of a person on a compassionate basis on probation is permissible in law." (Emphasis added)

11. Above questions were answered by Full Bench, as under:

"26. We, accordingly, answer the questions which have been referred to the Full Bench in the following terms:

(1) Re Question (1): Where a person is appointed on a compassionate basis as a dependent member of the family of an employee of the State who has died in harness, such an appointment can be made on probation. The object and purpose of appointing a person on probation is to determine the suitability of the person for retention in service. ***Appointment of a person who is engaged on a compassionate basis on probation is not contrary to law or unlawful.***

(2) Re Question (2): Since ***an appointment on compassionate grounds on probation is also a regular appointment and a person appointed as such is not offered a temporary appointment, such an appointee can be placed on probation in the first instance.***

(3) Re Question (3): The appointment of a person on a ***compassionate basis on probation is permissible in law."***

(Emphasis added)

12. Reply to Question (2) clearly shows that Full Bench held that appointment on compassionate basis is a regular appointment and is not to be treated as "temporary appointment". In para 18 of judgment Full Bench clearly observed that there is a distinction between "appointment on probation" and "temporary appointment". The relevant observations read s under:

"An appointment on probation does not detract from the nature of the appointment which is to a regular service. *Probation is merely an opportunity for the probationer to establish by dint of the work which is rendered during the period of probation, that he or she is suitable for being retained in service. On the part of the employer, probation enables the appointing authority to determine the suitability of the probationer for retention in service. There is a well accepted distinction in law and in service jurisprudence between a probationary appointment and a temporary appointment." (Emphasis added)*

13. The above authorities have been considered and followed recently by a Single Judge (Myself) in **Vikas Mishra vs. State of U.P. and others 2019(3) ADJ 486.**

14. Therefore, I am clearly of the view that appointment having been made on compassionate basis, there was no occasion for respondents to treat the said appointment as temporary and to proceed for regularization. Exercise of regularization was wholly uncalled for and unwarranted. Thus, order dated 30.3.1983 passed by Executive Engineer appointing petitioner as Temporary Beldar, is to be treated as having been made on substantive basis.

15. Now coming to the second question, "when requlariza tion order was already passed, whether it can be cancelled without any show cause notice

or opportunity," though subsequent regularization order is not of much consequence in view of nature of appointment, as already discussed above.

16. Any order of regularization, if cancelled, results in civil consequence. In similar circumstances where an order of confirmation was cancelled without notice, a Division Bench of this Court in **D.N.Upadhiya and another Vs The State of U.P. and another 1985 UPLBEC 1112**, observed in para 10 as under:

"It is, therefore, well established from the law laid down by their Lordships that there can be a substantive vacancy in a temporary post also. In view of the above, the petitioners, who were appointed as Senior Auditors although temporary, would be deemed to have beenappointed in a substantive capacity. Once this position is reached, their rights have crystallised. The petitioners were confirmed and subsequently deconfirmed. This could not be done, for their rights had crystallised. "

17. In view thereof, writ petition is allowed. Impugned order dated 22.07.2000 (Annexure 5 to the writ petition) is hereby set aside.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ- A No. 30914 OF 1991

Rajendra Singh ...Petitioner
Versus
District Assistant Registrar,Cooperative Societies Muzaffarnagar and Ors. ...Respondents

Counsel for the Petitioner:
Sri A.Kumar, Sri Sharad Malviya.

Counsel for the Respondents:
Sri Ravi Agarwal, S.C.

A. Regulation 85 of U.P. Cooperative Societies Employees' Service Regulations, 1975- "Deemed Termination" of the services of the Petitioner. Procedure prescribed in Regulations, 1975 not followed and no order of punishment as such has been passed-Order talks of termination though under the Rules, termination is not a punishment and it talks of removal or dismissal- deemed termination of petitioner is of no legal consequence and is a nullityand without jurisdiction. Writ Petition allowed with costs.
(Para 9,10,11,12,13,14) (E-3)

(Delivered by Hon'bleSudhir Agarwal, J.)

1. Heard Sri Sharad Malviya, learned counsel for petitioner, Sri Ravi Agarwal, learned counsel for respondent-Societies and perused the material available on record.

2. This writ petition filed under Article 226 of Constitution of India is directed against order dated 09.09.1991 (Annexure-6 to the writ petition) passed by Secretary, Shamli Sahkari Kray-Vikray Samiti Ltd. Gandhi Ganj, Shamli, District Muzaffarnagar informing petitioner that he has not deposited certain funds of Cooperative Society, therefore, should deposit dead-stock and hand over charge and also pay the amount embezzled, by 12.10.1991, failing which his services shall be deemed to have been terminated and no separate order will be passed.

3. Facts in brief, giving rise to the present writ petition, are that petitioner was appointed as Accountant in 1984 in Shamli Sahkari Kraya Vikray Sahkari

Samiti Ltd., Shamli, District Muzaffarnagar (hereinafter referred to as "Society"). He was also confirmed on the said post after approval of Deputy Assistant Registrar. He was allowed to officiate as "Secretary" of Society from 10.09.1990 to 13.02.1991. A complaint was made by successor Secretary of Society to Administrator of Society on 19.07.1991 whereupon Administrator required petitioner to deposit the amount, allegedly misappropriated, by 27.07.1991 failing which he shall be deemed to be under suspension. Petitioner submitted reply dated 26.07.1991 whereafter order of suspension was passed on 06.08.1991. By another order dated 24.08.1991, petitioner was directed to handover charge of record by 31.08.1991 else charge would be taken through District Magistrate. Thereafter, impugned order was passed on 09.09.1991 directing petitioner to handover charge of record, dead-stock and the alleged amount embezzled, by 12.10.1991, failing which he shall be deemed to have been terminated and no separate order shall be passed. Aforesaid order has been passed by Secretary of Society. Petitioner submitted reply dated 16.09.1991 and also handed over charge of all dead-stock and records on 06.10.1991. However, Administrator and Secretary of Society did not permit petitioner to function on his post stating that his services stood terminated vide order dated 09.09.1991, hence, this writ petition has been filed by petitioner challenging the said order.

4. A supplementary affidavit has also been filed stating that suspension order dated 06.08.1991 was challenged by petitioner in a writ petition wherein an interim order was passed. Thereafter petitioner was served with a charge-sheet dated 07.08.1991 containing six charges alleging that petitioner is guilty of misappropriation of Rs. 64,969/-. Aforesaid charge-sheet was issued by Additional District Magistrate (Consumer)/Enquiry Officer, Muzaffarnagar. It is also said that a criminal case under Section 409 IPC was registered against petitioner which has resulted in acquittal vide judgment dated 08.08.1996 passed by Sri C.S. Karol, Additional Chief Judicial Magistrate, Kairana in Criminal Case No. 340/9 of 1994. It is also said that an enquiry was conducted by Additional District Cooperative Tehsil Shamli, District Muzaffarnagar wherein it was found that alleged complaint contained forged signatures. Further a disciplinary enquiry was initiated against petitioner on 19.07.1991 and after considering his reply, Additional District Cooperative Officer, in his noting, exonerated petitioner in respect of charges-1 and 6 but held charges- 2, 3, 4 and 5 proved. In respect of charge-2, Society, however, subsequently recovered amount from another employee, Tej Pal Singh, to the tune of Rs. 6548.09. In respect of charges-3 and 4, the matter is pending for arbitration before District Assistant Registrar Cooperative Society, Muzaffarnagar. In respect to charge-5, criminal case has already resulted in acquittal of petitioner. Subsequently, an order was passed taking into account the fact that the present writ petition was dismissed in default on 26.10.2004 but I may place on record that this writ petition has been subsequently restored vide order dated 22.01.2010.

5. A counter affidavit has been filed by Society admitting that petitioner was suspended from the post of Accountant

with effect from 06.08.1991 on the charges of misappropriation of Rs. 1,02,404/-, mentioned in the charge-sheet dated 19.07.1991. It is also admitted that petitioner deposited 16 cylinders on 02.08.1991 and five cylinders on 05.08.1991. It is also submitted that Sri Suresh Pawar, Assistant District Cooperative Officer (Consumer), Muzaffarnagar was Enquiry Officer who submitted report dated 07.08.1991 holding petitioner guilty of misappropriation of Rs. 64,969/- and said report was submitted by Enquiry Officer after examining petitioner's reply dated 26.07.1991. Petitioner did not deposit alleged misappropriated amount hence his services stood terminated by order dated 12.10.1991 and said termination was duly approved by Managing Committee of Society on 23.10.1991 as per bye-laws. It is reiterated in para-16 of counter affidavit that petitioner stood terminated with effect from 12.10.1991.

6. In the counter affidavit, it is not stated anywhere that any order of termination was ever passed against petitioner and reference is made only to order dated 09.09.1991 wherein it was said that either he should handover charge of records and deposit certain amount by 12.10.1991 failing which his services shall stand terminated.

7. When questioned, learned counsel for respondents also could not show that after issue of charge-sheet when petitioner submitted reply, Enquiry Officer fixed any date, time and place to hold oral enquiry wherein employer proved the charges and thereafter opportunity was given to petitioner to defend his case and thereafter inquiry report was submitted which ultimately resulted in order of punishment.

8. Reference is also made to Regulation 85 of U.P. Cooperative Societies Employees' Service Regulations, 1975 (hereinafter referred to as "Regulations, 1975"). Learned counsel for respondents, however, could not show, from record, that such procedure was followed at all.

9. In this case, it appears that a charge sheet was issued, reply was received and thereafter Enquiry Officer submitted report. Then a strange order was passed that either petitioner should deposit certain amount etc. by 12.10.1991 failing which he shall be deemed to have been terminated. In my view, entire proceedings, including alleged order of termination, therefore, falls on the following ground:

i. Regulation 85 of Regulations 1975 was not followed.

ii. The order talks of termination and not dismissal or removal though under the Rules, termination is not a punishment and it talks of removal or dismissal.

10. Coming to first aspect, I would like to refer the decision rendered in **Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana and others, AIR 2016 SC 2510,** wherein Regulation 85 itself was considered, which is also applicable in the present case. Supreme Court has categorically held that unless departmental enquiry is conducted, following procedure prescribed in Regulation 85, any order of punishment without following such procedure would be illegal. Court has also laid down certain mandatory aspects of procedure which have to be followed before imposing a major penalty and the same are as under:-

"i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the ***employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.***

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any." (Emphasis added)

11. Since in the present case, procedure prescribed in Regulations, 1975 has not been followed and no order of punishment as such has been passed, therefore, alleged deemed termination of petitioner is of no legal consequence and it is a nullity.

12. Now, coming to second aspect, I find that only such punishment can be awarded which is prescribed under Rules and any punishment which is not provided in Rules is without jurisdiction. Dismissal and removal are termination of specific kinds while "termination" by itself may be punitive or simplicitor. Sometimes cessation of contract of employment due to resignation, retirement etc., is also within the ambit of termination. Order of termination, therefore, cannot be construed as one of the punishment prescribed in Rules since termination by itself is not one of the punishment prescribed in Rules but specific kinds of termination are mentioned in Rules and only such punishment can be imposed and not one which is not prescribed in Rules as held by Supreme Court in **Vijay Singh vs. State of U.P. and others, JT 2012(4) SC 105.**

13. In view of above discussion, I have no hesitation in holding that alleged "deemed termination" of petitioner with effect from 12.10.1991 pursuant to order dated 09.09.1991 is patently illegal and without jurisdiction.

14. In the result, the writ petition is allowed. Order dated 09.09.1991 insofar as it talks of "deemed termination" of petitioner on and after 12.10.1991 is hereby set aside. Petitioner shall be entitled for all consequential benefits and also a cost of Rs. 7,500/.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2019

BEFORE
THE HON'BLE PRAKASH PADIA, J.

Writ- A No. 19737 OF 2018
With
Other 264 Writ A Cases.

Shikha Singh and Ors....Petitioners
Versus
State of U.P. and Ors....Respondents

Counsel for the Petitioners:
Sri Siddharth Khare, Sri Ajeet Kumar Chaurasiya, Sri Alok Dwivedi, Sri Alok Mishra, Sri Anubhav Chandra, Sri Arvind Kumar Tiwari, Sri Ashok Khare, Sri Avinash Jaiswal, Sri Babu Lal Ram, SriBhawani Prasad Shukla, Sri Dinesh Kumar Yadav, Sri Durga Charan Singh Yadav, Sri Ganesh Kumar, Sri Ghanshyam Das Mishra, Sri Kalp Nath, Sri Manoj Kumar Tiwari, Sri Narendra Kumar, Sri Paritosh Kumar Malviya, Sri Pramod Kumar, Sri Pramod Kumar Chaudhary, Sri Rajesh Kumar, Sri Rajesh Kumar Bind, Sri Rajesh Kumar Srivastava, Sri Rajiv Kumar Tripathi, Sri Ram Sajiwan Prajapati, Sri Ramesh Kumar, Sri Surendra Kumar Chaubey, Sri Tarun Agrawal, Sri Varun Dev Sharma, Sri M.D. Singh Shekhar.

Counsel for the Respondents:
C.S.C., Sri Alok Dwivedi, Sri Ambarish Chatterji, Sri Ashok Kumar Yadav, Sri Harshit Pathak, Sri Kumar Dhananjay, Sri Rajiv Kumar Tripathi, Sri Vijay Gautam, Sri Vimal Kumar Mishra, Sri H.N. Singh, Sri P.N. Saxena, Sri Shailendra

A. Estoppel and waiver - Although the petitioners have joined their place of posting without any protest, but they cannot be estopped in law from challenging their place of posting, since the rights of MRC candidates guaranteed under Articles 14 and 16(1) of the Constitution of India having been violated, the principle of estoppel and waiver will not be applicable against the legal and constitutional rights. The allotment of district made by the respondents cannot be sustained in so far as it relates to MRC candidates and to that extent, it is quashed.

Constitution of India Article 226- Assistant Teacher Recruitment Examination 2018 – State Government order dated 9.1.2018 for appointment and selection of 68500 Assistant Teachers in Junior Basic School, run and controlled by the U.P. Basic Education Board – another government order dated 9.1.2018 for conducting Assistant Teacher Recruitment Examination 2018 ("ATRE2018") by the Regulatory Authority, U.P. Allahabad - The U.P. Basic Education Board guidelines dated 19.8.2018 provide for the allotment of district on the basis of quality point and preference of the candidate- Allotment of Districts to selected candidates- though the Petitioners are higher in merit in comparison to candidates who have been allotted district in second round of allotment, they have not been allotted district of their own preference.

Held:-The candidates of reserved category have been given appointment to the districts of their choice, whereas the candidates of reserved category who on the basis of their higher marks have been placed in general category could not be provided the appointment in districts of their choice as they were lower in rank in general category (although meritorious to their respective reserved category).Thus the Meritorious Reserve Category(herein after referred as 'MRC') candidates have been denied district of appointment of their choice simply because they are meritoriousto candidate of its respective reserved category.

There is no doubt that MRC candidate is entitled for allotment of preferential district treating him as a reserved category candidate only for allotment of district of their preference. In the present case,the reserved category candidates who have been placed in select list as general candidate on account of their better performance have been denied place of appointment of their choice as they are in merit of general candidate although higher in merit of their respective reserved category.

Case law relied/discussed: -

1.Ritesh R.Shah Vs. Dr.Y.L.Yamul and others,(1996)3SCC253

2. State of Bihar and others Vs. M.Neethi Chandra and others,(1996)6SCC36

3. Anurag Patel Vs.U.P.Public Service Commission and others,(2005)9SCC742

4. C.M. Thri Vikrama Varma Vs. Avinash Mohanty and others,2011(7) SCC385

5. Alok Kumar Pandit Vs. State of Assam and others,2012(13) SCC516

6. Union of India Vs. Ramesh Ram,2010(7) SCC234

7. Dega Venkata Harsha Vardhan and others Vs. Akula Ventaka Harshavardhan and others ,2018(10) SCALE618

8. Tripurari Sharan and another Vs. Ranjit Kumar Yadav and others passed in Civil Appeal No.158 of 2018

9. Sunita Kumari Meena Vs. State of Rajasthan and others, passed in S.B. Civil Writ No. 23680 of 2018

A. Fundamental Rule 54 – B Sub-Rule(2)- Notwithstanding anything contained in rule 53. Government servant under suspension dies before conclusion of disciplinary or court proceedings instituted against him. Punishment provided under the disciplinary Rules can be imposed upon the government servant and not on the family member of the government servant. As soon as an incumbent ceases to be a government servant upon death, no penalty under the rules could have been imposed upon him.

Where disciplinary proceedings are concluded after the death of the government servant, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

WritPetition Allowed.

<u>Case Law discussed/ relied upon</u>:-

1. Hirabai BhikAnr.ao Deshmukh v. State of Maharashtra and others, (1985) ILLJ469 Bom

2. Neeraj v. Air India Ltd.,2017XAD(Delhi)245 Rajeshwari Devi v. State of U.P. and others,2011(2) ADJ (E-3)

(Delivered by Hon'blePrakash Padia, J.)

1. The present writ petition has been filed with the following prayers:

"(i) a writ, order or direction in the nature of certiorari quashing the first merit list published 31.08.2018 as also the second merit list published 02.09.2018 (Annexure 7 & 8 to the writ petition) in so far as they pertain to allotment of districts of individual petitioners.

(ii) a writ, order or direction of a suitable nature commanding the respondents to issue a revised select list after taking into account the total number of 68,500 post of Assistant Teachers originally notified.

(iii) a writ, order or direction of a suitable nature commanding the respondents to allot district strictly in order of merit after taking into account the preference expressed for the district by the individual petitioners within a period to be specified by this Hon'ble Court."

2. As the issues involved in the Bunch of these writ petitions are identical, they are being heard and decided together by this common judgment and order.

3. The facts as stated in the writ petition are that the State Government issued a government order dated 9.1.2018 for appointment and selection of 68500

Assistant Teachers in Junior Basic School, run and controlled by the U.P. Basic Education Board.

4. The State Government has also issued another government order on the same date, i.e., 9.1.2018 for conducting an examination, known as Assistant Teacher Recruitment Examination 2018 (hereinafter referred to as "ATRE 2018"). Examination was to be conducted by the Regulatory Authority, U.P. Allahabad. By the aforesaid government order, the minimum qualifying cutoff for General Category and Other Backward Class category was fixed as 45% and for Scheduled Castes and Scheduled Tribes 40% respectively.

5. The State Government, vide government order dated 17.1.2018, notified schedule for conducting ATRE 2018. In pursuance of the aforesaid government order dated 17.1.2018, the Examination Regulatory Authority issued notification dated 23.1.2018, inviting applications for ATRE 2018. Subsequently, the State Government, vide government order dated 21.5.2018 reduced the qualifying cutoff marks of general category and Other Backward Class from 45% to 40% and from 40% to 30% for Scheduled Castes and Scheduled Tribes category. The aforesaid examination was held on 27.5.2018.

6. The government order dated 21.5.2018, by which the cutoff marks for General and Other Backward Class category was reduced from 45% to 40% and from 40% to 30% for Scheduled Castes and Scheduled Tribes candidate was challenged before Lucknow Bench of this Court by filing Writ Petition No. 20404 (Service Single) of 2018. In the said writ petition, initially an interim order was granted by Lucknow Bench of this Court and the State Government was directed to declare the result of ATRE 2018 as per the government order dated 9.1.2018.

7. In compliance of the order dated 24.7.2018 passed in writ petition no. 20404 (Service Single) of 2018, the State Government issued a government order dated 8.8.2018, directing the examination regulatory authority to declare the result of ATRE 2018, as per the government order dated 9.1.2018. The result of ATRE 2018 was declared on 13.8.2018. Total 41566 candidates qualified in the aforesaid ATRE 2018. The State Government issued a government order dated 18.8.2018 for appointment of candidates qualified in ATRE 2018.

8. The U.P. Basic Education Board issued a circular/notification dated 19.8.2018, inviting online application and district preference from 41556 candidates, who have passed ATRE 2018. The U.P. Basic Education Board also issued guidelines dated 19.8.2018, which provides that the allotment of district will be made on the basis of quality point and preference of the candidate. The successful candidates of ATRE 2018 submitted their online applications and accordingly, the Board issued select list of 35420 candidates with allocation of district and directed the District Level Authority, i.e., the District Basic Education Officer to conduct the counseling and after the verification of the records, issue letter of appointment to selected candidates as per the schedule.

9. In pursuance of the selection and issuance of appointment letter by the

concerned District Basic Education Officer, i.e., the Appointing Authority, the petitioners were appointed.

10. There remain 6136 candidates who were declared qualified in ATRE 2018 but were not allotted any district. These candidates mostly belong from unreserved category, as reserved category candidate occupied the general seat meant for general category on account of their higher merit. Out of 6136 candidates, 6028 candidates were of general category, 853 of Other Backward Class category, 22 in Scheduled Castes Category and 1 candidate was Scheduled Tribes Category.

11. It is further stated in the writ petition that the State Government has also taken a political decision to adjust these 6136 candidates. In pursuance of the aforesaid decision, a further exercised for allotment of district was carried on by the respondents and these 6136 candidate were given appointment after allotment of district by the District Basic Education Officer, as per their quality points marks and preference.

12. It is further alleged by the petitioners that in pursuance of various appointment letters, the petitioners have joined their place of posting under protest. The grievance of the petitioners in the writ petition is that though they are higher in merit in comparison to candidates who have been allotted district in second round of allotment, have been allotted district of their choice whereas the petitioners despite the fact that they are higher in merit, they have not been allotted district of their own preference. The petitioners have challenged the allotment of district basically on the following grounds that-

I. The Board has arbitrarily reduced notified vacancies of 68500 to 41506 without any authority of law.

II. The Board has arbitrarily varied district-wise vacancies without any authority of law.

III. The Board not only manipulated the vacancies of various district but also committed gross illegality, irregularity or arbitrariness in allotment of district to the candidates having higher merit. Certain examples have been mentioned in the writ petition.

IV. The candidates of reserved category having higher merit and selected against unreserved post were also denied their first preference, whereas the candidates of same category having lower merit and selected under their respective reserved category have been granted their first preference.

V. The candidates selected in second list, who were having lower merit than those of selected in the first list have been granted district of their first preference.

13. All the petitioners were selected on the post of Assistant Teachers in Junior Basic Schools run and controlled by the U.P. Basic Education Board. The petitioners before this Court are aggrieved on account of denial of the allocation of appropriate districts as per their merit-cum-preference while being appointed as Assistant Teacher in Junior Basic Schools. The grievances of the petitioners are that while less meritorious candidates in their respective categories were allotted districts of their choice but the petitioners were prevented to get the district of their choice in spite of the fact that they are meritorious.

14. It is submitted by the learned counsel for the petitioners that the manner of allotment of district adopted by the respondents is grossly

unfair, unjust and arbitrary. The same is violative of principles of equality in as much as the more meritorious candidates, who have ranked higher have been denied allocation of districts for which they had given their preferences and less meritorious candidates have been allocated the said districts.

15. Counter affidavits have been filed by Sri Dev Pratap Singh, the Special Secretary, Basic Education, Government of U.P. Lucknow. In para 6 of the counter affidavit it is stated that the process of appointment of 41556 candidates who applied online e-form between 21.8.2018 to 28.8.2018 against 41556 vacancies was initiated. Final merit list was drawn as per schedule of U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "Rules of 1981"). Some of the applicants belong to reserve category stood higher on merit and occupied seat in open category along with general candidate, whereby limiting the chances of general category candidate. Some reserved category candidates did not give choice or their chance got exhausted, as such only 35420 candidates could be appointed and 6136 candidates could not be appointed. Out of 6136 candidates, 6028 candidates belong to General Category, 85 in Other Backward Class, 22 in Scheduled Castes and 1 in Scheduled Tribes category.

16. It is further stated in the counter affidavit that to accommodate left out 6136 candidates and to appoint them on remaining vacancies out of 68500, i.e., 26944 posts which were available were released so that these candidates be also allotted district based on remaining available vacancies in district in accordance with their merit category and preference. Therefore, the allocation of district was done in two phases and each allocation has been done by NIC in accordance with criteria laid down in Rules of 1981 in fair and transparent manner.

17. It is further stated that the petitioners have been allotted district which were on low preference of their choice because their candidature had been considered in the first phase of preparation of merit list by the NIC by taking into consideration all 41556 posts of Assistant Teachers. The petitioners were having low merit in their category, NIC had allotted them district as per their merit in the first phase of preparation of merit list. In paragraph 10 of the counter affidavit it is stated that to accommodate left out 6136 candidates and to appoint them on remaining vacancies out of 68500, i.e., 26944 posts which were available, were released so that these left out candidates could be allotted district based on remaining available vacancies in district on their merit and preference, therefore, allocation of district was done in two phases and each allocation has been done by NIC in accordance with criteria laid down in Rules of 1981 in fair and transparent manner.

18. It is further stated in the counter affidavit that to accommodate left out 6136 candidates and to appoint them on remaining vacancies out of 68500, i.e., 26944 posts were released. It is also stated in the counter affidavit that the process of appointment of 41556 candidates, who applied online e-form between 21.8.2018 to 28.8.2018 against 41556 vacancies when the district allocation after the final merit list drawn had been carried on as per schedule of Rules of 1981.

19. It is also stated in the counter affidavit that after the result of ATRE 2018 was declared, only 41556 candidates have qualified. The State Government in its meeting had decided that the vacancies advertised for recruitment should be reduced to 41556 for offering appointment by proportionately reducing the numbers of vacancies in all the district of State so that no vacancy in any district is unfilled. It was a bona fide decision of the State Government, however, after first phase of allotment it was found that 6136 candidates could not get any district allotted to them for appointment, only to accommodate left out 6136 candidates and to appoint them on remaining vacancies out of 68500, i.e., 26944 posts available, were released, so that these candidates could also be allotted district based on remaining available vacancies in the district in accordance with their merit, category and preference therefore, allocation of district was done in two phases and each allocation was done by the NIC by the criteria laid down in Rules of 1981 in a fair and transparent manner. Therefore only those candidates who had been appointed in second phase allotted district of their higher preference as subsequently released vacancies of 26944 posts were proportionately divided in all the district of State for appointment of left out candidates.

20. Various impleadment applications have been filed by the candidates, who were allotted district in second phase.

21. The case set up by the candidates who have filed impleadment applications is in short is that although 68500 vacancies were advertised but as 41556 candidates could qualify in ATRE 2018, the vacancies were reduced to 41556. The petitioners have accepted the number of reduced vacancies and have applied for their appointment. They have accepted the amended procedure. Once the selection is completed and list was prepared district-wise, district-wise counseling and appointment was over. The appointments have been given to the petitioners as well as the respondents on their district and the petitioners as well as the respondents have submitted their joining and working without objection, there is no scope of interference.

22. It is further stated that all the incumbents including the petitioners as well as the respondents became member of district cadre as per the Rules of 1981, therefore any action to remove them requires to be taken as per the provisions of Rules of 1981. Another objection has been raised that the persons who are to be affected have not been impleaded as respondents in the writ petition, as such the writ petition deserves to be dismissed.

23. Along with the written submission submitted by the counsel for the proposed respondents, one order passed by this Court in Writ-A No. 19125 of 2018 (Aman Singh Chandel and 4 others Vs. State of U.P. and others) decided on 10.9.2018 have been filed. Vide order dated 10.9.2018 the writ petition has been dismissed on the ground that the petitioners were granted posting in same district for which they participated in the counseling and this being a policy decision of Government to post a candidate in same district for which the counseling has been done, the writ petition was not maintainable.

24. Various orders passed by Lucknow Bench of this Court being Service Single Writ Petition Nos. 28525 of 2018, 30093 of 2018, 30147 of 2018 and 28447 of 2018 have been brought on record which pertains to same dispute. The Court has disposed off the above mentioned writ petitions, granting liberty to the petitioners to raise their grievances before the respondent no. 2 with a further direction to the aforesaid respondents to consider and pass appropriate reasoned speaking order within a period of two weeks from the date of production of certified copies of the orders.

25. It is also argued on behalf of the respondents that there are no allegations of malafides in the matter of district allocation and it is not the petitioners' case that they have been deliberately denied allocation of district as per their merit and preferences. Other arguments were made that the entire process of district allocation is done electronically, i.e., by employing a computer program/software. The same is not done manually.

26. It is contended that all the candidates were allocated different districts by adopting the same system as adopted in the case of petitioners. The petitioners should have impleaded all those candidates who are likely to be affected on account of the present challenge. He further submits that present petition is bad for non-joinder of necessary parties.

27. It is further argued by the learned counsel for the respondents that the procedure for selection of 68500 Assistant Teachers was initiated by issuing advertisement. Only 41556 applicants were declared selected and appointed in the first round of the appointment. Subsequently, the State Government had taken decision to release 26944 vacancies and against the said 26944 vacancies, the remaining selected candidates, i.e., 6136 were given appointment. Thus the selection and appointment was in two phase as such the petitioners who were selected and appointed in first phase has no right to challenge the second phase of the appointment.

28. The learned counsel for the respondents has further raised an objection that 6136 candidates appointed in pursuance of second round of the selection and appointment had not been impleaded as such the present writ petition is liable to be dismissed for non-joinder of necessary parties.

29. It was further argued by the learned counsel for the respondents that the entire exercise of district allocation, if required to be revised at this stage, would lead to great inconvenience. I do not agree that these two reasons. Firstly, when the fundamental rights of a citizens are pitted against some administrative inconvenience that the respondents may suffer in case relief is to be granted to the aggrieved petitioners, the so-called administrative inconvenience has to give way to the fundamental rights of the citizens. Secondly, even the respondents stated that the entire process of district allocation has been undertaken electronically i.e., through a computer system/software and that being the position.

30. So far as the first contention raised by the learned Standing Counsel that all 6136 candidates in various

districts is second phase and selection and appointment is concerned, the said contention is wholly devoice of merits. The State Government has issued advertisement inviting applications for 68500 Assistant Teachers. Only one examination was conducted by the Regulatory Authority and in the said examination 41556 candidates were declared eligible as per cutoff fixed by the State Government. Out of 41556 eligible and qualified candidates, only 35420 were given appointment. Without initiating any fresh selection process, remaining 6136 candidates declared eligible in pursuance of the examination conducted by the Regulatory Authority, were given appointment, thus the contention raised by the learned Standing Counsel that 6136 candidates were given appointment in second round of selection against 26944 vacancies is misconceived and is not tenable.

31. So far as the objection regarding non-joinder of necessary party is concerned, this Court vide order dated 28.11.2018 has directed the third respondents, i.e., Board of Basic Education, U.P. Allahabad to ensure that the notice is to be published in the news dailies of the concerned district, both having vide circulation and local circulation within a period of one week from today and a circular to that effect should be issued at its end to all the District Basic Education Officer in the State, with regard to the hearing of present writ petition. The order dated 28.11.2018 reads as under:

"Impleadment application was filed on 21st October, 2018. Office is directed to trace out the same and place it on record.

The matter relates to the joining and posting in preferred district on the basis of cut off marks in junior basic schools run by U.P. Basic Education Board.

The argument advanced is that on account of serious error of the respondent authorities, the petitioners who were higher in merit, on the basis of which they ought to have been given posting on their preferred districts the persons below in rank have been given choice posting and this has prejudiced their rights.

This petition No. 19737 of 2018 is taken up as the leading petition but any order that may be passed in this writ petition may have adverse effect on those teachers who have already been given posting of their choice for the fault of the authorities and they may get prejudiced if they are not heard.

Let the third respondent cause publication of notice about the hearing of this petition along with several other identical petitions scheduled on 10th of December, 2018 asking teachers who may have concern to defend themselves under Chapter XXIII Rule 5-A of Rules of Court, 1952 through counsel before this Court on the date fixed. The third respondent has to ensure that the notice is published in the news dailies of the concerned district, both having vide circulation and local circulation within a period of one week from today and a circular to that effect should be issued at its end to all the District Basic Education Officers in the State.

The matter is directed to be listed peremptorily, on 10th December, 2018 for final disposal.

A copy of this order may be given to the learned Standing Counsel, learned Additional Chief Standing

Counsel free of cost for necessary compliance within twenty four hours."

32. In compliance of the order dated 28.11.2018 passed by this Court, the Secretary, U.P. Basic Education Board, Prayagraj has issued an advertisement on 3.12.2018 mentioning therein that the writ petitions with regard to the allotment of district in respect of appointment of 68500 Assistant Teachers, the matter is listed before this Court on 10.12.2018. The persons aggrieved may appear and plead their case.

33. In pursuance of the aforesaid publication, various persons have filed their impleadment applications through their counsel namely Sri M. D. Singh 'Sekhar', learned Senior Counsel, Mr. H. N. Singh, learned Senior Advocate assisted by Mr. Alok Dwivedi, Sri Alok Dwivedi, Sri Pankaj Kumar Ojha, Sri Amit Kumar Singh Bhadauria and Ajit Kumar Chaurasiya, Sri Shailendra, Sri Rajesh Kumar Srivastava, Sri Avinash Jaiswal and Sri Anubhav Chandra, Sri Alok Mishra, Sri Ganesh Kumar Verma, Sri A. K. Tiwari, Sri Rajiv Kumar Tripathi, Sri Pramod Kumar Chaudhary and Sri Ram Sajiwan Prajapati, Sri Bhawani Prasad Shukla, Sri Durga Charan Yadav and Sri Manoj Kumar Tiwari, Sri Ramesh Kumar, Vijay Gautam, Sri Babu Lal Ram and Sri Rajesh Kumar, Sri S. K. Chaubey, Sri Varun Dev Sharma, Sri Pramod Kumar, Sri Tarun Agrawal, Sri Rajesh Kumar Bind and Sri Kalp Nath, Sri Abhishek Srivastava, Sri Paritosh Kumar Malviya, Mr. Shailendra had been heard. Thus, the persons who may be affected by any of the orders passed in the present writ petition, had been given notice and information. Thus the ground of non-joinder of necessary party is misconceived and is not tenable.

34. Sri H.N. Singh, learned Senior Advocate assisted by Mr. Alok Dwivedi apart from pointing out the procedure for appointment of Assistant Teachers as contemplated in U.P. Basic Education (Teachers) Service Rules, 1981 has further stated that 68500 posts of Assistant Teachers in Junior Basic Schools run by the Basic Education Board were advertised and in pursuance thereof, the petitioners and the proposed applicants have participated in the selection process. As per the cutoff marks fixed by the respondents, 41556 candidates were declared successful. It is further stated that as only 41556 candidates were declared eligible, as such, the numbers of vacancies were reduced accordingly in respective districts except for 8 aspirational districts, namely Fatehpur, Chandauli, Sonbhadra, Siddharth Nagar, Chitrakoot Dham, Balrampur, Behraich and Shrawasti. It is further stated that in pursuance of the government orders dated 18.8.2018 and 19.8.2018, the Secretary of the Board has published advertisement and instructed only to fill up the vacancies out of 41556 candidates and preference choice was obtained against 41556 vacancies. It is further stated that remaining 25944 vacancies remained vacant, as no person was eligible and qualified for such post in pursuance of the aforesaid examination.

35. It is also stated that in accordance with sub-section 6 of section 3 of the Act No. 4 of 1994, if a person belonging to reserved category get selected on the basis of merit in a open competition with general category, he shall not be adjusted against the vacancies

reserved for such category under sub-section 1 of Section 3 of the U. P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 which is reproduced hereinbelow :-

3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. - *[(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitment's are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, -*

(a) in the case of Scheduled Castes *Twenty-one per cent;*

(b) in the case of Scheduled Tribes *Two per cent;*

(c) in case of Other Backward Classes of citizens *Twenty-seven per cent:*

Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made;

36. It is further stated that the Board of Basic Education, after receiving the preference of district of respective candidates allotted the district keeping in mind the basis of quality point and choice of district given by the candidate. It was open for a candidate to give their choice in respect of number of district. It is also stated that the post of Assistant Teachers is a district cadre post and appointing authority is District Basic Education Officer. The Basic Education Board invited applications district-wise for counseling keeping in view the reservation of vacancies in respective district and ultimate result was that the reserved category candidate who have successful in general category occupy the vacancies of general category and the vacancies of reserved category remained vacant. It is further stated that since the candidates who have already passed the Assistant Teacher Recruitment Examination for their accommodation further vacancies were released in general category and the vacancies of reserved category corresponding to the same are still waiting its placement and will be treated as carry forward.

37. The arguments of learned Senior Counsel is that the candidates have given their choice against 41556 vacancies they have been allotted district and they have voluntarily participated in the counseling of respective districts. After issuance of appointment order in respective district and their joining in pursuance of the appointment orders, it is not open for them to question the process of selection by which they were appointed. The candidates have no right to be appointed in a particular district. It is always incumbent that the candidate may be adjusted in any district if they have not been offered the appointment as per their choice.

38. It is also contended that total 26944 vacancies were released in special

circumstances to accommodate the candidates who were left over and could not be offered appointment because of reservation rules. The case of candidates who have submitted their impleadment application is that they were called for counseling against 26944 vacancies released subsequently and as per the vacancies available, they have been appointed and have joined their respective district. All the candidates have joined and thus they are no more selectee/candidate. They have accepted their own choice and their reshuffling or transfer may be governed only by the Transfer Rule known as Uttar Pradesh Basic Education (Teachers) (Posting) Rules 2008.

39. The contention raised by Shri H.N. Singh, learned Senior Counsel that further 26944 vacancies were release to accommodate the candidates who were left over and could not be offered appointment because of reservation rules, is misconceived. The selection process for selection and appointment of 68500 vacancies was initiated by issuing government order dated 18.8.2018 and 19.8.2018 only one examination, namely, Assistant Teachers Recruitment Examination 2018 was conducted by the Regulatory Authority and in the said examination, 41556 candidates were declared successful.

40. The arguments raised by Shri H.N. Singh that 26944 posts were released so that 6136 candidates could not be given their appointment is second round of selection, is misconceived. The fact is that in pursuance of one selection process 41556 candidates were declared eligible and they were entitled to be considered for their appointment as Assistant Teacher. There is no question of release of any further vacancies and initiation of fresh selection process as 41556 were already declared eligible to be appointed as Assistant Teacher.

41. Out of 6136 candidates who could not be given appointment though were eligible, 6028 candidates belongs to General Category, 85 Other Backward Class category, 22 Scheduled Castes Category and 1 Scheduled Tribes Category. The respondents have initiated the process of allotment of district with regard to 6136 candidates who were eligible. In this process, the candidates of reserved category have been given appointment to choice of their district, whereas the candidates of reserved category who on the basis of their higher marks have been placed in general category could not be provided the appointment in choice of their district as they were lower in rank in general category (although meritorious to their respective reserved category). Thus the Meritorious Reserve Category (hereinafter referred as 'MRC') candidates have been denied district of appointment of their choice simply because they are meritorious to candidate of its respective reserved category.

42. In case of ***Ritesh R. Shah Vs. Dr. Y.L. Yamul and others,*** reported in ***(1996) 3 SCC 253,*** it was held that :-

"In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time

the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as a open category candidate and not as a reserved category candidate. The Full Bench of the Bombay High Court in Ashwin Prafulla Pimpalwar &Ors. v. State of Maharashtra [W.P. 2469/90] decided on 16th September, 1991 held that selection of candidates for admission to postgraduate medical course in colleges run by or under the control of the State Government shall be regulated in accordance with the prescription in that behalf contained in the rule for selection of the candidates for admission to the post-graduate medical course notified by the Government. The contention that the candidates belonging to the backward classes admitted to M.B.B.S. course selected as general candidates are not eligible for admission as reserved candidates or for scholarship etc. and also for admission to post-graduate medical course as reserved candidates, is illegal for and in negation of Article 15(4).

The memorandum issued by the Government on the basis of the statement made by the Minister of Health, Government of Maharashtra was placed before us showing that such candidates are entitled to all the benefits though admitted on merit basis. The said statement is consistent with Article 15(4). Therefore, the candidates belonging to backward classes but selected as general candidates for admission to graduate or postgraduate medical course are entitled to the concessions or scholarships and other benefits according to the rules or instructions of the State Government or the Central Government as the case may be. The admission to the Medical Colleges for the year 1995-96 in the State of Maharashtra is already over and we are not inclined to interfere with the admissions already made but we do commend that while deciding and publishing the Rules for admission in the next academic session. directions given in this judgment should be borne in mind and the rules should be made accordingly. In view of our conclusion, and admittedly the Authorities having admitted the candidates belonging to the reserved category only against seats meant for reserved category even though they were entitled to be admitted on the bais of their merit, the petitioner who could have been otherwise admitted, has be debarred from taking admission. Since the petitioner is a single applicant before us, we direct that the petitioner be admitted to any one of the colleges where be can be so admitted o the MBBS course where seat is still available and if no seat is available then he may be admitted by

increasing one seat in any one of the colleges. It may be made clear that, if the petitioner is desirous of being admitted to any of the Medical colleges in pursuance of this Court's order then he should approach the Designated Authority within two weeks from today and the Designated Authority will then take appropriate action within two weeks thereafter. The designated authority will decide the college to which the petitioner will be admitted."

43. Same principle was reiterated in ***State of Bihar and others Vs. M. Neethi Chandra and others*** reported in ***(1996) 6 SCC 36*** it was held that :-

".....However, to the extent the meritorious among them are denied the choice of college and subject which they could secure under the rule of reservation, the circular cannot be sustained. The circular, therefore, can be given effect only if the reserved category candidate qualifying on merit with general candidates consents to being considered as a general candidate on merit-cum-choice basis for allotment of college/institution and subject."

44. In case of ***Anurag Patel Vs. U.P. Public Service Commission and others*** reported in ***(2005) 9 SCC 742*** it was held that :-

"In the instant case, as noticed earlier, out of 8 petitioners in writ petition No. 22753/93, two of them who had secured ranks 13 and 14 in the merit list, were appointed as Sales Tax Officer-ll whereas the persons who secured rank Nos. 38, 72 and 97, ranks lower to them, got appointment as Deputy Collectors and the Division Bench of the High Court held that it is a clear injustice to the persons who are more meritorious and directed that a list of all selected backward class candidates shall be prepared separately including those candidates selected in the general category and their appointments to the posts shall be made strictly in accordance with merit as per the select list and preference of a person higher in the select list will be seen first and appointment given accordingly, while preference of a person lower in the list will be seen only later. We do not think any error or illegality in the direction issued by the Division Bench of the High Court."

45. In the case of ***C.M. Thri Vikrama Varma Vs. Avinash Mohanty and others*** reported in ***2011 (7) SCC 385*** it was held that in the matter of district allocation particularly when the government has invited preferences, the preferences should be considered according to merit and secondly that complexity of the decision making process cannot be a defence, when a grievance is made before the Court by a citizen that his fundamental right to equality has been violated. When such a grievance is made before the Court, the authorities have to justify their impugned decision by placing relevant material before the Court. The relevant extracted of the aforesaid decision are quoted below:

20. In fact, the object of the principles of allocation indicated in different clauses in the letter dated 31.05.1985 is not only to implement the policy having 2 outsiders and 1 insider in each cadre, but also to ensure that general and reserved candidates selected and appointed to the All India Service get

a fair and just treatment in the matter of allocation to different cadres. This will be clear from clause (2) of the letter dated 31.05.1985 which states that the vacancies for Scheduled Castes and Scheduled Tribes in the various cadres should be according to the prescribed percentage and from clause (3) which states that the allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. This will also be clear from clause 4(vii) which explains how the candidates belonging to the reserved category and the general category will be dealt with. These principles have been laid down in the letter dated 31.05.1985 because while making allocations of different candidates appointed to the service to different State cadres or Joint cadres, the Central Government has also to discharge its constitutional obligations contained in the equality principles in Articles 14 and 16(1) of the Constitution. A member appointed to the All India Service has no right to be allocated to a particular State cadre or Joint cadre, but he has a right to a fair and equitable treatment in the matter of allocation under Articles 14 and 16(1) of the Constitution.

25. Admittedly, Avinash Mohanty had secured a higher rank than Vikrama Varma in the Civil Services Examination, 2004 and both Avinash Mohanty and Vikrama Varma are insiders. Clause (3) of Para 3 of the letter dated 31.05.1985 states that allocation of insiders, both men and women, will be strictly according to their ranks, subject to their willingness to be allocated to their home States. Hence, Avinash Mohanty was required to be considered for allocation to the Andhra Pradesh cadre if he had given his willingness for being allocated to his home State, Andhra Pradesh, before Vikrama Varma could be considered for such allocation. If, however, the vacancy for which consideration was being made was a vacancy for an insider OBC candidate in the 30 point roster, Vikrama Varma would have preference over Avinash Mohanty. But the High Court has come to a finding that the number of vacancies in the 30 point roster filled up by OBC candidates from Civil Services Examinations 1999-2003 were 9 and had exceeded the 27% reservation for OBC candidates and hence there could not be an insider OBC vacancy in which Vikrama Varma could have been allocated. The High Court was, therefore, right in coming to the conclusion that allocation of Vikrama Varma to the Andhra Pradesh cadre was in violation of the guidelines contained in the letter dated 31.05.1985 and was clearly arbitrary and not equitable.

26. In our view, complexity of a decision making process cannot be a defence when a grievance is made before the Court by a citizen that his fundamental right to equality has been violated. When such a grievance is made before the Court, the authorities have to justify their impugned decision by placing the relevant material before the Court.

27. As has been held by a Constitution Bench of this Court in M. Nagaraj vs. Union of India [(2006) 8 SCC 212: 2007(1) SCC (L&S) 1013] (SCC P. 277, Para 118):

"118. The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or

enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis."

46. In the case of ***Alok Kumar Pandit Vs. State of Assam and others*** reported in ***2012 (13) SCC 516,*** the Supreme Court after considering the Constitution Bench Judgement of the Supreme Court in the case of ***Union of India Vs. Ramesh Ram*** reported in ***2010 (7) SCC 234*** held as under :-

24.1 A reserved category candidate who is adjudged more meritorious than the open category candidates is entitled to choose the particular service/cadre/post as per his choice/preference and he cannot be compelled to accept appointment to an inferior post leaving the more important service/cadre/post in the reserved category for less meritorious candidate of that category.

24.2. On his appointment to the service/cadre/post of his choice/preference, the reserved category candidate cannot be treated as appointed against the open category post."

47. The petitioners before this Court are aggrieved of being denied the allocation of appropriate district as per their merit-cum-preferences in being appointed as Assistant Teachers while those less meritorious in their respective categories were allocated district of their choice. The case in some of the petition is that merely because the petitioners therein were MRC candidates and the purpose of selection reckoned as general category candidates they were denied the benefit of reserve category seats in the district of their choice by not being reckoned for the reserved posts.

48. It has been further submitted that the procedure adopted for allocation of district to the successful MRC candidates entailed putting them to a disadvantage vis-à-vis reserved category candidates selected simplicitor in their respective quotas, that was wholly arbitrary and without application of mind and cannot be legally sustained. In support of this contention reliance has been placed on the judgment of the Apex Court in the case of ***Dega Venkata Harsha Vardhan and others Vs. Akula Ventaka Harshavardhan and others*** reported in ***2018 (10) SCALE 618,*** in which in para 11 it was held that MRC candidates could not be placed in a disadvantage position vis-à-vis others selected solely in the reserved category such as by not permitting the MRC to be considered against vacancies in the reserved category as that would amount to making a MRC suffer for his better performance in the competitive examination.

49. He further submitted that in the present case there is no disadvantage to the MRC respondents in as much as by allocation of district. They do not suffer any monetary loss or other disadvantage in their career.

50. Apex Court in the case of ***Tripurari Sharan and another Vs. Ranjit Kumar Yadav and others*** passed in Civil Appeal No. 158 of 2018 held that:

7. Often, in a competitive examination held for the purpose of admission in technical and medical

institutions etc. some candidates belonging to reserved category/categories, qualify for the higher ranking on the basis of their own merit and depending on their performance in the common entrance test, are placed in the general merit list. Such class of candidates belonging to reserved categories who qualify on their own merit, to be placed in general merit list, are described, for the purpose of convenience, as Meritorious Reserved Candidate (MRC). It is by now well settled that a MRC who goes on to occupy a general category seat is not counted against the quota reserved for a reserved category candidates, but is treated as an open competition candidate or general merit candidate. This Court in the case of Indra Sawnhey v. Union of India, ***1992 Supp (3) SCC 217*** *has observed thus:*

"In this connection it is well to remember that the reservations under Article 16 (4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates"

Even in service matters, the same principle is made applicable. The aforementioned principle of Indra Sawnhey (supra) is followed for admissions to seats in medical colleges, and the same was followed in the case of R.K. Sabharwal v. State of Punjab, ***(1995) 2 SCC 745.***

However, the issue before us is more nuanced - whether MRC can opt for a seat earmarked for reserved category? "If answer is yes" then since MRC exercises the option of admission to the seats in different colleges earmarked for reserved category candidates, should a less meritorious reserved category candidate who is affected by such process be given admission to the college left over by MRC consequently?

This would be better understood by a simplified example. Let it be assumed that there are 100 seats available through one common entrance examination to PG courses in various medical colleges across the country. Of these, 50 are general category seats and the remaining 50 are reserved category seats. X, a reserved category candidate, is assigned rank number 50 on account of his performance in the entrance examination. Thus he is just above the cut-off for reserved category candidates, and has got an open merit rank. Hence, X is a MRC; however, X being in general category is not willing to accept the seat available for general category at the time of his counselling. He wants admission in another college of his preference which is incidentally reserved for reserved category candidates, and a seat in the same is available in the reserved category. Consequently, X chooses a seat available in the college meant for reserved category candidate based on his merit among the reserved category candidates. As he does so, one seat in the general category list of 50 candidates remains unoccupied. In that context, two questions arise for consideration:

i. Whether X - MRC can opt for a seat earmarked for reserved category?

ii. If answer is yes; what happens to the 50 th seat which was to be allotted to X - MRC (i.e. 50th general merit candidate) had he opted for a seat meant for the reserved category to which he belongs?

8. This court has repeatedly including the judgment in the case of ***Indra Sawhney (supra),*** *has concluded that the aggregate reservation should not exceed 50%. Therefore, even when a MRC opts for a seat reserved for reserved category candidates, caution has to be exercised to maintain the reservation to 50%. So also it is not open for the authorities to deny a MRC a seat in the college of his preference based on his merit, if such seat is available at the relevant point of time and the same is reserved for candidates of the reserved category to which the MRC belongs. This is because there may be instances where a MRC may not get a seat in the institution of his choice on the basis of his own merit in the general merit. Under such circumstances, he may opt to be treated notionally as a candidate belonging to the reserved category only for the purpose of getting a seat in the college reserved for reserved category students. If such MRC is to be placed in the reserved merit list of his category, he would be ranking high and may get better choice of institution or course. A MRC cannot be placed in a disadvantageous position by not permitting him to be treated as reserved candidate, as that would amount to making him suffer for his better performance in the competitive examination.*

In the case of Shri Ritesh R. Sah v. Dr. Y.L. Yamul, ***(1996) 3 SCC 253,*** *this Court has had an occasion to deal with both the above questions. This Court held that a MRC who has opted for a seat in the college reserved for reserved category will not migrate/shift to reserved category but should be treated as part of the general category only. However, only for the purpose of getting better choice of seat in the college, he may opt to take a seat in the college reserved for the reserved category. This Court observed thus:*

"17...In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as a open category candidate and not as a reserved category candidate."

Right from the year 1996, the law is well settled that the provisions should be so made that they will not work out to the disadvantage of a MRC and he would not be placed at a more

disadvantageous position than the less meritorious reserved category candidates. Aforementioned objective can be achieved if, after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category, the cases of less meritorious reserved category candidates are considered.

In other words, the reserved category candidate is entitled to admission on the basis of his merit, and he will have the option of taking admission to the colleges where a specified number of seats are kept reserved for the reserved category. However, while computing the percentage of reservation, he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate.

51. In the case of ***Tripurari Sharan (supra)*** it was held that:

This Court, after examining the rival contentions on record, held that a MRC opting for a reserved category seat should be treated as a reserved category candidate, which means that he is deemed to have migrated/shifted from the general category to the reserved category to which he belongs once and for all, and that the vacant general category seat left by a MRC should be filled by a general category candidate. It arrived at the following findings:

"50. We sum up our answers-:

i) MRC candidates who avail the benefit of Rule 16 (2) and adjusted in the reserved category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the General Pool will be offered to General category candidates.

ii) By operation of Rule 16 (2), the reserved status of an MRC candidate is protected so that his/ her better performance does not deny him of the chance to be allotted to a more preferred service.

iii) The amended Rule 16 (2) only seeks to recognize the inter se merit between two classes of candidates i.e. a) meritorious reserved category candidates b) relatively lower ranked reserved category candidates, for the purpose of allocation to the various Civil Services with due regard for the preferences indicated by them.

iv) The reserved category candidates "belonging to OBC, SC/ ST categories" who are selected on merit and placed in the list of General/Unreserved category candidates can choose to migrate to the respective reserved category at the time of allocation of services. Such migration as envisaged by Rule 16 (2) is not inconsistent with Rule 16 (1) or Articles 14, 16 (4) and 335 of the Constitution."

14. In light of the cases discussed hereinabove, both questions are answered as follows:

i) A MRC can opt for a seat earmarked for the reserved category, so as to not disadvantage him against less meritorious reserved category candidates. Such MRC shall be treated as part of the general category only.

ii) Due to the MRC's choice, one reserved category seat is occupied, and one seat among the choices available to general category candidates remains unoccupied. Consequently, one lesser-ranked reserved category candidate who

had choices among the reserved category is affected as he does not get any choice anymore.

To remedy the situation i.e. to provide the affected candidate a remedy, the 50th seat which would have been allotted to X - MRC, had he not opted for a seat meant for the reserved category to which he belongs, shall now be filled up by that candidate in the reserved category list who stands to lose out by the choice of the MRC.

This leaves the percentage of reservation at 50% undisturbed."

52. In a recent judgment of Rajasthan High Court, in the case of ***Sunita Kumari Meena Vs. State of Rajasthan and others,*** passed in ***S. B. Civil Writ No.23680 of 2018,*** the Hon'ble Rajasthan High Court, vide judgment and order dated 2.4.2019 held as under:

"Consequently I would direct that in determining the preference of the MRC candidates for allocation of ranges/divisions as Senior Teachers they be considered against the reserved category posts in each of the division/range for which they have sought allocation on the basis of their inter se merit vis-à-vis other reserved category candidates.

I am also of the considered view that the mere that that the RPSC made recommendations in a truncated manner cannot give any benefit to the candidates lower in the select list or any right over those higher in merit in the select list for the purpose of allocation on the basis of their merit cum preference. Even otherwise in the course of hearing the petition/s it has transpired that the deficiencies in the verification process were rectified by the concerned higher placed selected candidates much before the order of allocation of divisions/ranges to those lower in the merit in the select list drawn pursuant to the advertisement dated 13.7.2016. And it cannot with any plausibility be denied, as it was indeed not by Mr. Ganesh Meena, that where in the same list of recommendations by RPSC candidates, candidates higher in merit in the respective category have been denied their preference of allocation of ranges/divisions while those lower in the same category were given their preference in the allocation, the respondents are under an obligation to make the requisite correction in view of the selected candidates' legitimate expectation and ensure firm adherence to the State Government's own guidelines of 4.3.2018.

It is no doubt true that the exercise of allocation of divisions/ranges to Senior Teachers selected pursuant to the advertisement dated 13.7.2016 has largely been completed. it is also true that redoing of the said exercise in the whole or part as would be necessitated by strict adherence to the guidelines of 4.3.2018 would entail some amount of disruption. That however by itself cannot suffice for this court to condone substantial contravention of the respondent-State Government's guidelines dated 4.3.2018. Law, fairness and justice not expediency has to prevail. The academic year 2018-19 has been concluded. The new academic year 2019-20 is to commence only in the month of July 2019 as stated by Mr. Ganesh Meena, AAG. In these circumstances, no serious unmanageable disruption in the coming academic calendar of the concerned schools is likely to be caused in the even the State Government were to be directed to strictly adhere to its guidelines of 4.3.2018 for

allocation of ranges/divisions to the Senior Teacher selected pursuant to the advertisement dated 13.7.2016.

Consequently these petitions are disposed of with the direction that the allocation of ranges/divisions to Senior Teachers selected pursuant to the advertisement dated 13.7.2016 be done afresh in accordance with the observations of this Court earlier in this judgment. This direction be complied within a period of two months from today.

A copy of this order be placed in each connected petition.

And a copy of this order also be furnished to Mr. Ganesh Meena, AAG for onward transmission and compliance."

53. Thus, there is no doubt that MRC candidate is entitled for allotment of preferential district treating him as a reserved category candidate only for allotment of district of their preference. In the present case, the reserved category candidates who have been placed in select list as general candidate on account of their better performance have been denied place of appointment of their choice as they are in merit of general candidate although higher in merit of their respective reserved category.

54. Thus the decision of the authorities is contrary to Article 16 as has been held by the Hon'ble Apex Court.

55. The contention raised by Shri H.N. Singh, learned Senior Advocate is that the petitioners have been allotted district and they have joined in their place of posting, thus they cannot be shifted to any other district, without following the procedure prescribed under Uttar Pradesh Basic Education (Teachers) (Posting) Rules 2008 is concerned, one advertisement was issued inviting applications for the post of 68500 Assistant Teachers in Basic School and Junior Basic School managed by the U.P. Basic Shiksha Parishad. In pursuance of the aforesaid advertisement, one examination, i.e., ATRE 2018 was conducted by the Regulatory Authority on the basis of aforesaid examination 41556 candidates were declared eligible and successful. Consequentially by one government order the process for appointment of 41556 candidates was initiated. In the process of appointment, MRC candidates have been discriminated, as the process of appointment had been completed in two phase. It is well settled that the process of selection starts from the issuance of advertisement inviting applications and is completed on appointment. The process of selection and appointment had been completed in two phase. In first phase, 34660 candidates were given appointment and in the second phase, 6136 candidates have been given appointment but the facts remained that all these candidates have been given appointment as a result of one selection process. In the process of appointment, MRC candidates have been put in disadvantage, as has been held by the Apex Court in the cases of ***C.M. Thri Vikrama Varma (supra)*** and ***Tripurari Sharan (supra).***

56. So far as the objection raised by the respondents that the petitioners have joined their place of posting without any protest, as such they are estopped in law from challenging their place of posting is concerned, since the rights of MRC candidates guaranteed under Article Articles 14 and 16(1) of the Constitution of India has been violated, as has been held by the Apex Court in the cases of

C.M. Thri Vikrama Varma (supra) and ***Tripurari Sharan (supra)*** the principle of estoppel and waiver will not be applicable against the legal and constitutional rights.

57. The allocation of district and appointment and joining of the teachers in their respective districts had been completed in academic year 2018-19. The said posting and allocation of district being contrary to law and in violation of Articles 14 and 16(1) of the Constitution of India, cannot be sustained.

58. In view of the law laid down by the Apex Court, the allotment of district made by the respondents cannot be sustained in so far as it relates to MRC candidates and to that extent, it is quashed.

59. The respondent no. 3 is directed to carry on process of allotment of district to MRC candidates only, treating them to be reserved category candidates only for the purposes of allotment of district of their preference. It is further directed that the MRC candidates who alleged that they have not been allotted district of their preference despite being MRC candidates, may file their applications before the respondent no. 3 within a period of 3 months from today and the respondent no. 3 is directed to consider and pass necessary order, as per law stated hereinabove within next 3 months.

60. The order passed by the respondent no.3 shall be given effect from next academic session, i.e., 2020-21, so that the teaching of students is not suffered.

61. With the aforesaid directions the writ petition is disposed off.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 20771 of 2004

Ram Sumarni Varma ...Petitioner
Versus
The State of U.P.& Ors. ...Respondents

Counsel for the Petitioner:
Sri A.R. Dwivedi, Sri K.K. Dubey, Sri L.C. Mishra, Sri R.R. Dwivedi, Sri S.R. Pandey, Sri S.S. Mishra, Sri V.K. Dubey

Counsel for the Respondents:
C.S.C., Sri Brij Bhushan Mishra, Sri Parmatma Rai, Sri Pursottam Rai, Sri Sunil Kumar Mishra

A. U.P. Municipal Boards Servants (Inquiry, Punishment and Termination of Service) Rules (hereinafter referred to as "Rules, 1960") published in U.P. Gazette dated 16.04.1960- Rule 4 Rule 8 of Rules, 1960 Fundamental Rule 54-B- punishment of "severe warning" was administered to the petitioner and he was required to deposit Rs. 590/- orders rejecting appeal and representation by Chairman, NPP stating that he was illegally placed under suspension for about five years and one month and denial of full salary for the said period is not justified, therefore, full salary should be paid to him for the period of suspension.

"Severe warning" or the direction to deposit Rs. 590/- claimed to be non-deposited part of fee are the prescribed punishment under Rule 4- The severe warning and direction to deposit alleged unpaid fee of Rs. 590/-, being not the prescribed punishment, it can be said that authorities found that any charge was so serious as to justify imposition of even a lightest punishment upon petitioner. Therefore, it can be said that suspension of

petitioner, in any manner was justified. That be so, denial of full salary to petitioner for the period of suspension is clearly illegal, arbitrary and lacks sanction of Statute. (Para 21,22,23,24,26)

Writ Petition allowed with costs.

Case Law discussed/ relied upon: -

In Vijay Singh Vs. State of U.P. and Others, JT 2012 (4) SC 105 (E-3)

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Sri K.K. Dubey, learned counsel for petitioner and learned Standing Counsel for State of U.P. and its authorities. None appeared on behalf of respondents-3 to 4. I, therefore, heard above counsels appearing in the matter and proceed to decide it ex-parte against respondents-3 and 4.

2. This writ petition under Article 226 of Constitution of India has been filed by sole petitioner, Ram Sumarni Verma challenging order dated 02.07.2001 (Annexure-9 to the writ petition) whereby punishment of "severe warning" was administered to petitioner and he was required to deposit Rs. 590/-; order dated 21.05.2002 (date is wrongly mentioned since correct date is 04.05.2002 which is order passed on petitioner's application/appeal and part of Annexure-13 to the writ petition) rejecting his appeal and order dated 18.06.2003 passed by Commissioner, Jhansi Division, Jhansi rejecting petitioner's representation against aforesaid two orders.

3. Fact in brief, giving rise to the present writ petition are, that petitioner was working as "Nabikar and Rajaswa Moharrir" in Nagar Palika Parishad, Barua Sagar, Jhansi (hereinafter referred to as "NPP"). Vide order dated 20.05.1996 passed by Executive Officer, NPP, petitioner was placed under suspension and, thereafter, a charge-sheet dated 17.08.1996 (Annexure-2 to the writ petition) was issued containing five charges as under:-

*"**आरोप संख्या 1**– आप की नियुक्ति इस पालिका में नायक कर एवं राजस्व मोहर्रिर के पद पर की गई थी तथा अधिशासी अधिकारी नगर पालिका परिषद, बरूआसागर आपके नियुक्ति अधिकारी है। अधिशासी अधिकारी के आधीन कार्यरत रहने दौरान आपने दि0 29.2.1996 को उनके साथ अभद्रता का व्यवहार एवं अपशब्दो का प्रयोग करते हुए कर्मचारी आचार संहिता का उल्लंघन किया।*

आरोप संख्या 2

नगरपालिका परिषद करूआसागर की अध्यक्ष महोदया श्रीमती उषा रानी कुशवाहा द्वारा 10.5.96 को कार्यालय का आकस्मिक निरीक्षण के समय आपको उपस्थिति पंजिका पर अनुपस्थित अंकित किया गया। अनुपस्थिति के संबंध में अध्यक्ष महोदया द्वारा आपसे स्पष्टीकरण मांगा गया। आपने अपने स्पष्टीकरण मांगा गया। आपने अपने स्पष्टीकरण में पालिका के सर्वोच्च अधिकारी के प्रति जिस प्रकार की भाषा का प्रयोग किया है उससे उनकी प्रतिष्ठा एवं सम्मान को ठेस पहुॅची है। पालिका के सर्वोच्च अधिकारी एवं प्रतिष्ठित जन प्रतिनिधि के प्रति अनादर पूर्ण भाषा का प्रयोग करके आपने कर्मचारी आचार संहिता का दूसरी बार उल्लंघन किया है।

आरोप संख्या–3

पालिका द्वारा आपको 25.11.1994 ई0 को नगरपालिका पब्लिक स्कूल बरूआसागर का लिपिकीय कार्य निष्पादित करने हेतु आदेशित किया गया था तथा आपने पब्लिक स्कूल, बरूआसागर के दिनांक 25. 11.1994 से 4.4.1996 तक आपने अपने लिपिकीय कार्य काल में अपने पद का दुरूपयोग करते हुए निम्न वित्तीय अनियमिततायें की हैं:–

1. स्कूल के शिक्षा सत्र वर्ष 1994–95 मे स्कूल में नर्सरी से लेकर कक्षा 5 तक कुल 131 छात्र अध्ययनरत रहे। स्कूल के अभिलेखों के अनुसार अर्द्ध वार्षिक परीक्षा शुल्क 10/– प्रति छात्र निर्धारित किया गया परन्तु आप द्वारा मात्र 70 छात्रों का ही परीक्षा शुल्क जमा कराया गया। इस प्रकार आपने नगरपालिका पब्लिक स्कूल बरूआसागर को 610/– रू0 की आर्थिक क्षति पहुॅचाई है।

2. आपके द्वारा शिक्षा सत्र 1995–96 में 200 डायरियॉ क्रय की गई थी जिस की कीमत प्रति डायरी 10/– छात्र से वसूल कर स्कूल कोष में जमा करायी जानी थी। आपने चार्ज हस्तान्तरण में श्री रमाशंकर दुबे को मात्र 91 डायरी हस्तान्तरित की। इस प्रकार आप द्वारा 109 डायरियां छात्रों को वितरित की गई जिसकी कीमत 1090/– रू0 स्कूल कोष में जमा नहीं की गई। जिससे स्पष्ट है कि आप द्वारा उक्त धनराशि का गबन करके स्कूल को आर्थिक क्षति पहुॅचाई गई है।

3. आप द्वारा स्कूल की सहायक अध्यापिका कु0 अलकेश्वरी, कु0 संगीता अग्रवाल व कु0 ऋतु कुशवाहा का माह मई 1995 का वेतन मु0 909/– चेक सं0 021002 दिनांक 16.5.1995 का आहरित किया गया परन्तु वेतन पंजिका माह मई 1995 के अनुसार मात्र कु0 अलकेश्वरी राठौर का वेतन मु0 284/– रू0 ही वितरित किया जाना दर्शाया गया है, शेष मु0 625 रू0 चार्ज हस्तान्तरण तक न तो वितरति की गई और ना ही स्कूल कोष में वापिस जमा कराया गया इस प्रकार आप द्वारा उक्त धनराशि का गबन किया गया।

4. नगरपालिका पब्लिक स्कूल में आपके कार्यरत रहने के दौरान आप का भतीजा श्री विजय सिंह निरंजन कक्षा प्रथम में अध्ययनरत रहा तथा आप ही उक्त छात्र के संरक्षक रहे परन्तु आपने अपने भतीजे की स्कूल फीस माह जनवरी 1996 से जून 1996 तक 50/– रू0 प्रतिमाह की दर से 300/– वार्षिक परीक्षा शुल्क रू0 20/– कुल रूपया 320/– जमा नहीं कराया गया है। इस प्रकार आपने अपने पद का दुरूपयोग करते हुए स्कूल का रूपया 320/– की आर्थिक क्षति पहुॅचाई है।

आरोप संख्या 4

आपने अपने स्कूल के लिपपकीय कार्यकाल में स्कूल बैंक खाते से निम्न धनराशियों का आहरण किया है:–

1. चेक संख्या–066792 दिनांक 13.12.94 मु0 1, 500.00 रूपये अर्द्धवार्षि परीक्षा अग्रिम।

2. चेक संख्या 066800 दिनांक 1.5.95 मु0 220. 00 रूपये छात्रों की विदाई अग्रिम।

3. चेक संख्या–21003 दिनांक 19.3.98 मु0 1,000.00 रूपये वार्षिक परीक्षा पुरस्कार विवरण।

4. चेक संख्या 021006 दिनांक 10.7.1995 मु0 500.00 रूपये अग्रिम।

5. चेक संख्या 021009 दिनांक 27.7.1995 मु0 225.00 रूपये

चेक संख्या 021013 दि0 23.9.95 मु0 2500.00 रूपये – श्री लखनलाल पठेरिया एडवोकेट झॉसी।

6. चेक संख्या 021017 दि0 6.11.95 मु0 रू0 0338.00 कक्षा तीन का पंजीकरण।

परन्तु आप द्वारा चार्ज हस्तान्तरण में उक्त आहरित धनराशि से सम्बन्धित पत्रावलियॉ चार्ज हस्तान्तरण नहीं की गयी हैं और आज तक उक्त धनराशियों के व्यय की समायोजन पत्रावलियॉ वाउचर आदि प्रस्तुत नहीं किया है। उक्त धनराशियों के आहरण के सम्बन्धित पत्रावलियों का प्रस्तुत न करने से न केवल आपकी कार्यपद्धति व सतयनिष्ठा संदिग्ध है बल्कि आप उक्त धनराशियों के गबन के लिये दोषी हैं।

आरोप संख्या 5

पालिका कार्यालय चेक संख्या 066488 दिनांक 3.7.1992 द्वारा मु0 2,000/– रूपये रिट संख्या 10203/92 जगन्नाथ प्रसाद अग्रवाल बनाम नगर पालिका बरूआ सागर, वाद की उच्च न्यायालय इलाहाबाद की पैरवी हेतु बैंक से आहरित किये गये तथा उक्त धनराशि न्यायालय प्रक्रिया हेतु आपको दिनांक 4.7.1992 को पालिका द्वारा हस्तगत करायी गयी थी परन्तु आप ने आज तक उक्त धनराशि के व्यय वाउचर समायोजन पत्रावली में प्रस्तुत नहीं की जिससे उक्त धनराशि के अपव्यय किये जाने के कारण आपकी भूमिका संदिग्ध है।''

*"**Charge No. 1:** You were appointed on the post of Nayab Kar Rajasva Moharrir in this Nagar Palika Parishad, and the Executive Officer, Nagar Palika Parishad, Barua Sagar is your appointing officer. While working under the Executive Officer, you on 29.02.1996 behaved with him in an undignified manner and used foul language, thereby violating the employees code of conduct.*

***Charge No. 2**: At the time of sudden surprise of the office made by Shri Usha Rani Kushwaha, Chairperson of Nagar Palika Parishad, Karua Sagar on 10.05.1996, you were recorded on the attendance register to be absent. An explanation was sought by the chairperson regarding your absence. You have in your explanation used such a language for the highest authority of the Palika as to adversely affect her prestige and reputation. You have by using insulting language towards the highest authority of the Palika and reputed public*

representative violated the employees code of conduct for the second time.

***Charge No. 3**: You were on 25.11.1994 directed by the Palika to discharge clerical duties for Nagar Palika Public School, Barua Sagar. You have while performing your clerical duties at Public School Barua Sagar from 25.11.1994 to 04.04.1996 misused your office and committed the following irregularities:*

1. In the academic session 1994-95 of the school, total 131 students from nursery to class V were studying in the school. As per the school records, the annual examination fee was fixed to be Rs. 10 per student. But examination fee of 70 students only were got deposited by you. In this way, you have caused financial loss of Rs. 610 to Nagar Palika Parishad School, Barua Sagar.

2. In the academic session 1995-96, 200 diaries had been purchased by you for which Rs. 10 per diary was to be realized from the students and was to be deposited in the school funds. In course of transfer of charge, you handed over just 91 diaries to Shri Rama Shankar Dubey. In this way, 109 diaries were distributed by you to the students prices whereof to the tune of Rs. 1090 was not deposited in the school funds. This goes to show that you have embezzled the said amount, thus causing financial loss to the school.

3. Salaries of Km. Alkeshwari, Km. Sangeeta Agarwal and Km. Ritu Kushwaha, Asstt. Teachers of the school, for the month of May, 1995, totalling Rs. 909, were withdrawn by you through Cheque No. 021002 dated 16.05.1995 but as per the Salary Register for the month of May, 1995, the salary to the tune of Rs. 284 only is shown to have been disbursed to Km. Alkeshwari Rathore. The remaining Rs. 625 was neither disbursed nor deposited back into the school funds till the transfer of charge. In this way, the said amount has been embezzled by you.

4. In course of your stint at Nagar Palika Public School, your neice Shri Vijay Singh Niranjan was studying in Class I and it was you who was a guardian for the said school. But you have not deposited your neice's school fees for the months of January, 1996 to June, 1996 at the rate of Rs. 50 per month totalling Rs. 300 and his annual fee of Rs. 20, aggregating to Rs. 320. In this way, you have misused your office, thus causing financial loss of Rs. 320.

Charge No. 4:

You have in course of your stint as clerk at your school withdrawn the following amounts from its bank accounts:

1. Cheque No. 066792 dated 13.12.1994 to the tune of Rs. 1,500.00: Half-yearly Examination Advance.

2. Cheque No. 066800 dated 01.05.1995 to the tune of Rs. 220.00: Students Farewell Advance.

3. Cheque No. 21003 dated 19.03.1998 to the tune of Rs. 1,000.00: Annual Examination Prize Distribution.

4. Cheque No. 021006 dated 10.07.1995 to the tune of Rs. 500.00: Advance.

5. Cheque No. 021009 dated 27.07.1995 to the tune of Rs. 225.00

Cheque No. 021013 dated 23.09.1995 to the tune of Rs. 2500.00: Shri Lakhan Lal Patheria, Advocate, Jhansi.

6. Cheque No. 021017 dated 06.01.1995 to the tune of Rs. 0338.00: Class III Enrolment.

But the records pertaining to the aforesaid amounts withdrawn have not

been handed over by you in course of transfer of charge and the records, vouchers etc. pertaining to the adjustment of the aforesaid spendings have not been presented so far. Non presentation by you of the records pertaining to the withdrawal of the said amounts casts doubts not only on your way of working but on your integrity as well. As a matter of fact, you are guilty of embezzling the said amounts.

Charge No. 5:

For pursuing Writ No. 10203/1992: Jagannath Prasad Agarwal Vs. Nagar Palika Barua Sagar at the Allahabad High Court, Rs. 2000 was withdrawn through cheque no. 066488 dated 03.07.1992 of the Palika Office. The said amount was handed by the Palika to you on 04.07.1992 for the said Court process. But you have not so far presented the voucher as to spending of the said amount so as to be on the adjustment file. For the reason of the said amount thus being wasted, your role is doubtful."
(English Translation by Court)

4. Petitioner moved an application dated 06.07.1996 requesting respondent-4 to supply certain documents mentioned in the said letter. Said letter reads as under:-

''आरोप संख्या 1 के समर्थन में प्रस्तावित निम्न अभिलेखो की प्रतियां उपलब्ध कराने की कृपा करें।

1. कर्मचारी गण श्री ज्वाला प्रसाद स्वर्णकार वरिष्ठ लिपिक।

2. श्री रमेश चन्द्र झा लिपिक।

3. श्री राकेश बाबू राय नायब कर राजस्व मोहर्रिर।

4. श्री हीरालाल कुशवाह नायब कर राजस्व मोहर्रिर।

5. श्री जाकिर अली चपरासी के बयान की प्रतियॉ।

आरोप संख्या 2:– कथित जांच अधिकारी की रिपोर्ट

आरोप संख्या 3:– में सकूल से सम्बन्धित पत्रावलियॉ एवं कैश बुक शुल्क रजिस्टर।

शिक्षण शुल्क बुके आदि निरीक्षण हेतु दिलाने की कृपा करें।'' " Kindly provide copies of the following documents proposed to be used in support of charge no. 1:

Copies of statements of the employees

1. Shri Jwala Prasad Swarnkar, Senior Clerck

2. Shri Ramesh Chandra Jha, Clerck

3. Shri Rakesh Babu Rai, Nayab Kar Rajasva Moharrir

4. Shri Heera Lal Kushwah, Nayaba Kar Rajasva Moharrir

5. Shri Zakir Ali, Peon

Kindly ensure to provide for inspection:

Charge No. 2: Report of the said inquiry officer

Charge No. 3: Records such as Cash Book Fee Register, Tuition Fee Books etc. pertaining to the school."
(English Translation by Court)

5. Petitioner submitted letter dated 06.09.1996 requesting respondent-4 to supply documents relied on in the charges and, thereafter, permit time to submit reply to charge-sheet.

6. A reminder for documents was given on 20.09.1996. It appears that petitioner continued to demand documents but did not submit any reply to the charge-sheet. He has made a complaint vide letter dated 12.08.1998.

7. A notice was published in daily newspaper "Dainik Bhasker" dated 17.12.1998 that documents desired by petitioner sought to be served upon him on 17.11.1998 by Special Messenger but

petitioner was not found at his address. Thereafter, documents were sent by registered post which was also received back unserved, hence, petitioner is given a weeks' time to approach Office and collect documents so that enquiry proceedings are concluded, expeditiously.

8. It is not stated anywhere in the writ petition that petitioner approached office of authorities concerned for collecting documents, as directed in the aforesaid notice. Instead, petitioner again sent an application dated 18.12.1998, served in the office of respondent on 22.12.1998, making demand of documents.

9. Thereafter on 21.01.1999, petitioner submitted reply denying all the charges.

10. It appears that an enquiry report was submitted by Enquiry Officer on 02.07.2001. Thereafter respondent-4 passed order dated 02.07.2001 reinstating petitioner without salary and also administering a "severe warning" for committing a misconduct of showing indecent behaviour with Appointing Authority. With reference to charge-2, petitioner was directed to deposit Rs. 590/- in the Treasury of Nagar Palika Public School.

11. Pursuant to said order, petitioner joined on 02.07.1991 and also assured respondent-4 that he shall deposit requisite amount and submit report. Joining report submitted by petitioner i.e. Annexure-10 to the writ petition dated 02.07.2001 reads as under:-

''निवेदन है कि आपके बहाली आदेश सं0 89 दिनांक 2.7.2001 के अनुपालन में मैं आज दिनांक 2.7.2001 को पूर्वान्ह अपनी योगदान आख्या प्रस्तुत करता हूँ। कृपया मेरे योगदान आख्या स्वीकार कर मुझे कार्य पर लेने का कष्ट करें। आदेश में उल्लिखित धनराशि मैं शीघ्र ही जमा कर अनुपालन आख्या प्रस्तुत कर दूँगा।''

"It is submitted that in compliance with your reinstatement order no. 89 dated 02.07.2001, I in the forenoon of this 02.07.2001 present my joining memo. Kindly allow my joining memo and take me on duty. I shall at the earliest present compliance report after depositing the amount mentioned in the order."
(Emphasis Added)
(English Translation by Court)

12. Thereafter, vide letter dated 20.08.2001, petitioner made an appeal to Chairman, NPP stating that he was illegally placed under suspension for about five years and one month and denial of full salary for the said period is not justified, therefore, full salary should be paid to him for the period of suspension.

13. By letter dated 14.03.2002, petitioner requested respondent-4 to supply copy of enquiry report.

14. A reminder was submitted by petitioner on 20.04.2002 to Chairman, NPP requesting for payment of full salary for the period of suspension.

15. On the aforesaid letter dated 20.04.2002, Chairman, NPP passed following order, which is part of Annexure-13 to the writ petition, as under:-

''मैंने सम्पूर्ण पत्रावली का अवलोकन किया। वादकारी के प्रत्यावेदन में निलम्बन काल का वेतन हित लाभ पाने का ठोस आधार नहीं है और न ही सत्यता एवं विश्वसनीयता का बोध होता है। फलस्वरूप प्रत्यावेदन निरस्त किये जाने योग्य है। अतः वादकारी का अपील प्रत्यावेदन निरस्त किया जाता है।''

" I perused the entire file. In the representation of the litigant, there is no strong ground for availing the benefit of salary for the period of suspension and it reflects neither truthfulness nor credibility. As a result, the representation is liable to be rejected. Hence, the appeal/representation of the litigants is rejected."
(English Translation by Court)

16. Against order of denial of full salary to petitioner for the period of suspension, he made a representation before Commissioner, Jhansi Division, Jhansi vide letter dated 05.10.2002. The same has been rejected by Commissioner vide letter dated 17.07.2003.

17. Aforesaid orders of denying full salary to petitioner for the period of suspension have been challenged in the present writ petition.

18. It is contended that denial of full salary to petitioner is not one of the punishment prescribed under Rules and, therefore, when petitioner was reinstated without imposing any punishment and that too without holding guilty of charges, denial of full salary to petitioner for the prolonged period of five years and one month is patently illegal, arbitrary and contrary to law.

19. Respondent-NPP has contested the matter by filing counter affidavit in which basic facts are not disputed. It is, however, said that petitioner has been rightly denied full salary for the period of suspension since charges of misbehaviour with Appointing Authority and non deposit of full fee during service period were found proved.

20. In the rejoinder affidavit filed by petitioner, he has reiterated what he has said in the writ petition and, therefore, I am not repeating the same.

21. The provisions pertaining to disciplinary action against servants of Municipal Board have been made in U.P. Municipal Boards Servants (Inquiry, Punishment and Termination of Service) Rules (hereinafter referred to as "Rules, 1960") published in U.P. Gazette dated 16.04.1960 . Punishment which can be imposed upon servants of Municipal Board are provided under Rule 4 which reads as under:-

"4. Subject to the provisions of these rules and any law governing a Municipal Board, the following penalties may, for good and sufficient reasons, be imposed upon a servant by the competent authority, namely-

(i) Censure.

(ii) Withholding of increments, including stoppage at an efficiency bar.

(iii) Reduction to a lower post or a time-scale, or to a lower stage in a time scale.

(iv) Suspension.

(v) Removal from service of the municipal board which does not disqualify for future employment.

(vi) Dismissal from the service of the municipal board which ordinarily disqualifies for future employment.

(vii) Fine (in case of servants appointed under Section 75 of the U.P. Municipalities Act only) : Provided that the total amount of such fine shall not ordinarily exceed and a half month's pay of the employee fined and it shall be deducted from his pay in instalments not exceeding one-quarter of a month's pay.

Explanation.-The discharge-

(a) of a person appointed on probation, during or at the end of the

period of probation, in accordance with the terms of the appointments and the rules governing the probationary service, or

(b) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment, or

(c) of a person appointed otherwise than under contract to hold a temporary appointment, for an unspecified period, in accordance with the provisions or Rule 11, or

(d) of a person engaged under contract, in accordance with the terms of his control, does not amount to removal or dismissal within the meaning of this rule or of Rule 5."

22. It does not appear that a "severe warning" or the direction to deposit Rs. 590/- claimed to be non deposited part of fee are the prescribed punishment under Rule 4. Therefore, it cannot be said that respondents have found petitioner guilty of any misconduct so as to impose upon him penalty prescribed under the Rules.

23. In other words, it can be said that petitioner has not been imposed any penalty prescribed under the Rules but has been reinstated in service. Suspension and the amount payable to servant of Municipal Board during period of suspension is governed by Rule 8 of Rules, 1960 which reads as under:-

"8.(1) Subject to the provisions of any law governing the municipal board, a servant against whose conduct an inquiry is contemplated or is proceeding, may, in the discretion of the competent authority be placed under suspension pending the conclusion of the enquiry.

Note.- As a rule, suspension should not be ordered unless the allegations against the servant are so serious that in the event of their being established they may ordinarily be expected to warrant his dismissal, removal or reduction in rank. Suspension, where deemed necessary, should, as far as possible, immediately proceeded the framing of charges and their communication to the servant charged.

(2) When a servant is suspended, he shall be given a subsistence allowance during the period of suspension. The amount of such allowance shall be governed by rules as applicable to Government servants."

24. Rule 8(2), therefore, by reference bring in the corresponding Rules applicable to Government servants and it takes this Court to Fundamental Rule 54-B which deals with issue of payment of full salary during the period of suspension and it reads as under:-

"54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order-

(a) regarding the pay and allowance to be paid to the Government servant or the period of suspension ending with reinstatement or the date of his reinstatement on superannuation as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Notwithstanding anything contained in Rule 53. where a

Government servant under suspension dies before the disciplinary or court proceeding instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule(8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceeding instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules(8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(6) Where suspension is revoked pending finalisation of the disciplinary or court proceedings, any order passed under sub-rule(1) before the conclusion of the proceedings against the Government servant, shall be reviewed on its own motion after the conclusion of the proceedings by the authority mentioned in sub-rule(1), who shall make an order according to the provisions of sub-rule(3) or sub-rule (5), as the case may be.

(7) In a case falling under sub-rule(5) the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purposes:

Provided that if the Government servant desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

NOTE- The order of the competent authority under the proceedings proviso shall be absolute and no higher sanction shall be necessary for the grant of -

(a) Extraordinary leave in excess of five years in the case of permanent Government servant.

(b) Leave of any kind in excess of five years in the case of permanent Government servant.

(8) The payment of allowances under sub-rule(2), sub-rule(3) or sub-rule(5) shall be subject to all other conditions under which such allowances are admissible.

(9) The amount determined under the proviso to sub-rule(3) or sub-rule (5) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(10) Any payment made under this Rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of suspension and the date ofreinstatement or, the date of retirement on superannuation while under suspension. Where the emoluments admissible under this Rule are equal to or less than those during the employment elsewhere, nothing shall be paid to the Government servant.

NOTE- Where the Government servant does not report for duty within reasonable time after the issue of the order of reinstatement after suspension, on pay and allowances will be paid to him for such period till he actually takes over charge." (Emphasis Added)

25. The full salary during the period of suspension, can be denied to a Government servant when a suspension is not found wholly unjustified.

26. In the present case, as already discussed, no punishment prescribed under Rules has been imposed upon petitioner, therefore, it cannot be said that suspension of petitioner was justified in any manner. This is fortified from the fact that Rule 8 clearly provides that suspension shall not be resorted unless the allegations against Municipal servant are so serious that in the event of their being established they may ordinarily be expected to warrant his dismissal, removal or reduction in rank. Suspension, therefore, ought to be resorted when there is a possibility of imposition of major penalty of dismissal, removal or reduction in rank but in the present case, enquiry has resulted in imposition of no prescribed penalty at all. The severe warning and direction to deposit alleged unpaid fee of Rs. 590/-, being not the prescribed punishment, it can be said that authorities found that any charge was so serious as to justify imposition of even a lightest punishment upon petitioner. Therefore, it can be said that suspension of petitioner, in any manner was justified. That be so, denial of full salary to petitioner for the period of suspension is clearly illegal, arbitrary and lacks sanction of Statute.

27. It is also well settled that a punishment not prescribed under the Rules, could not have been imposed as has been propounded by Supreme Court in **Vijay Singh Vs. State of U.P. and Others, JT 2012 (4) SC 105.**

28. In the result, impugned order dated 02.07.2001 and appellate orders, in my view, cannot be sustained. Writ petition is allowed. Impugned orders dated 02.07.2001, 04.05.2002 and 18.06.2003 are hereby set aside to the extent that petitioner has been imposed punishment which are not prescribed in the Rules and the same has been upheld in appeal by Appellate Authority.

29. Petitioner shall be entitled to full salary during the period of suspension which shall be computed and paid within three months. Petitioner shall also be

entitled to cost which I quantify to Rs. 5,000/- against respondents- 3 and 4.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.12.2016

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Service Single No. 30419 of 2016

Girish Kumar Gupta ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
P.K. Mishra

Counsel for the Respondents:
C.S.C., Neeraj Chaurasia

A. Article 226 of the Constitution of India - U.P. Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974-Section 12 of the Hindu Adoption and Maintenance Act, 1956- Delay and latches.

Delay of more than 19 years from the date of death of the deceased employee in filing the writ petition- Absence of any satisfactory explanation- Since the crisis was over the Petitioner cannot be offered compassionate appointment- A person who has been adopted after the death of the employee would not be entitled to the benefit of the appointment on compassionate grounds

(Para 5,9,12,14,20,22,25,27)

Writ petition dismissed.

Case Law discussed/relied upon: -

1. State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566

2. City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168

3. Gian Singh Mann v. High Court of Punjab & Haryana, (1980) 4 SCC 266

4.Karnataka Power Corpn. Ltd. v. K. Thangappan, (2006) 4 SCC 322

5. T.N. v. Seshachalam, (2007) 10 SCC 137

6. Umesh Kumar Nagpal v. State of Haryana & Ors, (1994) 4 SCC 138

7. Union of India &Ors. v. Bhagwan Singh, (1995) 6 SCC 476

8. State of J&K &Ors. v. Sajad Ahmed Mir, (2006) 5 SCC 766

9. Eastern Coalfield Limited v. Anil Badyakar &Ors., (2009) 13 SCC 112

10. Jai Prakash Vs. State of U.P. &Anr. 2003 (53) ALR 197 (E-3)

(Delivered by Hon'ble Hon'ble Rakesh Srivastava, J.)

1. One Surya Lal, an Assistant Teacher at NirmalaJunior High School, Chitauna Kala, District Ambedkar Nagar unfortunately died in harness on 01.09.1997 leaving behind his widow Nirmala Devi.

2. On 19.12.2016, after almost 19 years and 3 months to be precise, Girijesh Kumar Gupta, the petitioner, claiming himself to be the adopted son of Surya Lal has preferred this writ petition praying inter alia for the following relief:-

(i) Issue a writ, order or direction in the nature of mandamus commanding to the opposite parties to appoint the petitioner on compassionate ground under Dying in Harness Rules due to death of his father late Surya Lal as per his qualification, in the interest of justice.

3. It is alleged that on 01.02.2002, 15.06.2002 and 24.12.2002 representations were made by Nirmala Devi seeking compassionate appointment in place of her husband but no action was taken by the authority concerned. It is further alleged that in the year 2002 the petitioner passed his intermediate examination and on attaining the age of majority moved a representation on 10.10.2003 seeking compassionate appointment after getting 'no objection' from his mother Nirmala Devi and since then the petitioner is running from pillar to post but without any success. It has been stated that, in the meantime, in the year 2013, the petitioner did his post graduation and on 27.09.2016 the petitioner moved another representation to the authorities. Alleging inaction on the part of the respondents, the petitioner has filed the present writ petition claiming appointment on compassionate grounds.

4. Heard Sri P.K. Mishra, learned counsel for the petitioner, learned Standing Counsel appearing on behalf of respondent nos. 1 to 3 and Sri Neeraj Chaurasiya, learned counsel for the respondent no. 4 and perused the record. The writ petition deserves to be dismissed for more than one reason.

5. The power to issue a writ is discretionary. Delay and laches is one of the factors that requires to be borne in mind by the courts while exercising its equitable jurisdiction. If the petitioner wants to invoke the jurisdiction of a writ court, he should come to the Court at the earliest possible opportunity. Although there is no period of limitation provided for filing a writ petition, ordinarily it should be filed within a reasonable time. It is trite that in the absence of a satisfactory explanation for any inordinate delay in filing the writ petition, the discretionary jurisdiction may not be exercised in favour of those who approach the Court after a long time.

6. In State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566, the Apex Court has held that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution of India is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic.

7. In City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168, dwelling upon the jurisdiction under Article 226 of the Constitution of India, the Apex Court has held that the Court while exercising its jurisdiction under Article 226 is duty-bound to inter alia consider as to whether the person invoking the jurisdiction is guilty of unexplained delay and laches.

8. The learned counsel for the petitioner has submitted that the petitioner was genuinely pursuing his remedy before the authorities concerned, and only when he realised that the relief would not be forthcoming, has he approached this court. In this regard, the learned counsel for the petitioner has, painstakingly, taken this Court through the representations dated 10.10.2003 and 27.09.2016 alleged to have been made by the petitioner to various authorities.

9. Mere filing of representations cannot be considered to be a sufficient reason for the delay in approaching the Court for grant of relief. In Gian

Singh Mann v. High Court of Punjab & Haryana, (1980) 4 SCC 266 the Apex Court has held as under:

" ....seems to us that the claim is grossly belated. The writ petition was filed in this Court in 1978, about eleven years after the dates from which the promotions are claimed. There is no valid explanation for the delay. That the petitioner was making successive representations during this period can hardly justify our overlooking the inordinate delay. Relief must be refused on that ground."

(emphasis supplied)

10. In Karnataka Power Corpn. Ltd. v. K. Thangappan, (2006) 4 SCC 322 the Apex Court opined as under:

"10. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in K.V. Rajalakshmiah Setty v. State of Mysore. This was reiterated in Rabindranath Bose case by stating that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In State of Orissa v. Pyarimohan Samantaray making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone.

(See State of Orissa v. Arun Kumar Patnaik also.)"

(emphasis supplied)

11. In State of T.N. v. Seshachalam, (2007) 10 SCC 137 the Apex Court has ruled that filing of representations alone would not save the period of limitation.

12. In the present case, the cause of action, if any, accrued to the petitioner way back in the year 2003, when he attained the age of majority. Admittedly, the petitioner made a representation on 10.10.2003 seeking compassionate appointment but instead of taking recourse to the remedy available to him under law, the petitioner took more than 19 years from the date of death of Surya Lal to approach this Court by means of the present writ petition. In the absence of any satisfactory explanation for the inordinate delay in filing the present writ petition, the writ petition is liable to be dismissed on the ground of delay and laches alone.

13. The learned counsel for the petitioner has submitted that the penurious state of the petitioner is still continuing and the petitioner being the adopted son of late Surya Lal is entitled to compassionate appointment under the U.P. Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974 (for short 'Rules').

14. It is settled that appointment in public services are to be made strictly in accordance with merit and in accordance with the procedure provided in the rules. However, compassionate appointment under the Dying in Harness Rules is an exception to the general rule. When an earning member of a family unexpectedly passes away, his whole family is subjected to misery and privation. To mitigate the hardship caused on account of sudden change in the status and affairs

of the family and to save the family of the deceased Government servant from destitution, the concept of compassionate appointment has been carved out. Thus, the object of providing employment to the dependent of a Government servant dying in harness in preference to anybody else is to enable the penurious family of the deceased employee to tide over the sudden financial crisis and not to provide employment. The mere death of an employee does not entitle his family to compassionate appointment. By a series of judgments of the Apex Court, it is settled that compassionate appointment is not a vested right which can be exercised at any time in future. It is not a mode of employment and cannot be claimed and offered after a long lapse of time and after the crisis is over.

15. The object of compassionate appointment has been succinctly stated by the Apex Court in Umesh Kumar Nagpal v. State of Haryana & Ors, (1994) 4 SCC 138 as under:-

"2. ...The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.

* * *

6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

(emphasis supplied)

16. The principle laid down in the case of Umesh Kumar Nagpal (supra) has been reiterated by the Apex Court time and again. [see Jagdish Prasad v. State of Bihar &Anr., (1996) 1 SCC 301: Managing Director, MMTC Ltd., New Delhi v. Pramoda Dei Alias Nayak, (1997) 11 SCC 390: State of U.P. v. Paras Nath, (1998) 2 SCC 412: S. Mohan v. Govt. of T.N. &Anr., (1998) 9 SCC 485: Sanjay Kumar v. State of Bihar &Ors., (2000) 7 SCC 192]

17. In Union of India &Ors. v. Bhagwan Singh, (1995) 6 SCC 476, where the widow and two major sons did not apply for compassionate appointment immediately after the death of the employee and an application for compassionate appointment was moved after 20 years by the minor son of the deceased, the Apex Court in paragraph 8 of the report held that:

"It is evident, that the facts in this case point out, that the plea for compassionate employment is not to enable the family to tide over the sudden crisis or distress which resulted as early as September 1972. At the time Ram Singh died on 12.9.1972 there were two major sons and the mother of the children who were apparently capable of meeting the needs in the family and so they did not apply for any job on compassionate grounds. For nearly 20 years, the family has pulled on, apparently without any difficulty. In this background, we are of the view that the Central Administrative Tribunal acted illegally and wholly without jurisdiction in directing the Authorities to consider the case of the respondent for appointment on compassionate grounds and to provide him with an appointment, if he is found suitable."

18. In State of J&K &Ors. v. Sajad Ahmed Mir, (2006) 5 SCC 766 the Apex Court held that:

"11..... Once it is proved that in spite of death of the breadwinner, the family survived and substantial period is over, there is no necessity to say "goodbye" to the normal rule of appointment and to show favour to one at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution."

19. In Eastern Coalfield Limited v. Anil Badyakar &Ors., (2009) 13 SCC 112, immediately after the death of the employee in the year 1981, initially his widow sought compassionate appointment. Subsequently on 07.03.1983 the elder daughter staked her claim. Ultimately in pursuance of an understanding among the members of the family the second daughter's husband was nominated for seeking appointment and by an order dated 10.05.1993 he was given compassionate appointment on provisional basis, but the competent authority by its order dated 23.09.1993 cancelled it on the ground that the appointment could not be given 12 years after the death of an employee. Upholding the order dated 23.09.1993, the Apex Court held that the compassionate appointment was not a vested right which can be exercised at any time in future. The compassionate employment, it was held, cannot be claimed and offered after a lapse of time and after the crisis is over.

20. In the case at hand, after the death of Surya Lal his widow Nirmala Devi did not claim appointment under the Dying in Harness Rules. The representations dated 01.02.2002, 15.06.2002 and 24.12.2002 alleged to have been made by her, do not carry any receiving. In any case, admittedly, Nirmala Devi made her first representation on 01.02.2002, almost 5 years after the death of her husband and thereafter did not pursue her case. The petitioner, after attaining the age of maturity, admittedly, made a representation on 15.04.2003 seeking compassionate appointment and has filed the present writ petition 13 years thereafter. As already mentioned above, the compassionate appointment is neither a source of appointment nor can there be reservation of a vacancy. It is thus apparent that the petitioner had some alternative source of livelihood and his family has been able to pull on without any difficulty for almost 19 years since the death of Surya Lal. In view of the settled legal position, once the crisis is over, the petitioner cannot be offered compassionate appointment.

21. There is yet another reason why the relief prayed for cannot be granted. In paragraph 8 of his representation dated 27.09.2016 (annexure 5 to the writ

petition), the petitioner has categorically stated that he was adopted by Nirmala Devi, the widow of Surya Lal by a registered adoption deed dated 25.08.1999. Admittedly, the petitioner was adopted by Nirmala Devi after the death of Surya Lal. Relevant portion of the representation dated 27.09.2016 is extracted below:-

"8. यह कि प्रार्थी की जन्मतिथि 10.07.1985 है तथा वह स्व० सूर्यलाल का दत्तक पुत्र है तथा प्रार्थी के पिता की मृत्यु के उपरान्त उसकी माता द्वारा दिनांक 25.08.1999 को रजिस्टर्ड गोदनामा विलेख द्वारा गोद लिया गया है तथा वर्तमान में समस्त अभिलेखों में प्रार्थी का नाम स्व० सूर्यलाल के दत्तक पुत्र के रूप में दर्ज है।"
(emphasis supplied)

22. Section 12 of the Hindu Adoption and Maintenance Act, 1956 (for short 'Act') which deals with the effect of adoption being relevant is extracted below:-

"12. Effect of adoptions.-An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that-

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

23. As per Section 12 of the Act, an adopted child is deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption and from such date all the ties of the child with the family of his or her birth are deemed to be severed and replaced by those created by adoption in the adoptive family.

24. The object of granting compassionate appointment is to ensure that the dependents of the deceased are extended a helping hand. It is not in dispute that, as per the Rules, on the death of a Government servant, only a member of his family, as defined under Rule 3(f) of the Rules, who is dependent upon such Government servant is entitled to be given compassionate appointment. It is also not in dispute that an adopted son or adopted daughter is also entitled to compassionate appointemnt in case of death of his or her father or mother who is a Government employee. But when the adoption has been made after the death of the deceased employee, by no stretch of imagination can it be said that the adopted son or daughter, as the case may be, was dependent upon the deceased.

25. Since the petitioner became a member of the adoptive family long after the death of Surya Lal, the petitioner cannot be treated to be a dependent of the deceased in terms of the Dying in Harness Rules. Since the petitioner was not a

dependent of the deceased Surya Lal, the petitioner is not entitled to compassionate appointment under the Dying in Harness Rules.

26. In Jai Prakash Vs. State of U.P. &Anr. 2003 (53) ALR 197, a Division Bench of this Court has opined as under:-

"7. On the admitted facts, the writ petitioner having been taken in adoption by the widow of the deceased a couple of months after the death of Chhotey Singh, could not be said to be a dependent member of the family of the deceased employee entitled for appointment on compassionate grounds under the Dying in Harness Rules, 1974. The purpose of the said Rules is to provide employment to a dependent member of the family of the deceased employee to tide over the sudden financial-crisis which the family of the deceased undergoes because of the sudden death of the sole bread earner of the family. The writ petitioner can in no case be said to be a member of the family of Chhotey Singh at the time of his death. He had subsequently acquired the status of being a member of the family by way of an adoption made by the widow of the deceased employee. If the benefit of the Dying in Harness Rules, 1974 is permitted even to those who are subsequently adopted after the death of the employee, it would open a new channel of employment. This would encourage employment through backdoor even to those who were not actually Dependants of the deceased employee and had subsequently acquired such status by managing to get adopted in the family of the deceased employee, for the purposes of getting a job. The present day unemployment situation prevailing in the country, where qualified unemployed youth are queuing up in large numbers desperate to get Government jobs, is a fact well known to all and the Courts also cannot shut their eyes to this reality. Such back door entry of employment, if permitted, would defeat the very purpose of appointment on compassionate ground. Even those who are not actually members of the family of the deceased would in this manner, by subsequently getting adopted, put forward their claim and get appointment under the Dying in Harness Rules.

8. For the foregoing reasons, we have no hesitation in holding that a person who has been adopted after the death of the employee would not be entitled to the benefit of the appointment on compassionate grounds under the Dying in Harness Rules, 1974."

(emphasis supplied)

27. For the aforesaid reasons, the writ petition is dismissed on the ground of delay and laches as well as on merit.

28. There shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.08.2019

BEFORE
THE HON'BLE MANISH MATHUR, J.

Service Single No. 9293 of 2006

G.B. Saxena ...Petitioner
Versus
State Bank of India &Ors. ...Respondents

Counsel for the Petitioner:
K.K. Gautam, Madhav Srivastava, Madhusudan Srivastava

Counsel for the Respondents:

N.K. Seth, Anurag Srivastava, Smt. Pushpa

A. Natural justice. Violation. State Bank of India Officers Service Rules- Paragraph 68(2) of the Service Rules – Dismissal from service- Appeal and Review Rejected- Violation of Principles of Natural Justice- Proportionality of Punishment.

Not only are the enquiry proceedings vitiated for non-observance of the principles of natural justice according a fair opportunity to the petitioner to defend himself and on account of violation of paragraph 68(2) of the Service Rules, but also that the punishment imposed is disproportionate to the gravity of the charges.(Para 17,19,20,22,28,30,32)

Writ Petition allowed.

Case Law Relied Upon/Discussed: -

1. Kandaa v. Govt. of Malaya,1962 AC 322

2. K.L. Tripathi v. State Bank of India and others reported in AIR 1984 Supreme Court 273

3. Roop Singh Negi v. Punjab National Bank & others, reported in AIR 2008 SC (supp) 921

4. Asha Ram Verma and others v. State of U.P. and othersreported in 2003(21) Lucknow Civil Decisions 493

5. Union of India and others v. J. Ahmed, reported in AIR 1979 Supreme Court 1022

6. Bhagirathi Jena v. Board of Directors, O.S.F.C. and others,reported in (1999) 3 SCC 666

Case Law Distinguished: -

1. State Bank of India v. Tarun Kumar Banerjee and others, reported in (2000) 8 SCC 12

2. State of Andhra Pradesh and others v. S.Sree Rama Rao, reported in AIR 1963 Supreme Court 1723

3. State Bank of India and ors v. Narendra Kumar Pandey, reported in AIR 2013 Supreme Court 904

4. Bank of India v. Apurba Kumar Saha reported in 1994(1) SLR 260

5. State Bank of India and others v. Ramesh Dinkar Punde, reported in (2006) 7 SCC 212 (E-3)

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Sri Madhu Sudan Srivastava, learned counsel for the petitioner and Sri Anurag Srivastava, learned counsel appearing on behalf of the opposite parties.

2. The petitioner has challenged the order dated 18.07.2005 dismissing him from service, the order dated 27.10.2005 rejecting his appeal and the order dated 03.08.2006 dismissing the review application of the petitioner.

3. As per the averments made in the writ petition, the petitioner while in service was served with a charge sheet dated 25.06.2004 levelling 8 allegations against him primarily in relation to infraction of procedure pertaining to grant of loan on behalf of the Bank. The said charge sheet was replied to by the petitioner whereafter disciplinary proceedings ensued resulting in the passing of the dismissal order against which the petitioner's appeal and review were also rejected.

4. Sri Madhusudan Srivastava, learned counsel for the petitioner has submitted that the proceedings of the enquiry were vitiated not only on account of deviation from the established norms of natural justice but also against the provisions of the State Bank of India

Officers Service Rules(herein after referred to as the Service Rules).

5. Learned counsel for the petitioner has also submitted that even otherwise the punishment meted out is disproportionate to the charges levelled against the delinquent employee.

6. In order to buttress his submissions regarding lacuna in procedure, learned counsel for the petitioner has drawn attention to paragraph 68(2) of the Service Rules which provide for oral and documentary evidence to be adduced by which the articles of charge are proposed to be proved. He has further submitted that the aforesaid paragraph specifically provides for holding of oral enquiry and an opportunity for the delinquent employee to cross examine the witnesses produced against the delinquent employee. Sri Srivastava has submitted that the enquiry proceedings under challenge have deviated from the aforesaid mandatory provisions since no opportunity was given to the petitioner to cross examine the relevant witnesses whose statements were relied upon. He has also submitted that even the relevant documents which formed the basis of establishment of charges against the petitioner were never adduced in the enquiry proceedings.

7. The learned counsel in order to substantiate his arguments, has submitted his written submissions and has relied upon the following judgments:-

(i) State of Uttar Pradesh and others v. Saroj Kumar Sinha reported in (2010) 2 SCC 772;

(ii) Roop Singh Negi v. Punjab National Bank & others, reported in AIR 2008 SC (supp) 921;

(iii) M. V. Bijlani v. Union of India and others, reported in AIR 2006 Supreme Court 3475;

(iv) Union of India and others v. Mohd. Ramzan Khan; reported in AIR 1991 SC 471;

(v) Raj Kumar Srivastava v. State of U.P., reported in MANU/UP/3726/2017;

(vi) Syed Mansoor Hasan Rizvi v. Director, Local Bodies and others reported in 2017 SCC OnLine All 861; and

(vii) Kaptan Singh v. State of U.P. reported in 2014 SCC OnLine All 6718

8. Sri Anurag Srivastava, learned counsel appearing on behalf of the respondent-bank has vehemently denied the submissions of the learned counsel for the petitioner with the submission that ample opportunity of hearing was provided to the petitioner and there was sufficient evidence produced during the enquiry proceedings to indict the petitioner. He has further submitted that in relevant cases, such as the present one, strict compliance of oral enquiry is not required in view of the admission of the petitioner. Learned counsel has further submitted that the enquiry proceedings were held in a completely transparent and fair manner without causing any prejudice to the rights of the petitioner and, therefore, there was no infringement of the service rules. It has also been submitted that this court does not sit in appeal over the findings given by the disciplinary authority and that re-examination of evidence led in disciplinary proceedings is unwarranted and unless there is some perversity, the writ court cannot substitute its judgment in place of the decision of the disciplinary authority. Sri Srivastava has further submitted that when on the question of facts, there is no real dispute

and no prejudice has been caused by absence of any formal opportunity of cross-examination, it per se does not invalidate or vitiate the decision arrived at fairly, more so when the party against whom an order has been passed does not dispute the facts and does not demand to test veracity or credibility of the statement against him.

9. The learned counsel in order to substantiate his arguments, has submitted his written submissions and has relied upon the following judgments:-

(i) State Bank of India v. Tarun Kumar Banerjee and others, reported in (2000) 8 SCC 12;

(ii) State of Andhra Pradesh and others v. S.Sree Rama Rao, reported in AIR 1963 Supreme Court 1723;

(iii) K.L. Tripathi v. State Bank of India and others reported in AIR 1984 Supreme Court 273;

(iv) State Bank of India and ors v. Narendra Kumar Pandey, reported in AIR 2013 Supreme Court 904;

(v) Bank of India v. Apurba Kumar Saha reported in 1994(1) SLR 260; and

(vi) State Bank of India and others v. Ramesh Dinkar Punde, reported in (2006) 7 SCC 212

10. Heard learned counsel for the parties and perused the record.

11. It is admitted fact that paragraph 68(2) of the Service Rules would govern the disciplinary proceedings taken by the Bank against the delinquent employees such as the petitioner. Paragraph 68(2) (xiii) pertaining to the conduct of the proceedings is as follows :-

"(xiii) On the date fixed for the enquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the Bank. The witnesses produced by the Presenting officer shall be examined by the Presenting Officer and may be cross-examined by or on behalf of the officer. The Presenting Officer shall be entitled to re-examine his witnesses on any points on which they have been cross-examined, but not on a new matter without the leave of the Inquiring Authority. The Inquiring Authority may also put such questions to the witnesses as it thinks fit."

12. A perusal of the enquiry report dated 12.04.2005 which has been brought on record by the opposite parties by means of the supplementary counter affidavit indicates the fact that the charges have been found to be established against the petitioner not only on the basis of any alleged admission on the part of the petitioner but also on the basis of pre-recorded statements of the borrowers, namely, Smt. Pushpa Lata Devi, Smt.Ramjano, Sri Noor Mohammad and the Bank employee Sri V.K.Shukla. However, the enquiry report makes it apparent that the aforesaid persons were never produced as witnesses to substantiate the statements made against the petitioner. It is thus clear that no opportunity of cross-examination of the aforesaid persons was afforded to the petitioner which, therefore, is clearly in conflict with paragraph 68(2) of the Service Rules. The enquiry report further indicates that even at the time of enquiry proceedings, the petitioner had challenged the evidentiary value of the statement of Smt. Pushpa Lata Devi which was, however, rejected.

13. The enquiry report also reveals that the charges against the petitioner

have been found to be established by placing reliance on the reports submitted by the petitioner's successor on the post of Branch Manager, Sri Ashutosh Pandey. On the basis of the said reports submitted by Sri Ashutosh Pandey, the enquiry officer has concluded that the loans disbursed by the petitioner were diverted for other purposes and the project for which the loan had been sanctioned was not complete.

14. Such a finding on the basis of inspection report submitted by Sri Ashutosh Pandey clearly forms the basis of establishment of charges against the petitioner but a reading of the entire enquiry report makes it clear that the said person, namely, Sri Ashutosh Pandey has never been produced as a witness during the proceedings either to substantiate his report or for cross examination by the petitioner. The said fact assumes importance in view of the fact that the petitioner had objected to the reliance being placed upon the report of Sri Ashutosh Pandey on the ground that Sri Pandey had earlier also been warned for wrong and casual reporting by the Zonal Officer. The said report had been produced by the petitioner during the enquiry proceedings as exhibit DEx.13/8. However, the said submission of the petitioner had been rejected only on the ground that the said exhibit could not protect the charged officer for lapses committed by him.

15. It is, thus, clear that the enquiry officer has found the charges to be established against the petitioner on the basis of an inspection report submitted by an employee who was never produced in enquiry as a witness and also in the face of the warning letter of the zonal office regarding wrong and casual reporting by such an officer. Once the petitioner had objected to the reliance being placed on the inspection report of Sri Pandey, then it was incumbent upon the enquiry officer to have dealt with the issue thoroughly particularly in view of the warnings issued by the zonal office instead of dealing with the said objections in such a casual and cursory manner.

16. Apart from the statements of the aforesaid persons, various other documents pertaining to the loan accounts of many other borrowers have also been seen by the enquiry officer to hold the charges established against the petitioner but the enquiry report does not indicate as to whether such other borrowers were ever produced as witnesses in order to prove the charges against the petitioner.

17. The aforesaid factors clearly indicate an infraction of the provisions of Service Rules applicable upon the petitioner. Although various other factual discrepancies have also been indicated by learned counsel for the petitioner, the same is not being gone into in view of the settled law that factual disputes cannot be entertained in writ jurisdiction. Similarly, learned counsel for the opposite parties has also indicated various factual aspects of the enquiry report pertaining to the substantiation of charges against the petitioner but the same is also being ignored for the aforesaid reason.

18. Hon'ble the Supreme Court in a catena of decisions including the decision in **Roop Singh Negi v. Punjab National Bank(supra)** has specifically held that the authority conducting an enquiry against a delinquent employee clearly discharges a quasi-judicial function and

is, therefore, required to act in a fair and impartial manner. It is obligatory upon the said authority not only to deal with the reply submitted by the delinquent employee but also a duty is cast upon him to find out the truth of the allegations leveled against the delinquent employee. The purpose of an enquiry is not to establish a delinquent employee guilty of the charges levelled against him.

19. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. There principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated.

20. The golden rule which stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. Its essence is good conscience in a given situation; nothing more but nothing less.

21. Lord Denning, in the case of **Kandaa v. Govt. of Malaya**, 1962 AC 322 has observed that " if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."

22. In the present case, it is clearly discernible that a fair opportunity of hearing has not been afforded to the petitioner in view of the factors enumerated herein above and as such the disciplinary proceedings are clearly against the provisions of paragraph 68(2) of the Service Rules. It is also relevant that the petitioner objected to the non-adherence of the Rules even at the stage of enquiry proceedings itself, which, however, were rejected for unwarranted reasons. The non-observance of the principles of natural justice although not taken in appeal were thereafter taken the petitioner in the review application but the same has again been rejected without proper examination of the disciplinary proceedings vis-a-vis the Service Rules.

23. So far as the judgments relied upon by learned counsel for the opposite parties are concerned, a perusal of the judgment rendered by Hon'ble the Supreme Court in **State Bank of India v. Tarun Kumar Banerjee** and others(supra) will make it clear that while Hon'ble the Supreme Court has held that a customer of the bank need not be involved in domestic enquiry as such a course would not be conducive in the interest of the Bank, but the same was in the circumstances of the said case and would not have applicability in the present case where the statement of the customer of the Bank forms the basis of establishment of charges against the petitioner and would, therefore be covered by the judgment rendered by Hon'ble the Supreme Court in the subsequent decision of Roop Singh Negi(supra).

24. The decision in **State of Andhra Pradesh and others v. S.Sree Rama Rao(supra**) pertains to the power of the High Court under Article 226 of the Constitution of India to interfere with the findings recorded in enquiry proceedings. The same would not have any applicability in the present case since this Court has not enquired into the findings of fact recorded in the disciplinary proceedings but has only tested the breach of the provisions of natural justice as envisaged in the service rules.

For the same reason, the judgment rendered by Hon'ble the Supreme Court in **State Bank of India and others v. Ramesh Dinkar Punde(supra)** would be inapplicable in the present case.

25. The decision in **K.L. Tripathi v. State Bank of India and others(supra)** on the other hand would be of applicability since Hon'ble the Supreme Court itself has stated that the basic concept is fair play in action administrative, judicial or quasi-judicial. Hon'ble the Supreme Court has held that there is no requirement of cross-examination when on the question of facts there is no dispute and no real prejudice has been caused to a party as such, by absence of any formal opportunity of cross examination. This would be more so when a party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version of the credibility of the statement.

In the present case, the petitioner even during the enquiry proceedings had clearly disputed the credibility of the statements made/pre-recorded against the petitioner and, therefore since there was a dispute with regard to the said statements, the right to cross-examine such witnesses was inherent and mandatory as held by Hon'ble the Supreme Court itself.

26. The decision in **State Bank of India and others v. Narendra Kumar Pandey(supra)** would also be inapplicable in the circumstances of the present case because of the disciplinary enquiry referred to in the said case was ex parte and in view of the said fact, Hon'ble the Supreme Court held that in an ex parte enquiry, if the charges are borne out from documents, no oral evidence is necessary to prove the charges. It has been held that when the charged officer does not attend the enquiry, then he cannot contend that the inquiring authority should not have relied upon the documents which were not made available or disclosed to him. In the present case, the enquiry was clearly not an ex parte one and the petitioner was fully involved at all stages.

For the same reason, the judgment rendered by Hon'ble the Supreme Court in **Bank of India v. Apurba Kumar Saha(supra)** would be inapplicable in the present case.

27. A Full Bench of this Court in **Asha Ram Verma and others v. State of U.P. and others** reported in 2003(21) Lucknow Civil Decisions 493 has held that although the Evidence Act is not applicable in departmental enquiry but whenever any evidence is produced either oral or documentary and is relied upon, the person concerned should be given opportunity to cross examine.

28. With regard to the submission of learned counsel for the petitioner pertaining to disproportionality of punishment, relevant fact pertaining to the present case is that none of the charges imputed against the delinquent employee

pertain to any collusive activity for defrauding the Bank or any charge pertaining to embezzlement. At best the charges would indicate negligence or failure to attain the highest standards of administrative ability against the petitioner. Hon'ble the Supreme Court in Union of India and others v. J. Ahmed, reported in AIR 1979 Supreme Court 1022 has held that it is difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ispo facto constitute misconduct. The relevant paragraph is reproduced hereinafter.

"11.....It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ispo facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence....."

Applying the aforesaid judgment of Hon'ble the Suprme Court in the present case, it can be seen that dismissal of the petitioner from service is, therefore, exorbitant and disproportionate to the gravity of the charges particularly since there is no allegation that the petitioner was involved in active collusion with the borrowers for causing financial loss to the Bank.

29. No other point was argued by learned counsel for the parties.

30. In view of the aforesaid, it is clear that not only are the enquiry proceedings vitiated for non-observance of the principles of natural justice according a fair opportunity to the petitioner to defend himself and on account of violation of paragraph 68(2) of the Service Rules, but also that the punishment imposed is disproportionate to the gravity of the charges.

31. It has been informed that during pendency of the writ petition, the petitioner has subsequently superannuated from service and the service regulations do not prescribe for holding of any disciplinary proceedings after superannuation. Therefore, in view of the judgment of Hon'ble the Supreme Court in **Bhagirathi Jena v. Board of Directors, O.S.F.C. and others,** reported in (1999) 3 SCC 666 no remand for fresh enquiry can be directed. 32. In view of the aforesaid, the writ petition is allowed and a writ in the nature of Certiorari is issued quashing the impugned orders dated 18.07.2005, 27.10.2005 and 03.08.2006 with consequential service benefits to the petitioner.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2019

BEFORE
THE HON'BLE ABDUL MOIN, J.

Service Single No. 2391 of 2015

Shri Kant Tiwari ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
A.K. Pandey

Counsel for the Respondents:

C.S.C.

A. U.P. Collection Amin Service Rules 1985 as amended in the year 2004- Seasonal Collection Amin. Issues closed upon earlier leg of litigation – held cannot be reopened. Also, ground of age - power to grant relaxation exercised vexatiously, in disregard of earlier judgement.

Claim of the Petitioner rejected on two grounds- (a) recovery made by the petitioner is below the criteria of 70% as envisaged (b) no incumbent junior to the petitioner has been given regular appointment on the post of Collection Amin- Challenged earlier through Writ Petition- Court vide judgment and order dated 21.8.2014 had set-aside the order of rejection. Earlier order reiterated with additional reason that now the petitioner is now aged more than 45 years.

No longer open for the respondents to have taken the same grounds while rejecting the claim of the petitioner-Other ground of there being 44 persons senior to the petitioner for being regularized and all the posts are filled in was never taken before this Court in the earlier round of litigation- third ground of the petitioner now being aged more than 45 years and the age limit as specified under the rules being only 45- D.O Dated 24.06.2004 and another order dated 22.02.2019 State Government is vested with the power of granting relaxation in age beyond the age of 45 years - power vested with the respondent no. 2 exercised in a whimsical, capricious, casual and cavalier manner without application of mind and without even considering the observations made by this Court while delivering the judgment and order passed in previous Writ Petition- COSTS- when the Court should impose cost to check the frivolous writ petition and the orders which are cause of explosion of dockets of the Court. (Para 12,14,15,16,1718,19,20,21)

Writ Petition allowed with costs Rs. 50,000/-

Case Law Discussed/Relied Upon:-

1. Writ Petition No. 5986 (SS) of 2009

2. Dinesh Kumar Asthana Vs. Collector, Azamgarh and Ors, (2001) 1 UPLBEC 867

3. Karnataka Housing Board Vs. C. Muddaiah ,(2007) 1 SCC 689

4. Subrata Roy Sahara Vs. Union of India and ors, (2014) 8 SCC 470 (E-3)

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

2. By means of the present petition, the petitioner has prayed for the following reliefs:-

"1. ISSUE, a writ order or direction in the nature of CERTIORARI quashing the impugned order dated 10.11.2014 passed by the opposite party no.2 contained as Annexure No.1 to the writ petition.

2. ISSUE, a writ order or direction in the nature of MANDAMUS commanding the opposite parties to regularize the services of the petitioner on the post of collection Amin in District- Sultanpur from the date on which the juniors to him have been regularized with consequential benefit of service under 35% quota allocated for seasonal collection amins and pay him regular salary in accordance with law.

3. ISSUE other writ order or direction as is deemed fit and proper under the circumstances of the case.

4. Allow the Writ Petition with cost."

3. The case set forth by the petitioner is that he is working as Seasonal Collection Amin since 1.6.1988. His working has been intermittent on account of certain artificial break which has been created by the respondents. However, the work and conduct of the petitioner have always been appreciated. When a junior to the petitioner was regularized as Collection Amin and the case of the petitioner was not considered and the petitioner also meeting the requirement as specified under the rules for being regularized, he preferred Writ Petition (S/S) No.413 of 2009 In re: Sri Kant Tiwari vs. State of U.P. and others. The said writ petition was disposed of by this Court vide judgment and order dated 21.1.2009, a copy of which is Annexure-3 to the writ petition, directing the respondents to consider the case of the petitioner for regularization. In pursuance thereof, the respondents rejected the claim of the petitioner by means of the order dated 16.3.2009 primarily on two grounds- (a) that the recovery made by the petitioner is below the criteria of 70% as envisaged in U.P. Collection Amin Service Rules 1985 as amended in the year 2004 and (b) that no incumbent junior to the petitioner has been given regular appointment on the post of Collection Amin. The rejection order dated 16.3.2009 compelled the petitioner to file a second writ petition namely Writ Petition No. 5986 (SS) of 2009 before the court. This Court, after considering both the grounds of rejection negated the same on the ground that so far as 70% recovery is concerned, taking into consideration the Division Bench judgment of this Court passed in Special Appeal No.518 of 2000 In re: State of U.P. and others vs. Sri Surendra Singh decided on 15.9.2009, mere non achieving of target for collection, bereft of other relevant facts, cannot be a criterion for achieving efficiency for the purpose of regularization. The Court also considered that the District Magistrate while passing the order dated 16.3.2009 had not considered the fact that at the relevant time the district was hit by drought. So far as the other ground of no incumbent junior to the petitioner having been given regular appointment , this Court specifically referred to paragraph 24 of the supplementary counter affidavit dated 19.11.2012 filed by the Tahsildar Sadar, Sultanpur wherein it had been admitted by the respondents that an incumbent at Serial No.156 of the seniority list, namely, Dev Narayan Upadhyaya has been given regular appointment w.e.f 01.03.2006 while the name of the petitioner was at Serial No.125 of the said seniority list. Thus the Court vide judgment and order dated 21.8.2014 had set-aside the order of rejection dated 16.3.2009 and directed the District Magistrate, Sultanpur to consider the matter of the petitioner's appointment as regular Collection Amin in view of the observations made in the said judgment and also in the case of Surendra Singh (supra) within three months. Copy of judgment and order dated 21.8.2014 is annexure 4 of petition.

4. Thereafter, the respondents No.2 has passed the impugned order dated 10.11.2014, a copy of which is Annexure-1 to the writ petition, by which the claim of the petitioner for regularization has again been rejected. Aggrieved against the

order dated 10.11.2014, present petition, a third in the series of litigation , has been filed.

5. Learned counsel for the petitioner contends that a perusal of the impugned order dated 10.11.2014 would indicate that the Collector, Sultanpur has rejected the claim of the petitioner for regularization again primarily on the same grounds which were negated by the Court in the earlier judgment and order dated 21.8.2014 namely (a) the petitioner not having achieved the standard recovery of 70%; (b) there are still 44 persons who are senior to the petitioner for being regularized and that all posts are filled in and (c) that the petitioner is now aged more than 45 years.

6. Elaborating this, learned counsel for the petitioner submits that of the three grounds sought to be taken, two grounds have already been considered and negated by this Court vide judgment and order dated 21.8.2014 which has already attained finality inter-se the parties. With regard to the ground of petitioner being aged about more than 45 years, reliance has been placed on the D.O. letter dated 24.9.2004, a copy of which he been filed as Annexure-7 to the writ petition, to contend that the State Government is vested with the power of granting relaxation in age. It is also contended that the State Government has recently issued an order dated 22.2.2019, a copy of which is Annexure RA-4 to the rejoinder affidavit dated 15.7.2019, wherein again the age relaxation beyond the age of 45 years has been permitted provided the employee concerned fulfills the other conditions as specified for the purpose of regularization.

7. Learned counsel for the petitioner submits that from the aforesaid, it is apparent that the respondents are bent upon rejecting the claim of the petitioner on frivolous grounds and on the grounds which have already been negated by this Court and as such the same is nothing but an attempt to harass the petitioner whereby compelling him to approach the court of law repeatedly for redressal of his grievance.

8. On the other hand, learned Standing Counsel on the basis of averments contained in the counter affidavit, argues that in terms of the regularization rules there is an age bar of 45 years beyond which the claim for regularization cannot be considered. It is contended that petitioner is aged more than 45 years and as such the impugned order of rejection was passed. So far as the other two grounds which are repetitive of earlier grounds which were taken in the order dated 16.3.2009 and which have been negated by the Court while delivering the judgment and order dated 21.8.2014, it is contended that as the petitioner has not achieved the standard recovery of 70% as required under the rules, consequently the impugned order has been passed. It is also contended that in terms of the impugned order as no vacancy is available, consequently there is no occasion for regularization of the petitioner.

9. Heard learned counsel for the parties and perused the record.

10. From the arguments of the contesting parties and from a perusal of the records it comes out that initially the claim of the petitioner for regularization on the post of

Collection Amin had been rejected by the respondents vide order dated 16.03.2009 on two grounds namely that the recovery of the petitioner is below the standard criteria of 70% as well as that no incumbent junior to the petitioner has been given regular appointment on the post of Collection Amin. Upon a challenge being raised to the said order, this Court vide judgment and order dated 21.08.2014 set aside the impugned order of rejection by dealing with both the grounds namely that so far as 70% recovery is concerned, taking into consideration the Division Bench judgment of this Court in the case of Surendra Singh (supra) mere non achieving of target for collection, bereft of other relevant facts, cannot be a criteria for achieving efficiency for the purpose of regularization. So far as the other ground of there being no junior to the petitioner having been given regular appointment on the post of Collection Amin, this Court specifically considered paragraph 24 of the supplementary counter affidavit dated 19.11.2012 filed by the Tehsildar Sadar, Sultanpur wherein it had been admitted by the respondents that the incumbent of Serial No. 156 of the seniority list had been given regular appointment while the name of the petitioner found place at Serial No. 125 of the said seniority list meaning thereby that it was categorically admitted by the respondents that a junior of the petitioner had been regularized and the petitioner had not been regularized. In this view of the matter, the impugned order had been set aside by this Court through the aforesaid judgment . The respondents were also directed to consider the matter of the petitioner for regular Collection Amin in view of the observations made in the said judgment.

11. After consideration, the respondents have proceeded to pass the impugned order dated 10.11.2014 in which now three grounds have been taken namely that the petitioner has not achieved the standard recovery of 70%, there are 44 persons who are still senior to the petitioner for being regularized and that all posts are filled in and that the petitioner is now aged more than 45 years.

12. So far as the first ground is concerned i.e the petitioner not having achieved the standard recovery of 70%, this Court vide judgment and order dated 21.08.2014 has specifically observed that the same would not be a relevant criteria taking into consideration the Division Bench judgment of this Court in the case of Surendra Singh (supra). It is also admitted by the contesting parties that the said judgment has attained finality inter se the parties. Thus, it was no longer open for the respondent no. 2 to take the same ground while rejecting the claim of the petitioner.

13. Even otherwise, this Court in the case of **Dinesh Kumar Asthana Vs. Collector, Azamgarh and Ors** reported in **(2001) 1 UPLBEC 867** after considering the provisions of Rule 5 of the Rules, 1974 has held as under:-

"Necessary pleadings on this aspect are wanting. Even the Counter Affidavit does not disclose that no person in the list prepared in the year 1993 has been regularised whose recovery was below the prescribed limit or that all persons

above such regularized persons were inefficient and or had poor efficiency on comparison. This Court has no means to find out whether the recovery in a particular year with respect to the petitioner was low for reason other than this own efficiency. It is very relevant circumstance while considering the efficiency of Seasonal Collection Amin. For example, recovery is not possible beyond a certain limit for various factors and reasons like-orders from Court, the total extent of recovery to be made in one's area and/or whether Government itself kept recovery in abeyance due to famine, flood, drought etc. These will be relevant consideration to be taken into account and a Seasonal Collection Amin, being put to sufferance for reasons beyond his control, cannot be non-suited for low recovery as it does not reflect at all upon his efficiency."

14. Thus, taking into consideration the aforesaid judgments in the case of Surendra Singh and Dinesh Kumar Singh (supra) it was no longer open for the respondents to have taken the same ground while rejecting the claim of the petitioner.

15. So far as the other ground of there being 44 persons who are still senior to the petitioner for being regularized and all the posts are filled in, suffice to state that the said ground was never taken before this Court in the earlier round of litigation. Even otherwise, this Court had categorically observed that in terms of the supplementary counter affidavit filed by the respondents themselves it had been admitted that one of the junior of the petitioner namely Sri Dev Narayan Upadhyay had been given regular appointment. Thus, merely because there are 44 persons who are senior to the petitioner for being regularized and all posts are filled in, as alleged in the impugned order, cannot be considered to be a valid ground for rejection of the claim of the petitioner once admittedly, the respondents have regularized a junior of the petitioner Even otherwise, learned counsel for the petitioner has filed a copy of an order dated 14.09.2017 as annexure 5 to the rejoinder affidavit dated 15.07.2019 to contend that in district Sultanpur, to which the present controversy pertains, against 119 posts of Collection Amin, there are only 84 persons working and 35 posts are lying vacant. Thus, the said ground could not also validly have been taken by the respondents while rejecting the claim of the petitioner. A peculiar aspect of the matter is that the specific observation of this Court of Sri Dev Narayan Upadhyay, junior to the petitioner having been regularized, has been given a complete go bye by the respondent no. 2 while passing the impugned order dated 10.11.2014 which itself reflects the cavalier manner in which the respondent no. 2 has treated the final order inter se the parties as passed by this Court.

16. So far as the third ground of the petitioner now being aged more than 45 years and the age limit as specified under the rules being only 45, suffice to state that in terms of the D.O Dated 24.06.2004, the State Government is vested with the power of granting relaxation in age beyond the age of 45 years as specified under the rules. The said D.O is followed by another order dated 22.02.2019, a copy of which has been filed as annexure 4 to the rejoinder affidavit which also primarily talks about the respondents vested with the power of

granting age relaxation beyond 45 years. The D.O Dated 24.06.2004 being of a date prior to issue of the impugned order dated 10.11.2014 as passed by the respondent no. 2 must very well have been in the knowledge of the respondent no. 2, i.e Collector, Sultanpur but again the same has not been referred to by the respondent no. 2 and conveniently ignored while proceeding to reject the claim of the petitioner for regularization. Thus, it is apparent that all the three grounds which have been taken by the respondent no. 2 while rejecting the claim of the petitioner through the impugned order dated 10.11.2014 are patently misconceived and also run contrary to the specific observations of this Court passed while delivering the judgment and order dated 21.08.2014 which, as already indicated above, has attained finality inter se the parties. Thus, it is clearly apparent that the power vested with the respondent no. 2 has been exercised in a whimsical,capricious, casual and cavalier manner without application of mind and without even considering the observations made by this Court while delivering the judgment and order dated 21.08.2014.

17. Thus, taking into consideration the aforesaid discussion, the writ petition deserves to be allowed and is allowed. A writ of Certiorari is issued quashing the impugned order dated 10.11.2014, a copy of which is annexure 1 to the petition. A writ of Mandamus is issued to the respondent no. 2 to consider the case of regularization of the petitioner w.e.f the date when junior to the petitioner, namely Sri Dev Narayan Upadhyay was regularized, in accordance with rules including the D.O Dated 24.06.2004 and the subsequent order dated 22.02.2019 considering the admission on the part of the Tehsildar-Sadar, Sultanpur in the counter affidavit dated 19.11.2012 of a junior of the petitioner namely Sri Dev Narayan Upadhyay having already been given regular appointment and also considering that in terms of the order issued by the Collector, Sultanpur dated 14.09.2017, 35 posts of Collection Amin are still lying vacant. The said consideration shall be done within a period of three months from the date of receipt a certified copy of this order.

18. Before parting with the case and taking into consideration that this Court has already observed that the order dated 10.11.2014 as passed by the respondent no. 2 rejecting the claim of the petitioner is capricious and passed in a cavalier manner and has also been passed without considering the specific observations as made by this Court in the judgment and order dated 21.08.2014 and the petitioner having repeatedly been compelled to approach this Court for the redressal of his grievances and this being a third round of litigation, this Court also proposes to impose cost against the petitioner.

19. In this regard, from a perusal of the discussion made above, it is apparent that the respondent no. 2, i.e Collector, Sultanpur has adopted an adamant attitude while reiterating the earlier order despite the specific observations of this Court in the earlier round of litigations. It is thus apparent that the respondent no. 2 has not taken pain to look into the earlier judgment of this Court and primarily the same grounds have been reiterated in the impugned order as already indicated above. The Apex Court in the case of Commissioner, Karnataka Housing Board Vs. C. Muddaiah reported in (2007) 1 SCC 689 has considered the somewhat akin facts and observations that even if the Court's order is wrong and illegal, that

is binding on the parties unless that order is challenged in the superior Court. The Hon'ble Supreme Court also held that if this principle is not adhered to by the State, there will be end of the rule of law. The relevant observations of the Hon'ble Supreme Court in this regard are reproduced below :-

"32. We are of the considered opinion that once a direction is issued by a competent court, it has to be obeyed and implemented without any reservation. If an order passed by a court of law is not complied with or is ignored, there will be an end of the rule of law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the Court. In our judgment, upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice. The argument of the Board, therefore, has no force and must be rejected.

33. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a court of law. The court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The court, in the circumstances, directs the authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged."

20. The Hon'ble Supreme Court in the case of **Subrata Roy Sahara Vs. Union of India and ors** reported in **(2014) 8 SCC 470** has held as to when the Court should impose cost to check the frivolous writ petition and the orders which are cause of explosion of dockets of the Court. As already observed above, the impugned order herein has been a cause of unnecessary and avoidable litigation had the respondent no. 2 applied his mind to the observations of this court in the earlier judgment. For the sake of convenience, the relevant observation of the Hon'ble Supreme Court in the case of **Subrata Roy Sahara (supra)** are being reproduced below:-

"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims.

One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"."

21. Accordingly, taking into consideration the law laid down by the Hon'ble Supreme Court in the case of Subrata Roy Sahara (supra) this Court imposes cost of Rs. 50,000/- on the State to be paid to the petitioner within a period of four weeks from the date of receipt of a certified copy of this order. It would be open for the State to recover the said cost from the officials who were lax and whose action has resulted in such avoidable litigation causing repeated harassment to the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.09.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 22973 of 2016

Vimlesh Kumar Sharma ...Petitioner
Versus
Central Administrative Tribunal Circuit Bench Lko &Ors. ...Respondents

Counsel for the Petitioner:
Mohammad Babar Khan

Counsel for the Respondents:
Anurag Srivastava

A. Validity of Select List - only six months. Thereafter, it was not considered for providing appointment. Prior to the period of validity of the select list, neither it was acted upon nor it was approved by the competent authority A candidate whose name finds place in the select list has no legal right to get appointment.

B. Post of Store-Keeper, against which the selection process was initiated and the petitioner was declared successful, is not vacant.

As the validity of the list was only for six months and after lapse of six months, the same was not considered for providing appointment to the petitioner-Different select lists and therefore the claim of the petitioner on the ground of parity is unsustainable- Prior to the period of validity of the select list, in issue, was neither acted upon nor it was approved by the competent authority-Post of Store-Keeper, against which the selection process was initiated and the petitioner was declared successful, is not vacant- A candidate whose name finds place in the select list has no legal right to get appointment.

Writ Petition dismissed.

Case Law Relied Upon/Discussed: -

1. S.S. Balu and another v. State of Kerala and others, (2009) 2 SCC 479

2. All India SC/ST Employees Association v. A. Arthur Jeen and others, 2001 (6) SCC 380

3. State of Haryana v. Subash Chander Marwaha, (1974) 3 SCC 220

4. Shankarsan Dash v. Union of India, (1991) 3 SCC 47

5. Punjab State Electricity Board and Others v. Malkiat Singh, (2005) 9 SCC 22

6. Rakhi Ray v. High Court of Delhi, (2010) 2 SCC 637

7. U.P. Public Service Commission, Allahabad and another Vs. State of U.P. and another, 2007(5) ADJ 280 (DB)

8.Vijay Singh Charak v. Union of India (2007) 2 SCC (L&S) 721 (E-3)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Mohammad Babar Khan, learned counsel for the petitioner and Sri Anurag Srivastava, learned counsel for the respondents.

2. Under challenge is the order dated 11.04.2016 passed by the Central Administrative Tribunal (in short "CAT") in Original Application No. 427 of 2012 (in short "OA") filed by the petitioner for the following main reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order and judgment dated 11.04.2016 passed by the learned Central Administrative Tribunal (opposite party No. 1) in Original Application No. 427/2012, as contained in Annexure No. 1 to the writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties No. 2 to 4 to appoint the petitioner on the post of Store-Keeper in Jawahar Navodaya Vidyalaya Itara Pihani District Hardoi on the basis of select list prepared on 24.02.2009, forthwith.

(iii) Issue any other order or direction which this Hon;ble Court may deem just and proper under the circumstances of the case.

(iv) Award the costs of the writ petition in favour of the petitioner."

3. The facts, in brief, of the present case are that for filling the post of Chaukidar, Chaukidar-cum-Sweeper, Electrician-cum-Plumber and Store Keeper, lying vacant, in the Jawahar Navodaya Vidyalaya, Itara Pihani, Hardoi, the name of eligible candidates were sought from the employment exchange. Vide letter dated 30.04.2008, the employment exchange sent the list of eligible candidates for the post of Store Keeper (Annexure No. 2 to the writ petition).

4. It appears that for other posts, the lists were also sent by the employment exchange. On the basis of the list forwarded by the employment exchange, the Selection Committee was constituted and eligible candidates were required to undergo Trade Test (Typing Test) held on 24.02.2009.

5. In the Typing Test, the petitioner was declared successful. The Typing Test was also held for the post of Electrician/Plumber on 24.02.2009 and in

the said test, one Sri Faheem Siddiqui was declared successful. On being declared successful, appointment was provided to Sri Faheem Siddiqui on 09.07.2009 on the post of Electrician/Plumber. The appointment to the petitioner was not provided on the post of Store-Keeper for which he appeared in the Typing Test and was declared successful on 24.02.2009.

6. It is pertinent to point out that the eligibility list dated 30.04.2008, which was provided to the employer by the employment exchange, for the post of Store-Keeper, the name of the petitioner find place at Serial No. 3 but the name of Sri Faheem Siddiqui does not find place in the aforesaid list for the reason that the posts on which Sri Faheem Siddiqui was provided appointment is the post of Electrician/Plumber and a separate list of eligible candidates for the post of Electrician/Plumber was provided by the employment exchange to the employer.

7. The petitioner being aggrieved by denial of appointment, sought the information through the RTI Act, 2005 vide application dated 14.07.2009.

8. In response to the same, the employer provided the reply disclosing the reasons for not giving the appointment to the petitioner on the post of Store-Keeper. The reasons indicated in the reply dated 11.08.2009 reads as under:-

"जिला सेवायोजन कार्यालय से अभ्यर्थियों की जो सूचि प्राप्त हुयी थी उन्ही अभ्यर्थियों का दिनांक24.02.09 को ट्रेड टेस्ट कराया गया। चूँकि प्राप्त सूचि की वैधता मात्रा छः माह मानी गयी इसलिए सक्षम अधिकारीद्वारा सम्बंधित सूचि पर दिनांक 24.02.09 को करायी गयी टंकणपरीक्षा को वैध नहीं माना गया इसलिए चयन का अनुमोदन नहीं किया गया।"

9. The above quoted reasons mentioned in reply dated 11.08.2009 are based on letter of employment exchange dated 17.01.2009, according to which the list of eligible candidates provided by the employment exchange was valid only for six months.

10. In the counter reply filed before the CAT in response to OA, the opposite parties took the main pleas to the effect that:-

(i) list of eligible candidates provided by the employment exchange expired after lapse of six months, accordingly, the same was not acted upon,

(ii) that mere appearance in the competitive examination and even being declared successful therein does not entitle the applicant/petitioner to get appointment on the post rather a candidate, who applies for the post concerned, has a right to be considered for appointment on the post concerned and which, in the present case, the applicant/petitioner has availed, and

(iii) even in pursuance to the selection for the post of Store-Keeper, no such, appointment has even been made by the opposite parties and the post in question at Jawahar Navodaya Vidylaya, Hardoi has been filled up by transfer of opposite party no. 4.

11. In aforesaid factual background, the petitioner has filed the OA before the Tribunal for the reliefs quoted hereinabove.

12. The Tribunal, after considering the facts of the case and relying upon the judgment of the Hon'ble Apex Court

passed in the cases of ***S.S. Balu and another v. State of Kerala and others reported in (2009) 2 SCC 479*** and ***All India SC/ST Employees Association v. A. Arthur Jeen and others reported in 2001 (6) SCC 380***, dismissed the OA.

13. In the case of S.S. Balu (supra), the Hon'ble Apex Court observed as under:-

"A person does not acquire a legal right to be appointed only because his name appears in the select list. The State as an employer has a right to fill up all the posts or not to fill them up. Unless a discrimination is made in regard to filling up of vacancies or arbitrariness is committed, the candidate concerned will have no legal right for obtaining a writ of mandamus. Even selected candidate do not have legal right in this behalf."

14. In the case of ***All India SC/ST Employees Association (supra)***, the Hon'ble Apex Court observed as under:-

"Inclusion of a candidate in the panel only indicates his provisional selection and he does not acquire any indefeasible right for appointment even on existing vacancy."

15. The Tribunal, while dismissing the OA, has also taken note of the fact that on the post, in issue, for which the type test was held, one person, who was earlier working in Itawah was posted at Hardoi vide letter dated 16.11.2010. The Tribunal has also taken note of the fact, while dismissing the OA, that the validity of the list was only for six months and after lapse of six months, the same was not considered for providing appointment to the petitioner.

16. Assailing the impugned order dated 11.04.2016 passed by the Tribunal in the OA No. 427/2012 filed by the petitioner, the counsel for the petitioner submits that the petitioner as well as Sri Faheem Siddiqui were duly selected in the type test held on 24.02.2009 and the appointment to Sri Faheem Siddiqui was provided by the employer-opposite parties-Navodaya Vidalaya and the appointment was not given to the petitioner and this act of the employer is arbitrary, unjust and iniquitous.

17. Learned counsel for the petitioner has further submitted that in the case of Sri Faheem Siddiqui, the select list was acted upon and in the case of the petitioner, the appointment has been denied on the ground that the list has expired and thus, denial of the appointment to the petitioner by the opposite parties is arbitrary and illegal and liable to be interfered by this Court.

18. It has also been submitted by the learned counsel for the petitioner that the Tribunal without appreciating the facts of the case in its true spirit, dismissed the OA and while doing so, relied upon the judgments of the Hon'ble Apex Court, which in the facts of the case are not applicable.

19. Per contra, learned counsel for the respondents submitted that the petitioner was declared successful in the type test held on 24.02.2009 for the post of Store-Keeper for which the list of eligible candidates was sent by the employment exchange on 30.04.2008 in

which the name of Sri Faheem Siddiqui does not find place and Sri Faheem Siddiqui was declared successful in the type test held for the post of Eletrician-cum-Plumber for which separate eligibility list was sent by the employment exchange. Thus, the claim of the petitioner based on parity is unsustainable in the eye of law.

20. Learned counsel for the respondents further submitted that prior to approval of the select list with regard to the post of Store-Keeper, the validity of the list expired and on account of this reason, the approval for appointment was not made by the competent authority and in view thereof, the appointment was not given to the petitioner.

21. Learned counsel for the respondents further submitted that on account of transfer of Sri A. Singh from Itawah to Hardoi, the post, in issue i.e. the post of Store-Keeper, against which the selection, in issue, was held, is not vacant and accordingly, the petitioner cannot be appointed against the said post.

22. We have considered the submissions advanced by the learned counsel for the parties and gone through the record.

23. We find from the record that the eligibility list for the post of Store-Keeper was sent by the employment exchange to the employer for the post of Store-Keeper wherein, the name of the petitioner find place at Serial No. 3 and in the said list, the name of Sri Faheem Siddiqui does not find place.

24. It is also evident from the select list dated 25.02.2009 (Annexure No. 2 to the writ petition) that in the said select list, the name of the petitioner finds place at Serial No. 3 and in the said select list, the name of Sri Faheem Siddiqui, who was appointed on the post of Electrician-cum-Plumber does not find place.

25. In view of the above facts, it is crystal clear that the select list, which was acted upon by the employer for providing the appointment to Sri Faheem Siddiqui, is a different select list and accordingly, we are of the view that the claim of the petitioner on the ground of parity is unsustainable.

26. It is admitted fact that the validity of the period of list was six months and prior to the period of validity of the list, the select list, in issue, was neither acted upon nor it was approved by the competent authority.

27. It is also evident from the record that the post of the Store-Keeper, against which the selection process was initiated and the petitioner was declared successful, is not vacant on account of the joining of Sri A Singh on the said post.

28. The judgment relied upon by the petitioner of the Apex Court in the case of ***Purushottam v. Chairman, M.S.E.B. and another reported in (1999) 6 SCC 49*** is not applicable as in the said case, the appointment was denied on the basis of the decision of the Screening Committee, which was reversed by the High Court.

29. In the instant case, the select list dated 25.02.2009, for the post of Store-Keeper, was not acted upon during the period of validity of the list provided by the employment exchange, which was of six months.

30. The judgment of the Apex Court in the case of ***R.S. Mittal v. Union of India reported in 1995 Supp (2) SCC 230*** relied upon by the learned counsel for the petitioner is also not applicable in the facts of the present case, in which the validity of the list was for the period of the six months and after the period of validity of the list, no appointment can be made, as per the law laid down by the Apex Court in various pronouncements. In the case of R.S. Mittal (supra) also the Apex Court only awarded the compensation and not provided the appointment to the appellant therein on account of the period of validity of the select list/panel.

31. In view of the above, the judgment of the Apex Court in the case of R.S. Mittal (supra) would not in any way help the petitioner.

32. The judgment passed by the Apex Court in the case of ***Santosh Kumar and others v. G.R. Chawla and others*** reported in ***(2003) 10 SCC 513*** relied upon by the learned counsel for the petitioner in support of his claim is not applicable as in the said case, the select list was acted upon and the appellant therein was not appointed.

33. In the instant case, the select list for the post of Store-Keeper (Annexure No. 3 to the writ petition) was not acted upon and separate select list for the post of Eletrician-cum-Plumber was acted upon.

34. The aforesaid judgment is also not applicable in the case of the petitioner because, in the aforesaid judgment, the recruitment process was canceled and the Hon'ble Apex Court after considering the facts of the case, came to the conclusion that the recruitment process was canceled in an arbitrary manner and thereafter, interfered therein and directed the authorities to finalize the process of appointment.

35. When there is no legal vested right if a candidate declared successful in the recruitment process to get the appointment, the writ of mandamus cannot be issued in view of the settled law that a writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breach of a statutory duty on the part of the employer. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he/ she has a legal right to insist on such performance. The existence of the said right is a condition precedent for invoking the writ jurisdiction. (Vide Calcutta Gas Company (Propriety) Ltd. v. State of West Bengal and Ors.,AIR 1962 SC 1044; Mani Subrat Jain and Ors. v. State of Haryana,AIR 1977 SC 276; State of Kerala v. Smt. A. Lakshmi Kutty,AIR 1987 SC 331; State of Kerala v. K.G. Madhavan Pillai and Ors.,AIR 1989 SC 49; Krishan Lal v. State of J & K,(1994) 4 SCC 422; State Bank of Patiala and Ors. v. S.K. Sharma,AIR 1996 SC 1669; Rajendra Singh v. State of M.P.,AIR 1996 SC 2736; Rani Laxmibai Kshetriya Gramin Bank v. Chand Behari Kapoor and Ors., AIR 1998 SC 3104; Utkal University v. Dr. Nrusingha Charan Sarangi and Ors.,AIR 1999 SC 943; State of Punjab v. Raghbir Chand Sharma and Anr.,AIR 2001 SC 2900 ; and Sadhana Lodh v. National Insurance Co. Ltd. and Anr. (AIR 2003 SC 1561).

36. Needless to say that on the right of a candidate in the select list, the view

of the Apex Court is that a candidate whose name finds place in the select list has no legal right to get appointment.

37. The Hon'ble Supreme Court in the case of ***State of Haryana v. Subash Chander Marwaha, reported in (1974) 3 SCC 220***, has observed as under:-

"10. One fails to see how the existence of vacancies give a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list, and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

11. It must be remembered that the petition is for a mandamus. This Court has pointed out in Dr Rai Shivendra Bahadur v. Governing Body of the Nalanda College [AIR 1962 SC 1210 : 1962 Supp (2) SCR 144 : (1962) 2 SCJ 208 : (1962) 1 Lab LJ 247 : (1962) 4 FIR 507.] that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived."

38. The Hon'ble Supreme Court in the case of ***Shankarsan Dash v. Union of India , reported in (1991) 3 SCC 47***, has observed as under:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for

appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab.

8. In State of Haryana v. Subhash Chander Marwaha 15 vacancies of Subordinate Judges were advertised, and out of the selection list only 7, who had secured more than 55 per cent marks, were appointed, although under the relevant rules the eligibility condition required only 45 per cent marks. Since the High Court had recommended earlier, to the Punjab Government that only the candidates securing 55 per cent marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the government to decide how many appointments should be made and although the High Court had appreciated the position correctly, it had "somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies". It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in Jatendra Kumar v. State of Punjab, was turned down holding that it was open to the government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection. It is true that the claim of the petitioner in the case of Neelima Shangla v. State of Haryana, was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The government accordingly made only 17 appointments and stated before the court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and, there must be a conscious application of mind by the government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant."

39. The Hon'ble Supreme Court in the case of ***All India SC & ST Employees' Assn. v. A. Arthur Jeen ,***

reported in (2001) 6 SCC 380, has observed as under:

"10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court,after referring to earlier cases in Shankarsan Dash v. Union of India. Para 7 of the said judgment reads thus:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subash Chander Marwaha, Neelima Shangla v. State of Haryana or Jatinder Kumar v. State of Punjab."

40. The Hon'ble Supreme Court in the case of ***Punjab State Electricity Board and Others v. Malkiat Singh , reported in (2005) 9 SCC 22***, has observed as under:

"4. Having considered the respective submissions made by the learned counsel for the parties, we are of the view that the High Court committed an error in proceeding on the basis that the respondent had got a vested right for appointment and that could not have been taken away by the subsequent change in the policy. It is settled law that mere inclusion of name of a candidate in the select list does not confer on such candidate any vested right to get an order of appointment. This position is made clear in para 7 of the Constitution Bench judgment of this Court in Shankarsan Dash v. Union of India which reads: (SCC pp. 50-51) "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subash Chander Marwaha, Neelima Shangla v. State of Haryana or Jatinder Kumar v. State of Punjab."

41. The Hon'ble Supreme Court in the case of ***Rakhi Ray v. High Court of Delhi, reported in (2010) 2 SCC 637***, has observed as under:

"*24. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment."*

42. In the case of Kulwinder Pal Singh v. State of Punjab, (2016) 6 SCC 532, the following has been observed:

"12. In Manoj Manu v. Union of India, (2013) 12 SCC 171, it was held that (para 10) merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the Government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the Court would not issue any mandamus to the Government to fill up the vacancies..."

43. In the case of ***U.P. Public Service Commission, Allahabad and another Vs. State of U.P. and another, 2007(5) ADJ 280 (DB)*** in which rights of wait list candidate was considered by this Court, in para-15 of the judgment it held:-

"A wait list candidate does not have any indefeasible right to get appointment merely for the reason that his name finds place in the wait list." This Court in taking the aforesaid view relied upon the decision in Ved Prakash Tripathi Vs. State of U.P., 2001(1) ESC 317 and Surinder Singh and others vs. State of Punjab and another, (1997) 8 SCC 488 and held that even a select list candidate has no indefeasible right to claim appointment. In para-31 of the judgment in U.P.Public Service Commission, Allahabad and another (supra) this Court has further held as under:

"Moreover, even in the case of a select list candidate, the law is well settled that such a candidate has no indefeasible right to claim appointment merely for the reason that his name is included in the select list as the State is under no legal duty to fill up all or any of the vacancy and it can always be left vacant or unfilled for a valid reason."

44. The select list has already lapsed, as per the averments made in the counter affidavit, which has not been denied in the rejoinder affidavit.

45. In the case of ***Vijay Singh Charak v. Union of India (2007) 2 SCC (L&S) 721***, it has been held that:-

"12. A select list can only be prepared for a particular year, and only those who are eligible in that particular year alone can be considered for selection in the select list. Even if the select list is not prepared in that year, it will relate back to that particular year."

46. For the foregoing reasons, we do not find any merit in the writ petition. Hence, dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.08.2019

BEFORE
THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 36325 of 2018

U.P. State Road Transport Corporation &Ors. ...Petitioners
Versus
Rajendra Prasad ...Respondent

Counsel for the Petitioners:
Ratnesh Chandra

Counsel for the Respondent:
Mohd. Ali

A. Service Law - Domestic Enquiry – Bus Conductor/Employee found carrying ticketless passengers – Termination - Tribunal, allowed the claim on finding – 16 ticketless passengers were not examined – Held:- Finding of Tribunal is perverse –bus Conductor/employee failed to plead and state/prove prejudice caused to him by not producing and examining other four persons - Non-examination of driver and other members of the inspecting team would not vitiate the enquiry-

Claimant/respondent being conductor of the bus was entrusted with the duty to collect tickets from the passengers and deposit the same with the Corporation in which he failed. (Para 20,24,25,26,27,32,34,36,38,39)

Writ Petition Allowed.

Case Law Relied Upon/ Discussed: -
1. Special Appeal No. 33 of 2015 decided on 12.04.2017 (U.P. State Road Transport Corporation Lucknow & Others v. Sarvesh Kumar Shukla)

2. Divisional Controller, KSRTC (NWKRTC) v. A.T. Mane, (2005) 3 SCC 254

3. North West Karnataka Road Transport Corporation v. H.H. Pujar; (2008) 12 SCC 698

4. Union of India and others. v. Prakash Kumar Tandon; (2009) 2 SCC 541

5. Suresh Chandra Sharma v. Rajaswa Parishad U.P. and others; AIR 1971 Alld. 12
6. Uttarakhand Transport Corporation (earlier known as UPSRTC) and others v. Sukhveer Singh; (2018) 1 SCC 231

7. ECIL v. B. Karunakar; (1993) 4 SCC 727

8. Haryana Financial Corpn. v. Kailash Chandra Ahuja (2008) 9 SCC 31

9. UPSRTC v. Suresh Chand Sharma; (2010) 6 SCC 555

10. Rajasthan State TPT Corporation and another v. Bajrang Lal, (2014) 4 SCC 693

Writ Petition allowed (E-3)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioners and Mohd. Ali, learned counsel for the respondent.

2. By means of the present writ petition, the petitioners have challenged the order dated 05.09.2018, passed by the U.P. Public Services Tribunal, Lucknow in Claim Petition No. 214 of 2016 (Rajendra Prasad v. State of U.P. and others), annexed as Annexure No. 1 to the writ petition.

3. The facts in brief of the present case are as under:-

4. Sri Rajendera Prasad, claimant/respondent was the conductor of Bus bearing Registration No. U.P.53 T 8956 of U.P. Road Transport Corporation (in short "UPSRTC"), when it was plying

on Gorakhpur-Sidharth Nagar road. An inspection was done by the inspecting team of U.P.S.R.T.C. at around 08:05 A.M. at Jungledih (Farenda). At the time of inspection, 45 passengers were found on-board out of which 16 passengers were found ticketless, although the conductor of the bus Rajendra Prasad had already realized the amount for the same from the passengers. Hence, 16 persons were found without ticket at the time of inspection and in this regard an endorsement has been made in the way-bill.

5. In regard to above said facts, a report dated 04.06.2012 was submitted by Sri Parvez Anwar, Assistant Transport Inspector, who was heading the team of inspection, to the punishing authority. Thereafter, by an order dated 05.06.2012, the claimant/respondent was put under suspension and thereafter, the charge-sheet dated 14.06.2012 was also served upon claimant/respondent. The Assistant Regional Manager, Deoria was appointed as an Enquiry Officer to conduct the enquiry and claimant/respondent was given 15 days' time to submit his reply in regard thereto. Thereafter the enquiry officer conducted the enquiry proceedings and submitted the enquiry report to the punishing authority. On 07.07.2013, the punishing authority issued a show cause notice to the petitioner to submit his reply against the enquiry report, to which the claimant/respondent did not submit his reply. Thereafter, the punishing authority vide order dated 04.01.2014 removed the claimant/respondent from service.

6. Aggrieved by the order dated 04.01.2014, the claimant/respondent preferred a departmental appeal, which was rejected vide order dated 11.12.2014. Aggrieved by the order dated 11.12.2014, a revision was filed and the same was also dismissed on 14.10.2015.

7. Aggrieved by the punishment order dated 04.01.2014, appellate order dated 11.12.2014 and revisional order dated 14.10.2015, the respondent-claimant filed a claim petition No. 214 of 2016 (Rajendera Prasad v. State of U.P. & others) before the U.P. Public Services Tribunal, Lucknow (in short "Tribunal"). The Tribunal by means of the order dated 05.09.2018 allowed the claim petition and set-aside the punishment order dated 04.01.2014, appellate order dated 11.12.2014 and revisional order dated 14.10.2015 with a direction to respondents-petitioners, herein, to reinstate the claimant/respondent forthwith and also directed that they may take a decision by way of a speaking order in respect of the payment of back wages to the claimant/respondent, herein, within a period of three months. The finding recorded by the Tribunal while allowing the claim petition vide order dated 05.09.2018 reads as under:-

"वर्तमान मामले में जांच की कार्यवाही में न तो बिना टिकट यात्रियों का कोई बयान है और न ही बस के चालक का कोई बयान है। इसके अलावा कैश बैग की जांच के सम्बन्ध में कोई कथन भी नहीं है केवल रिपोर्टकर्ता के बयान के आधार पर जांच अधिकारी द्वारा यह निष्कर्ष निकालना सम्भव नहीं है कि परिचालक (याची) ने यात्रियों से पैसे लिये। इस तरह जांच अधिकारी द्वारा की गयी जांच आख्या तर्कसंगत नहीं है। अतः उपरोक्त परिस्थितियों में हमारे विचार सें जांच अधिकारी

द्वारा दी गयी जांच आख्या दूषित है और दूषित जांच आख्या के आधार पर पारित दण्डादेश निरस्त किये जाने योग्य है।

इस तरह उपरोक्त विवेचना के आधार यह स्पष्ट है कि जांच की कार्यवाही में जांच अधिकारी ने न तो बस के चालक का कोई बयान नहीं लिया जिससे घटना के समय का सत्यापन हो सके। साथ ही निरीक्षक दल ने जो रिपोर्ट प्रेषित की उस पर सभी सदस्यों के हस्ताक्षर नहीं है और न ही यात्रियों के नाम व पते का उल्लेख है। इसके अतिरिक्त निगम द्वारा जारी परिपत्र दिनांकित 12.03.1996 में दिये गये निर्देशों का पालन नहीं किया गया। ऐसी दशा में जांच

की कार्यवाही त्रुटिपूर्ण है। अतः त्रुटिपूर्ण जांच आख्या के आधार पर पारित दण्डादेश हमारे विचार से नियम विरूद्ध, तर्क संगत व मुखरित न होने के कारण निरस्त किये जाने योग्य है। तद्नुसार याचिका स्वीकार किये जाने योग्य है।

उपरोक्त कारण के आधार पर अपीलीय आदेश व रिवीजनल आदेश भी हमारे विचार से निरस्त किये जाने योग्य है।

आदेश

याचिका स्वीकार की जाती है। आलोच्य आदेश दिनांक 04.01.2014 (संलग्नक सं0–1), अपीलीय आदेश दिनांकित 11.12.2014 (संलग्नक सं0–2) तथा रिवीजनल आदेश दिनांकित 14.10.2015 (संलग्नक सं0–3) निरस्त किये जाते है। विपक्षीगण को निर्देशित किया जाता है कि वे याची को तत्काल सेवा में पुर्नस्थापित करें। याची के सेवा से पृथक किये जाने और पुर्नस्थापन किये जाने के बीच की अवधि के वेतन भत्तों के सम्बन्ध में दण्डाधिकारी समुचित, तर्क संगत व मुखरित आदेश इस निर्णय की प्राप्ति के तीन माह के अन्दर पारित करना सुनिश्चित करें।"

8. Aggrieved by the order dated 05.09.2018, the present writ petition has been filed by the petitioners-UPSRTC.

9. Sri Abhinava Singh, holding brief of Sri Ratnesh Chandra, learned counsel for the petitioners submitted that the main reason for allowing the claim petition filed by the claimant/respondent-Rajendra Prasad is to the effect that during the course of enquiry, 45 passengers were found on-board out of which 16 passengers were found without ticket, were not examined nor the driver was examined by the enquiry officer during the enquiy.

10. Accordingly, it is submitted by the learned counsel for the petitioners that the ground related to examination of passengers taken by the Tribunal for allowing the claim petition filed by the claimant/respondent is contrary to the law laid down by a Division Bench of this Court vide order dated 12.04.2017 passed in Special Appeal No. 33 of 2015 (U.P. State Road Transport Corporation Lucknow & others Vs. Sarvesh Kumar Shukla) and Divisional Controller, KSRTC (NWKRTC) v.. A.T. Mane, (2005) 3 SCC 254. Learned counsel for the petitioners further submitted that neither the passenger(s) nor the driver was required to be examined because as per the charge-sheet, the witnesses who were required to be examined, were examined and cross-examined during the enquiry and the enquiry officer after considering the entire material including the version of the claimant/respondent recorded his findings and held that charge levelled against the claimant/respondent found proved.

11. Accordingly, it is submitted by the learned counsel for the petitioners that the impugned judgment dated 05.09.2018, passed by the Tribunal is contrary to law and is liable to set aside.

12. Sri Mohd. Ali learned counsel for the claimant/respondent-Rajendra Prasad in rebuttal submitted that in order to prove that remaining 16 passengers were found without ticket and from whom money was alleged to have been recovered, it was mandatory to record their statements and in the present case, admittedly the statements of the passengers travelling without ticket from whom, the claimant/respondent-Rajendra Prasad alleged to have taken money, were not examined. In view of the same, the finding given by the Tribunal is perfectly valid.

13. In addition, Mohd. Ali, learned counsel for the claimant/respondent-Rajendra Prasad submitted that in the disciplinary enquiry, the proper opportunity of cross-examination was not given to the delinquent.

14. Further submission of the learned counsel for the

claimant/respondent is to the effect that the inspecting team was made of four persons including Parvez Anwar and another four persons were not produced during the course of enquiry proceedings to prove the charge, so, the entire enquiry proceeding is vitiated in the eye of law, as the same is contrary to the law settled on the issue of principles of natural justice.

15. Sri Mohd. Ali, learned counsel for the claimant/respondent submitted that Sri Parvez Anwar, Assistant Transport Inspector, who submitted his inspection report inter alia stating therein that 16 passengers were found traveling without ticket at the time of inspection, which was done on 04.06.2012 and on the basis of the said report, the claimant/respondent was charge-sheeted, was not examined and the claimant/respondent was ordered to cross-examine him. Thus, enquiry is vitiated. In this regard, reliance has been placed on paragraph 11 of the claim petition filed by the claimant/respondent. The same reads as under:-

"That the learned Enquiry Officer did not record any 'Examination-in-chief' of the prosecution witness Mr. Parvez Anwar and he directly ordered the petitioner to cross-examine him. Without 'Examination-in-chief', there was not occasion for any cross-examination ye the petitioner was able to prove that statement of passengers were not recorded by the checking team, which was mandatory."

16. He further submitted that the punishing authority was himself one of the members of inspecting team consisting of four members and except Sri Parvez Anwar no one put signature on the inspection report and as such the inspection report is vitiated and being so, the entire action based on the same including the order passed by the punishing authority is unsustainable.

17. Accordingly, it is submitted by Sri Mohd. Ali learned counsel for the claimant/respondent that there is no illegality and infirmity in the impugned judgment passed by the Tribunal and the writ petition for it lacks merit and is liable to be dismissed.

18. In order to verify the factual position, we have also gone through the original record of the enquiry proceedings, which has been submitted by the learned counsel appearing for petitioners-UPSRTC.

19. We have considered the submission made by the learned counsel for the parties and perused the record.

20. Firstly, we are dealing with the finding given by the Tribunal while allowing the claim petition which is to the effect that in the present case, 16 passengers/persons, who were found without ticket at the time of inspection, were not examined, so the entire action on the part of the petitioners (respondents before the Tribunal) is contrary to law and in contravention to principles of natural justice and in view thereof, the Tribunal set-aside the punishment order, appellate order and revisional order impugned before it.

21. The Division Bench of this Court in Special Appeal No. 33 of 2015 decided on 12.04.2017 (U.P. State Road Transport Corporation Lucknow & Others v. Sarvesh Kumar Shukla) held as under:-

"In the case of charge of travelling of passengers without tickets, factum that passengers were not made witness or their statements were not recorded, has not been found to be relevant or a crucial aspect for valid inquiry. Similarly, when conductor holding fiduciary relation is found allowing travelling by passengers without tickets, it has been held to be a serious misconduct justifying maximum penalty of dismissal. Mere fact that subsequently fare was realized by checking squad is not sufficient to condone misconduct committed by the person concerned."

22. The Hon'ble Apex Court in the case of Divisional Controller, KSRTC (NWKRTC) v. A.T. Mane, (2005) 3 SCC 254 held as under:-

".....question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment, on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a person is found guilty of misappropriating corporation's fund, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal."

23. The Hon'ble Apex Court in the case of ***North West Karnataka Road Transport Corporation v. H.H. Pujar; (2008) 12 SCC 698***, after considering the earlier judgments on the issue related to examination of passengers during disciplinary proceedings interfered in the matter and upheld the order of dismissal. The relevant paras of the judgment in the case of ***North West Karnataka Road Transport Corporation (supra)*** are quoted hereunder for ready reference:-

"9. In State of Haryana v. Rattan Singh [(1977) 2 SCC 491 : 1977 SCC (L&S) 298] it was, inter alia, held as follows: (SCC pp. 493-94, paras 4-5)

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and Administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Evidence Act. For this proposition it is not necessary to cite decisions nor textbooks, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The "residuum' rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple

point is, was there some evidence or was there no evidence-not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the flying squad, is some evidence which has relevance to the charge levelled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground.

5. Reliance was placed, as earlier stated, on the non-compliance with the departmental instruction that statements of passengers should be recorded by inspectOrs. These are instructions of prudence, not rules that bind or vitiate in the violation. In this case, the Inspector tried to get the statements but the passengers declined, the psychology of the latter in such circumstances being understandable, although may not be approved. We cannot hold that merely because statements of passengers were not recorded the order that followed was invalid. Likewise, the re-evaluation of the evidence on the strength of co-conductor's testimony is a matter not for the court but for the Administrative Tribunal. In conclusion, we do not think the courts below were right in overturning the finding of the domestic tribunal."

The view was reiterated in Karnataka SRTC v. A.T. Mane [(2005) 3 SCC 254 : 2005 SCC (L&S) 407 : (2004) 8 Scale 308] .

10. As rightly contended by the appellant, since fairness of the proceedings was conceded and the respondent admitted that he had not issued tickets to 20 passengers, their non-examination is really of no consequence.

11. In view of what has been stated by this Court in Rattan Singh case [(1977) 2 SCC 491 : 1977 SCC (L&S) 298] and in A.T. Mane case [(2005) 3 SCC 254 : 2005 SCC (L&S) 407 : (2004) 8 Scale 308] award of the Labour Court and impugned order of the High Court cannot be maintained and are set aside. The order of dismissal passed by the Corporation is to operate."

24. In view of the above, we find no substance in the argument raised by the learned counsel for the claimant/respondent to the effect that the passengers were required to be examined during enquiry and accordingly, we hold that the finding with regard to examination of passengers given by the Tribunal is perverse being contrary to the Law and being so is unsustainable. It is also for the reason that the enquiry officer after examining the witnesses including claimant/respondent held that the charge levelled against the claimant/respondent found proved.

25. The next issue for consideration, in our view, is to the effect that "whether in enquiry, witnesses including claimant/respondent, were examined and cross-examined or not and whether opportunity to cross-examine the department witnesses was given to the claimant/respondent." On this issue, we find from the enquiry report (Annexure No. 6 to the writ petition) that in the enquiry, the dates i.e. 13.07.2012,

28.08.2012, 29.09.2012, 31.10.2012, 30.01.2013, 15.02.2013 and 28.02.2013 were fixed. Sri Parvez Anwar, Sri Firangi Prasad and Sri Babu Lala Verma were examined, as department witnesses, who were present at the time of inspection of Bus. Sri Parvez Anwar proved his report. All the department witnesses were cross-examined by the claimant/respondent. The claimant/respondent also gave his statement before the enquiry officer. The enquiry officer after considering the material on record, observed as under:-

"इस संबंध में आरोपी के विरूद्ध जारी आरोप पत्र, आरोपी द्वारा लगाये गये आरोपों के संबंध में प्रस्तुत प्रतिउत्तर एवं उभय पक्षों के बयानों व पत्रावली पर उपलब्ध समस्त अभिलेखों का भलि–भांति अवलोकन एवं मनन करने पर यह पाया गया कि आरोपी अपने आरोप पत्र के उत्तर व अपने बयान में यह स्वीकार किया है कि निरीक्षण के समय बस में 16 यात्री बिना टिकट यात्रारत थे, और उसका यह कहना कि वह टिकट बनाने की प्रक्रिया में था, सत्य प्रतीत नहीं होता है, क्योंकि उक्त बिना टिकट यात्री गोरखपुर एवं पीपीगंज से बैठे थे, और वाहन का निरीक्षण कई स्टापेज बीत जाने के बाद जंगलडीह (रिचिंग फरेन्दा) नामक स्थान पर किया गया है। जिससे स्पष्ट है कि निरीक्षण के समय बस में 16 यात्री बिना टिकट थे।"

26. In view of the above, we are of the view that the enquiry officer conducted the enquiry as required under the Law and witnesses were examined and proper opportunity was given by the enquiry officer to the claimant/respondent.

27. In view of the aforesaid, we are also of the view that non-examination of driver and other members of the inspecting team would not vitiate the enquiry.

28. In regard to the argument raised by the learned counsel for the claimant/respondent Sri Mohd. Ali to the effect that the inspecting team was of four members and inspection report on 04.06.2012 was signed and submitted only by Sri Parvez Anwar, Assistant Transport Inspector and the Punishing authority was also a member of the inspecting team and other members of the inspecting team were not examined by the enquiry officer, so the enquiry proceeding/enquiry report is vitiated. We put a query that in which paragraph, the said plea was taken before the Tribunal. In reply, he submitted that the said fact has been stated in paragraph 10 of the claim petition. Paragraph 10 of the claim petition reads as under:-

"That as per the report dated 04.06.2012, the checking was conducted by four persons, but amazingly the report dated 04.06.2012 bears the signature of a sole person, namely Sri Parvez Anwar only. It is not understandable as to why other members of the checking team did not put their signature on the report dated 04.06.2012. It appears that there was no unanimity of mind on the alleged misconduct of the petitioner, otherwise all of them would have put their signature on the report."

29. Needless to say that department witness Sri Firangi Prasad and Sri Babu Lal Verma, who were the members of the inspecting team, were examined during enquiry, as appears from the enquiry report.

30. From the perusal of the contents of para 10 of the claim petition, the position emerges out is to the effect that the points, on which learned counsel for the the claimant/respondent has placed his argument, were neither pleaded nor argued before the Tribunal.

31. In this regard, reliance has been placed by the learned counsel for the claimant/respondent in the case of ***Union of India and others. v. Prakash Kumar Tandon; (2009) 2 SCC 541***, wherein the Apex Court in paragraph 15,16,17 observed as under:-

"15. The principles of natural justice demand that an application for summoning a witness by the delinquent officer should be considered by the enquiry officer. It was obligatory on the part of the enquiry officer to pass an order in the said application. He could not refuse to consider the same. It is not for the Railway Administration to contend that it is for them to consider as to whether any witness should be examined by it or not. It was for the enquiry officer to take a decision thereupon. A disciplinary proceeding must be fairly conducted. An enquiry officer is a quasi-judicial authority. He, therefore, must perform his functions fairly and reasonably which is even otherwise the requirement of the principles of natural justice.

16. In M.V. Bijlani v. Union of India [(2006) 5 SCC 88 : 2006 SCC (L&S) 919] this Court has held: (SCC p. 95, para 25)

"25. ... Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

17. If the disciplinary proceedings have not been fairly conducted, an inference can be drawn that the delinquent officer was prejudiced thereby."

32. From the aforesaid judgment, the claimant/respondent can't derive any benefit because as per settled principle of law, the claimant/respondent was required to specifically plead and state/prove that what prejudice has been caused to him by not producing and examining other four persons and as per the admitted facts, there is no pleading in this regard before the Tribunal. In this regard, we would like to refer the judgment of the Division Bench of this Court in the case of ***Suresh Chandra Sharma v. Rajaswa Parishad U.P. and others; AIR 1971 Alld. 122***, wherein this Court has observed as under:-

"23. The submission cannot be accepted for several reasons. No such plea or point has been taken in the writ petition. If the petitioners were serious in pressing this point they should have amended their writ petition. They should have filed a copy of the Notification by which five years' service qualification was prescribed. They should have taken the point expressly so that the respondents may have had an opportunity to explain the reasons and the background for laying down this qualification. The petitioners cannot legitimately pick out a sentence from the counter-affidavit and make a point out of it."

33. The Hon'ble Supreme Court in the case of ***Uttarakhand Transport Corporation (earlier known as UPSRTC) and others v. Sukhveer Singh; (2018) 1 SCC 231***, wherein the Lordship of the Supreme Court after considering the judgment rendered in the case of ***ECIL v. B. Karunakar; (1993) 4 SCC 727, Haryana Financial Corpn. v. Kailash Chandra Ahuja; (2008) 9 SCC 31*** as well as ***UPSRTC v. Suresh Chand Sharma; (2010) 6 SCC 555*** held as under:-

"8. In ECIL v. B. Karunakar &Ors. this Court, while considering the effect on the order of punishment when the report of the inquiry officer was not furnished to the employee and the relief to which the delinquent employee is entitled, held as under:

"30... (v)??..When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

9. The question of the relief to be granted in cases where the report of the inquiry officer was not supplied to the delinquent employee came up for consideration of this Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja in which it was held as follows:

"21. From the ratio laid down in B. Karunakar [(1993) 4 SCC 727] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside.

After a detailed examination of the law on the subject, this Court concluded as follows:

44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so

would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show "prejudice". Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down.

10. It is clear from the above that mere non-supply of the inquiry report does not automatically warrant re-instatement of the delinquent employee. It is incumbent upon onthe delinquent employee to plead and prove that he suffered a serious prejudice due to the non-supply of the inquiry report. We have examined the writ petition filed by the Respondent and we find no pleading regarding any prejudice caused to the respondent by the non-supply of the inquiry report prior to the issuance of the show cause notice. The respondent had ample opportunity to submit his version after perusing the report of the inquiry officer. The respondent utilised the opportunity of placing his response to the inquiry report before the disciplinary authority. The High Court committed an error in allowing the writ petition filed by the respondent without examining whether any prejudice was caused to the delinquent employee by the supply of the inquiry officer's report along with the show cause notice. We are satisfied that there was no prejudice caused to the respondent by the supply of the report of the inquiry officer along with the show cause notice. Hence, no useful purpose will be served by a remand to the court below to examine the point of prejudice."

34. In addition to the above said facts, from the original record, the position which emerges out is to the effect that the inspection report was prepared and signed by Parvez Anwar, Assitant Transport Inspector and he was examined and cross-examined in the enquiry and two other members of the inspecting team were also examined and cross-examined in the enquiry.

35. Keeping in view the aforesaid, we are of the view that the submission of the learned counsel for the claimant/respondent on the aspect of examination and cross-examination of all the members of the inspecting team has no force, as such liable to be rejected.

36. Further, in the present case, claimant/respondent-Rajendra Prasad is a conductor of the bus and he was entrusted with the duty to collect the ticket from the passengers travelling in the bus and deposit the same with the Corporation however in the present case, from the material on record, the position which emerges out is to the effect that he collected the fair from 16 passengers/persons but did not deposit the same.

37. The Hon'ble Apex in the case of ***Rajasthan State TPT Corporation and another v. Bajrang Lal, (2014) 4 SCC 693,*** observed as under:-

"21. As regards the question of disproportionate punishment is concerned, the issue is no more res integra. In U.P. SRTC v. Suresh Chand Sharma [(2010) 6 SCC 555 : (2010) 2

SCC (L&S) 239] , it was held as under: (SCC p. 561, para 22)

"22. In Municipal Committee, Bahadurgarh v. Krishnan Behari [(1996) 2 SCC 714 : 1996 SCC (L&S) 539 : (1996) 33 ATC 238] this Court held as under: (SCC p. 715, para 4)

"4. ... In a case of such nature-indeed, in cases involving corruption-there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant.'

Similar view has been reiterated by this Court in Ruston & Hornsby (I) Ltd. v. T.B. Kadam [(1976) 3 SCC 71 : 1976 SCC (L&S) 381] , U.P. SRTC v. Basudeo Chaudhary [(1997) 11 SCC 370 : 1998 SCC (L&S) 155] , Janatha Bazar (South Kanara Central Coop. Wholesale Stores Ltd.) v. Sahakari Noukarara Sangha [(2000) 7 SCC 517 : 2000 SCC (L&S) 962] , Karnataka SRTC v. B.S. Hullikatti [(2001) 2 SCC 574 : 2001 SCC (L&S) 469] and Rajasthan SRTC v. Ghanshyam Sharma [(2002) 10 SCC 330 : 2003 SCC (L&S) 714] ."

22. In view of the above, the contention raised on behalf of the respondent employee, that the punishment of removal from service is disproportionate to the delinquency is not worth acceptance. The only punishment in case of the proved case of corruption is dismissal from service."

38. Keeping in view the aforesaid facts, we are of the view that the order dated 05.09.2018, passed by the U.P. Public Services Tribunal, Lucknow in Claim Petition No. 214 of 2016 (Rajendra Prasad v. State of U.P. and others) is contrary to law and is liable to be set aside.

39. Resultantly, the writ petition is ***allowed***. The judgment and order dated 05.09.2012, passed by the Tribunal is set aside. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.09.2019

BEFORE
THE HON'BLE ABDUL MOIN, J.

Service Single No. 812 of 2015

Nadeem Ahmad.... ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Rajeiu Kumar Tripathi

Counsel for the Respondent:
C.S.C., Shivam Sharma

A. Once a candidate willingly participates in the examination then he cannot be allowed to challenge the same after he has been declared failed in the said examination.

Departmental examination for Class III post of Junior Assistant-Petitioner claims to have participated in the typing test but allegedly no videography carried out as provided in G.O dated 19.08.2014 - Petitioner appeared in written examination and viva-voce- Petitioner was not selected- contention that a selection process can also be challenged by a failed candidate despite having participated in the examination. The very conduct of the petitioner in waiting for the result to be declared and after he having been declared as failed, submitting a complaint subsequent thereto itself indicates that the petitioner all along was perfectly satisfied with the selection process-No averment of violation of the service rules or Rule 8 of the Rules, 2001

rather the violation is alleged of the Government order dated 19.08.2014 which is only directory and not mandatory. Writ Petition dismissed.

(Para12,16,17,18,19,20)

Case Law Discussed/Relied Upon: -

1. Dharmendra Kumar and Ors Vs. Abhishek Kumar and Ors, (2017) 35 LCD 1318

2. Pradeep Kumar Rai and Ors Vs. Dinesh Kumar Pandey and Ors, (2015) 11 SCC 493

3. Ashok Kumar and Anr. Vs. State of Bihar, (2017) 4 SCC 357

4. Madras Institute of Development Studies and Anr. Vs. Dr. K. Sivasubramaniyan and Ors, (2016) 1 SCC 454. (E-3)

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing counsel appearing for the State-respondents.

2. By means of the present petition, the petitioner has prayed for the following reliefs:-

"(a) Issue a writ, order or direction in the nature of certiorari, quahsing the impugned promotion order dated 20.01.2015 issued by the opp-party no. 3, as contained in Annexure No. 1 to the writ petition.

(b) Issue a writ, order or direction in the nature of mandamus, commanding the opp-parties, particularly opp-parties no. 3 and 4 to constitute a fresh Departmental Selection/Promotion Committee and to conduct a fresh writeen test, typing test and interview for selection and promotion of employees from Group-D to Group-C post by complying with the Guidelines and Government order Dated 19.08.2014, contained in Annexure No. 6 to the writ petition.

(c) Issue such other order or direction, which this Hon'ble Court may deem just and proper in the circumstances of the case in the favour of the petitioner, and;

(d) award the costs of the petition in favour of the petitioner.

3. The case set forth by the petitioner is that he was appointed as a Class IV employee by the respondents in the year 2005 and has been working since then on the said post. On 16.10.2014, the respondent no. 3 issued an order for holding a departmental examination for a Class III post of Junior Assistant in terms of provisions of dk;kZy; fyfid oxhZ; (inksUurh }kjk HkrhZ) fu;ekoyh] 2001 (hereinafter referred to as "Rules, 2001") for which a typing test was scheduled to be held between 28.10.2014 to 30.10.2014 at Lucknow. Copy of the said order is annexure 5 to the writ petition. A Government order dated 19.08.2014 had also been issued, a copy of which is annexure 6 to the petition for the purpose of videography in the examination hall while holding the typing test for promotion to Group C post. The petitioner claims to have participated in the typing test but according to him, no videography was carried out on the said date of examination. Subsequently, when the result was declared of the typing test, the petitioner was declared as passed and his name figured at Serial No. 15 in the list of passed candidates which was issued along with a covering letter dated 11.11.2014, copy of which is annexure 7 to the writ petition. Thereafter, the petitioner appeared in the written examination and viva-voce which was held on 18.11.2014. Even before the result was declared claims were made of malpractices in the said examination through a complaint by

an Ex-President of the Class IV Employee Union to the Government on 16.01.2015 and 19.01.2015, copies of which have been filed cumulatively as annexure 8 to the petition. The result was thereafter declared on 20.01.2015, a copy of which is annexure 1 to the petition in which the petitioner was not declared selected. Being aggrieved, the petitioner submitted a representation before the respondent no. 2 on 31.01.2015, a copy of which is annexure 9 to the petition and when no action has been taken, the present petition has been filed.

4. Learned counsel for the petitioner while seeking to challenge the result dated 20.01.2015 declaring various persons as selected contends that a perusal of the result would indicate that various ineligible persons have been declared as selected while the petitioner who had the requisite speed of typing and had also passed the typing test, has not been declared as selected in the final result whereby casting a suspicion on the final result.

5. Elaborating this, learned counsel for the petitioner contends that once a Government order dated 19.08.2014 had been issued for the purpose of videography in the typing test yet no videography was conducted on the date of the typing examination thus it is apparent that the Government order was flagrantly and deliberately violated with the result that those persons who had no knowledge of typing were impersonated by outsiders and had the Government order dated 19.08.2014 been followed scrupulously then such impersonation could have come to light and consequently such outsiders could have been weeded out whereby resulting in fairness and the same not having been done vitiates the said selection. It is also argued that all these irregularities were pointed out by the petitioner in his representation dated 31.01.2015 as well as by the Ex-President of the Union through his complaint dated 16.01.2015 but to no avail and thus it is prayed that the impugned result merits to be set aside.

6. With regard to the fact of the petitioner having participated without any demur or protest in the typing test and thereafter in the written examination and viva-voce and having only filed the petition after having been declared as failed in the written examination, learned counsel for the petitioner has placed reliance on a Division Bench judgment of this Court in the case of **Dharmendra Kumar and Ors Vs. Abhishek Kumar and Ors** reported in **(2017) 35 LCD 1318** to contend that a selection process can also be challenged by a failed candidate despite having participated in the examination.

7. Per contra, Sri Shivam Sharma, learned counsel appearing for the selected candidates who have been impleaded as respondents no. 5 to 20 takes a preliminary objection that once the petitioner participated in the typing test, written examination and viva-voce and it was only after the result has been declared on 20.01.2015 that the petitioner has raised objection to the selection process through his representation dated 31.01.2015 and consequently, taking into consideration the settled proposition of law in this regard, a failed candidate cannot be allowed to challenge the selection process. In this regard, reliance

has been placed on the judgment of the Hon'ble Supreme Court in the cases of **Pradeep Kumar Rai and Ors Vs. Dinesh Kumar Pandey and Ors** reported in **(2015) 11 SCC 493 and Ashok Kumar and Anr. Vs. State of Bihar** reported in **(2017) 4 SCC 357 & Madras Institute of Development Studies and Anr. Vs. Dr. K. Sivasubramaniyan and Ors** reported in **(2016) 1 SCC 454.**

8. On merits, Sri Sharma argues that when the typing test was held between 28.10.2014 to 30.10.2014, the petitioner was perfectly aware about the Government order dated 19.08.2014 and thus in case he found that no videography had been conducted on the said date, he should have either not participated in the typing test and lodged his objections or should have submitted a complaint immediately but the petitioner participated in the typing test and was also declared as selected in the typing test in the result which was declared on 11.11.2014. It is only when the petitioner has been declared unsuccessful in the final result dated 20.1.2015 that he has approached the respondents through his representation dated 31.01.2015 and has thereafter approached this Court, which conduct itself indicates that the petitioner was all along satisfied with the typing test that had been held by the respondents and only after having been declared failed has approached this Court which is legally impermissible in the eyes of law.

9. So far as the Government order dated 19.08.2014 is concerned, Sri Sharma argues that the Rules, 2001 do not contemplate or provide for holding of a videography of the typing test and as such the Government order can only be held to be directory and not mandatory and thus even if the said Government order was not followed and there being no such provision under the Rules, consequently there is no illegality or infirmity in no videography having been held during the typing test. It is thus contended that the writ petition being misconceived merits to be dismissed.

10. Learned Standing counsel on the basis of averments contained in the counter affidavit argues that the typing test was held from 28.10.2014 to 31.10.2014 in the supervision of an invigilator. There was no illegality in conducting the typing test as the petitioner has passed the typing test but it was only when his name did not find place in the final merit list and he could not be promoted that the petitioner is now making wild and false insinuations in order to make out a case against the said selection which is patently misconceived. Learned Standing counsel also adopts the other arguments as have been raised by Sri Sharma pertaining to the very maintainability of the petition.

11. Heard learned counsels for the contesting parties and perused the records.

12. The petitioner a Class IV employee participated in the typing test held for the purpose of promotion to a Group C post. The rules governing the promotion are governed by the Rules, 2001 which categorically provides in rule 8 for a written examination, interview and service record to be considered as well as a typing test to be organized. Rule 8 of the Rules, 2001 do not contain any provision for holding of any videography for the typing test. Fully being aware of the

Rules, the petitioner willingly participated in the typing test which was held from 28.10.2014 to 30.10.2014. Though the Government order dated 19.08.2014 provides for a videography yet admittedly no videography was held of the typing test. In case the petitioner was of the view that the videography of the typing test was mandatory, he should have either not participated in the typing test or in case he participated, then he should have lodged a complaint immediately or could have participated under protest. From the arguments as raised by the learned counsel for the petitioner as well as records it clearly comes out that it is only after the petitioner was declared failed in the final result which was declared on 20.01.2015 that he has submitted his complaint on 31.01.2015. Thus, from the conduct of the petitioner itself it is apparent that the petitioner willingly participated in the typing test despite the existence of the Government order dated 19.08.2014 and no videography having been held by the respondents. Thus, in view of the settled proposition of law once a candidate willingly participates in the examination then he cannot be allowed to challenge the same after he has been declared failed in the said exam.

13. In this regard, suffice would be to place reliance on the judgment of the Apex Court in the case of **Pradeep Kumar Rai (supra)** wherein the Apex Court has held as under:-

"16. Moreover, we would concur with the Division Bench on one more point that the Appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the Appellants did not challenge it at that time. Thus, it appears that only when the Appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted. (See Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and Ors. (2011) 1 SCC 150, and K.H. Siraz v. High Court of Kerala and Ors. (2006) 6 SCC 395)."

14. Likewise, Hon'ble Supreme Court in the case of **Ashok Kumar (supra)** has held as under:-

"10. The basic issue that was addressed by the Division Bench was that the appellants having participated in the fresh round of selection could not be permitted to assail the process once they were declared unsuccessful. On this aspect, a brief recapitulation of the facts would be in order. In the original process of selection, following the issuance of General order No. 204 of 2003 by the District and Sessions Judge, Muzaffarpur on 2 December 2003, a written examination was held on 20 April 2004 consisting of eighty five marks followed by an interview on 7 July 2004 consisting of fifteen marks.

The High Court declined to approve of the selection list and issued through its Registrar (Administration), a communication dated 19 August 2004 requiring the holding of a fresh written examination carrying ninety marks in which the qualifying marks would be

regarded as forty five in terms of its General letter No.1 of 1995. Pursuant thereto, a circular was issued in the form of a new General order bearing No. 171 of 2004 on 8 October 2004 which stipulated that in terms of the directions issued by the High Court on 19 August 2004, a fresh written examination would be held carrying ninety marks (with qualifying marks as forty five) followed by an interview of ten marks. Candidates who had applied earlier were not required to apply afresh.

11. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

12. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla[4], this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate hasappeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar[5], this Court held that :

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same... (See also Munindra Kumar v. Rajiv Govil[6] and Rashmi Mishra v. M.P. Public Service Commission[7])."

The same view was reiterated in Amlan Jyoti Borroah (supra) where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful. In Manish Kumar Shah v. State of Bihar[8], the same principle was reiterated in the following observations :

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission.

This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in MadanLal v. State of J. and K. MANU/SC/0208/1995 : (1995) 3 SCC 486, MarripatiNagaraja v. Government of Andhra Pradesh and Ors. MANU/SC/8040/2007 : (2007) 11 SCC 522, Dhananjay Malik and Ors. v. State of Uttaranchal and Ors. MANU/SC/7287/2008 : (2008) 4 SCC

171, AmlanJyotiBorooah v. State of Assam MANU/SC/0077/2009 : (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (supra)." In Vijendra Kumar Verma v. Public Service Commission[9], candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations.

The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible. In Ramesh Chandra Shah v. Anil Joshi[10], candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that :

"18. It is settled law that a person who consciously takes partin the process of selection cannot, thereafter, turn around and question the method of selection and its outcome." In Chandigarh Administration v. Jasmine Kaur[11], it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey[12], this Court held that : "Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared.

There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted." This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subaramanyam[13]."

15. Similarly the Hon'ble Supreme Court in the case of **Madras Institute of Development Studies (supra)** has held as under:-

20. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra. 21. In Dr. G. Sarana v. University of Lucknow and Ors. (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the Petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the Petitioner rushed to the High Court pleading bias against him of the three

experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Courtheld:

15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the Appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the Appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting:

It seems clear that the Appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.

22. In Madan Lal and Ors. v. State of J&K and Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that:

9. Before dealing with this contention, we must keep in view the salient fact that the Petitioners as well as the contesting successful candidates being Respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned. Thus the Petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla it has been clearly laid down by a Bench of three learned Judges of this Court that when the Petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a Petitioner.

23. In Manish Kumar Shahi v. State of Bihar (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:

We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the

Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court Under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.

24. In the case of Ramesh Chandra Shah and Ors. v. Anil Joshi and Ors. (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under:

In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the Respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the Respondents."

16. Thus, once the conduct of the petitioner is seen in the context of the aforesaid law laid down by the Apex Court, it is apparent that the petitioner willingly participated in the examination but when he was declared failed he has challenged the process, which challenge is legally impermissible.

17. As regards the complaints submitted by an Ex-President of the Union on 16.01.2015 highlighting the alleged illegalities, suffice to state that the said complaint was never submitted by the Union itself rather was submitted by an an Ex-President. Nothing prevented the petitioner from submitting a complaint, as already indicated above, immediately on the date of the type test or subsequent to the type test having been held but the very conduct of the petitioner in waiting for the result to be declared and after he having been declared as failed, submitting a complaint subsequent thereto itself indicates that the petitioner all along was perfectly satisfied with the selection process.

18. As regards the Government order dated 19.08.2014 which provides for videography, suffice to state that conduct of videography does not form part of the Rules, 2001. The said Government order is not mandatory and at the most be said to be only directory inasmuch as no consequence for not holding of the videography has been provided. Further, nothing prevented the Government from incorporating videography during type test to be part of the Rule 2001. In this view of the matter, the said Government order can at the most be said to be directory only and once the respondents have categorically stated in their counter affidavit that an invigilator had been deputed during the type test and no illegalities were brought to his notice consequently merely because the petitioner has failed and has not been declared as selected would not now give a license to the petitioner to place reliance on the aforesaid Government order dated 19.08.2014 to raise a challenge to the typing test, more particularly when the petitioner participated in the said type test without any objection, demur or protest.

19. As regards the Division Bench judgment of this Court in the case of

Dharmendra Kumar (supra), wherein this Court had interfered in the selection process after the result had been declared, in the said case, the locus of the petitioner to file a petition after participating in the selection had been raised but the same was negated by this Court on the ground that the grievance of the unselected candidates was with relation to the rounding of marks that had been done by the respondents without existence of any such provision in the service rules. Thus, the service rule had itself been violated by the respondents while conducting the selection. This would be apparent from a perusal of the following observations made by the Division Bench of this Court, which, for the sake of convenience, are reproduced below:-

"18. In the instant case, what we find is that challenge to any rule or prescription or criteria or procedure for selection was not made by the petitioners before the learned Single Judge. What was assailed before the learned Single Judge was the manner in which the selection was held which according to the petitioners was contrary not only to the Service Rules, 2008 but also to the Instructions Manual. It was contended by the petitioners before the learned Single Judge that application of rounding off marks was not permissible in absence of any such provision in the Service Rules, 2008 or in the Instructions Manual. They had also contended that calling of candidates more than three times the vacancies for the purpose of group discussions was also in violation of Rule 15(f) of the Service Rules, 2008 and Clause 2.7 of the Instructions Manual.

19. In the aforesaid view of the matter, we are not impressed by the submissions made in regard to the locus of the petitioners for challenging the selection. We are, thus, in agreement with the view recorded by learned Single Judge, in this regard, in the judgment and order under appeal. "

20. In the present case, there is no averment of violation of the service rules or Rule 8 of the Rules, 2001 rather the violation is alleged of the Government order dated 19.08.2014 which, as already indicated above, can at the most be considered to be only directory and not mandatory. Hence, the aforesaid judgment of Dharmendra Kumar (supra) is distinguishable and would not have any application in the facts of the present case.

21. Accordingly, taking into consideration the aforesaid discussion, no case for interference is made out. The writ petition is dismissed.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.08.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Criminal Appeal (U/S 378(4) of Cr.P.C.) No. 8 OF 2019

Pramod Tyagi ...Appellant (In Jail)
Versus
State of U.P. and Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Veerendra Kumar Shukla, Sri Pawan Kumar Tiwari.

Counsel for the Opposite Parties:
A.G.A.

A. Negotiable Instruments Act – Section 256 – discretion must be exercised judicially and fairly without

impairing the cause of administration of criminal justice. Accused acquitted due non-appearance of the appellant under section 256 Cr.P.C.- Criminal Appeal filed.(Para 3)

There are two conditions under Section 256 Cr.P.C. first, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice. The Magistrate should not have acquitted the opposite party no.2 exercising the power under Section 256 Cr.P.C. in the peculiar facts of the case. Therefore, the impugned order set-aside accordingly.
(Para 14 & 15)

The criminal appeal allowed. (E-2)

(Delivered by Hon'ble Rajul Bhargava, J.)

1. As per the officer report dated 15.2.2019, notice issued to opposite party no.2 was received personally. Thereafter, several dates were fixed and no one appeared on behalf of opposite party no.2 despite service of notice. The Court has no option but to decide the appeal with the assistance of learned counsel for the applicant and learned A.G.A. for the State.

2. Heard Sri Pawan Kumar Tiwari, learned counsel for the applicant as well as learned A.G.A. for the State and perused the record.

3. Since, no response has been filed by opposite party no.2 on the leave to appeal application, the Court with the assistance of learned counsel for the applicant and learned A.G.A. has gone through the record and the Court is of the opinion that it is a fit case for grant of leave to appeal.

4. Accordingly, the present application for leave to appeal is **allowed.**

5. Now, the Court proceeds to dispose of the appeal on merits.

6. The present criminal appeal has been filed against the judgement and order dated 30.10.2018 passed by learned Additional Civil Judge (Senior Division)-IIIrd, Ghaziabad passed in Complaint Case No.225 of 2017 (Pramod Tyagi v. M/s Ptatinum Facility & Management Services), under Section 138 of Negotiable Instruments Act, P.S. Muradnagar, District- Ghaziabad, whereby the learned Magistrate acquitted the accused-opposite party no.2 under Section 256 Cr.P.C. on account of absence of applicant-complainant on that date.

7. Brief facts of the case are that the applicant filed a complaint under Section 138 N.I. Act against the opposite party no.2 along with the requisite documents after compliance of mandatory provisions as contained under the aforesaid Sections before the Magistrate. The court issued summons to opposite party no.2 fixing 24.7.2017 for his appearance. On 24.7.2017 both the parties were not present and the case was posted for 18.9.2017 for appearance of opposite party no.2 as well as the applicant. In the meantime, opposite party no.2 appeared before the court and was granted bail on 13.9.2017. In para 10 of the affidavit filed in support of the appeal, it is stated that opposite party no.2 continued to seek

adjournments and ultimately on 26.7.2018 non-bailable warrant was issued against opposite party no.2. On 16.8.2018, the opposite party no.2 appeared before the court for recalling the non-bailable warrant and the court recalled the order issuing non-bailable warrant on opposite party no.2 furnishing a personal bond of Rs.20,000/- and next date was fixed on 11.9.2018. On 11.9.2018, exemption application was moved on behalf of the applicant and the accused-opposite party no.2 and then the case was fixed for 23.10.2018 on which date the applicant remained absent and the court fixed 30.10.2018. On 30.10.2018 as neither the applicant-complainant nor the opposite party no.2-accused was present and, thus, the court while recording that the first informant is absent and in exercise of power under Section 256 Cr.P.C., the proceedings of complaint case were dropped and the accused-opposite party no.2 was acquitted.

8. Submission of the learned counsel for the applicant is that the impugned order dated 30.10.2018 is out and out illegal for two reasons. Firstly, that on 11.9.2018 exemption application was moved on behalf of the applicant and accused-opposite party no.2 and the next date fixed was 23.10.2018 for evidence. The counsel for the applicant inadvertently noted that next date fixed was 23.11.2018 in his advocate diary whose photostat copy has been annexed as Annexure-2 to the affidavit. At present, there is no rebuttal as opposite party no.2 has not put an appearance or has engaged any counsel. It is further argued that since a wrong date was noted by his lawyer, the applicant neither appeared on 23.10.2018 nor on 30.10.2018 on which date the learned Magistrate on account of absence of the applicant-complainant acquitted the accused-opposite party no.2 under Section 256 Cr.P.C. It has been argued that there was no wilful default on the part of the applicant in not appearing on 30.10.2018.

9. For appreciating the second submission of learned counsel for the applicant, Section 256 Cr.P.C. is quoted as under:-

"256. Non- appearance or death of complainant.

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non- appearance of the complainant is due to his death."

10. Learned counsel has argued that impugned order and order-sheet reflect that the accused-opposite party no.2 was also not present on 30.10.2018 and, thus, in view of the proviso of Section 256 Cr.P.C. that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal

appearance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. It is argued that on 30.10.2018 merely because the applicant-complainant was not present, the learned Magistrate should not have acquitted the accused under Section 256 Cr.P.C. without recording that the personal attendance of the complainant was necessary on that date and as already stated above that the accused-opposite party no.2 was also not present and even if the applicant-complainant had appeared on that date, his statement could not have been recorded in absence of the accused or his counsel.

11. This Court is also of the view that the purpose of including the provision in the nature of 256 Cr.P.C. is to afford some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.

12. The bare reading of the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. ***Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason.*** If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

13. While considering the situation of the case as on 30.10.2018, from the facts narrated above, I have no manner of doubt that the learned Magistrate should not have resorted to the axing process, particularly in view of the fact that the accused was also not present on that date and, therefore, he could very well have adjourned the hearing of the case to some other day and may have dispensed with his attendance.

14. In view of above, the learned Magistrate should not have acquitted the opposite party no.2 exercising the power under Section 256 Cr.P.C. in the peculiar facts of the case. Therefore, the impugned order of acquittal dated 30.10.2018 passed by learned Additional Civil Judge (Senior Division)-IIIrd, Ghaziabad in the

aforesaid complaint case is, hereby, set-aside.

15. The present criminal appeal is, accordingly, **allowed.**

16. The learned Magistrate shall issue notice to both the sides to appear on a particular date fixed and would proceed further from the stage where it has reached before the order of acquittal was passed and decide the case as expeditiously as possible preferably within a period of six months from the date of production of certified copy of this order, if there is no legal impediment.

17. Office is directed to communicate the order to the court concerned.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 4657 OF 2003

Guru Baksh Singh ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
In Preson, From Jail, Sri Noor Mohammad, Sri Pratap Kanchan Singh, Sri Shiv Vilas Mishra (A.C.)

Counsel for the Opposite Party:
Sri Rishi Chadha (A.G.A.)

A. Indian Penal Code, 1860-Section 302-Conviction-Accused/Appellant Continuously inflicted blows of sword on victim who sustained serious injuries and succumbed to death on spot-medical evidence shows that the death of the victim might have occurred due to ante-mortem injuries at the time as alleged by prosecution-accused/appellant in his statement under section 313 criminal procedure code,1973 has given reply that witnesses gave false statements but he did not suggest anything as to why PW1, PW2, CW1,CW3, CW4 and CW5 gave false statement against him. Therefore, there cannot be any hesitation that accused committed murder by causing several injuries-conviction order confirmed-Appeal dismissed.

Held: Para 2, 22, 43 and 44

Case Law Discussed: -
(2012) 3 SCC 196, (2007) 14 SCC 150
(2002) 9 SCC 537, (2012) 4 SCC 124
AIR 2009 SC 152, AIR 2009 SC 331
(2009) 11 SCC 334, (2014) 7 SCC 323
(1990) 4 SCC 731, (2005) 5 SCC 554
(1996) 2 SCC 175, (2010) 12 SC 287 (E-6)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This Jail Appeal has been filed by accused-appellant Guru Baksh Singh through Senior Superintendent Central Jail, Agra against judgement and order dated 03.08.2002 passed by Additional Sessions Judge, Court No. 8, Meerut in Sessions Trial No.552 of 1999 (State v. Guru Baksh Singh) under Section 302 IPC, Police Station Hastinapur, District Meerut, convicting accused-appellant and sentencing him to undergo life imprisonment and fine Rs. 1000/- and in default of payment of fine, six months additional imprisonment.

2. Factual matrix of the case as emerging from First Information Report (hereinafter referred to as "FIR") as well as material placed on record is as follows.

3. A written report Ex. Ka-1 dated 20.3.1999 was presented by PW-1,

Rishipal Singh, Chowkidar of village, getting it scribed by one Rakesh Kumar, in Police Station Hastinapur, District Meerut, alleging that on 19.3.1999 in the evening, Guru Baksh Singh, brother-in-law (Sala) of one Jaswant Singh, along with Jeet Singh and Teerath Singh came to house of Jaswant Singh at village Sirjepur Patelnagar and after having dinner, they had slept in the house of Jaswant Singh. Next morning, when PW-1 was crossing river Ganga, saw that accused Guru Baksh Singh was abusing his companion Jeet Singh Sardar and saying that he had to see him that day. Thereupon, Teerath Singh pacified them. Thereafter, Jeet Singh (victim) went to take bath. At about 9:00 AM, suddenly, Guru Baksh Singh inflicted many sword blows on Jeet Singh and said that he would not leave him alive. On alarm raised by victim, he and Teerath Singh, rushed to save him but Guru Baksh Singh continuously inflicted blows of sword on victim, as result of which Jeet Singh succumbed to injuries and fell into water. He also raised alarm, on which many people of Sirjepur working in the field, came there. On seeing them coming, Guru Baksh Singh ran away towards western side, but they chased. Guru Baksh Singh was apprehended after applying some force at around 9.15 AM in the jungle of Sirjepur by PW-1 and other persons of village. Dead body of Jeet Singh was kept on the bank of river Ganga by Harvansha (brother of PW-1 and villagers).

4. On the basis of Written Report Ex. Ka-1, PW-7, the then Constable Clerk Vijay Pal Singh registered a chick F.I.R. Ex.Ka-7 as Case Crime No.50 of 1999, under Section 302 IPC against accused. An entry was made in general diary, copy whereof is Ex. Ka-8.

5. PW-5 Ghanshyam Lal Srivastava, on the direction of PW-8, held inquest over the dead body of deceased Jeet Singh, prepared inquest report Ex.Ka-5 and other relevant papers relating thereto.

6. PW-4 Dr. V.P. Gupta conducted autopsy over the dead body of deceased Jeet Singh on 21.3.1999 at about 6:00 PM and prepared post-mortem report Ex.Ka-4 expressing his opinion that death of victim was possible on 20.3.1999 at about 9:00 AM i.e. one and half days prior to post-mortem due to shock and haemorrhage on account of ante-mortem injuries. Doctor found ante-mortem injuries on the person of deceased as under :-

(i) Incised wound left side head 5cm x 1 cm x bone cut 8 cm. It is above left ear.

(ii) Incised wound middle side 6 cm x 1 cm. It is 7 cm above to left ear bone cut.

(iii) Incised wound on head of 7 cm x 1 cm x bone deep.

(iv) Incised wound on right forehead 4 cm x 1 cm x bone deep. It is 3 cm above to right eyebrow.

(v) Incised wound right hand 2 cm x 1 cm x bone deep. It is 6 cm above to right ear.

(vi) Incised wound on left side neck 8 cm x 1 cm x muscle deep. It is 3 cm below to left ear.

(vii) Incised wound on neck left side 16 cm x 2 cm x bone deep neck vessel cut with C3 Fracture (cut).

(viii) Abrasion on left shoulder.

(ix) Incised wound left back above and 11 cm x 1 cm x bone deep scapula left cut.

(x) Incised wound on left upper arm 5 cm x 1 cm x muscle deep at middle and out.

(xi) Incised wound left forearm 5 cm x 1 cm x bone cut on extensor side left forearm. It is 6 cm above to left wrist both lower cut.

(xii) Incised wound on left wrist 4 cm x 2 cm x bone deep on extensor of left arm.

(xiii) Incised wound right hand side 11cm x 2 cm x bone cut, 3rd, 4th, and 5th metacarpal cut.

(xiv) Contusion on left chest upper and out.

7. PW-8 Rajvir Singh commenced investigation; visited spot; prepared site plan Ex.Ka-9; collected simple and blood stained earth from spot; prepared Fard Ex.Ka-10; recorded statement of witnesses; took sword allegedly used in commission of offence in his possession; prepared memo Ex.Ka-12; and after completion of investigation, submitted charge-sheet Ex.Ka-18 against accused-appellant-Guru Baksh Singh under Section 302 IPC in the Court of Chief Judicial Magistrate who took cognizance of the offence.

8. Case, being exclusively triable by Court of Sessions, was committed to Sessions Court for trial.

9. Trial Court, framed charge against accused-appellant Guru Baksh Singh under Section 302 IPC on 01.09.1999 which reads as under :

आरोप

मैं, दिनेश गुप्ता, अष्टम अपर जिला एवं सत्र न्यायाधीश मेरठ, जनपद मेरठ आप अभियुक्त गुरूबक्श सिंह के विरूद्व निम्न आरोप लगाता हूँ–

1– यह कि दिनांक 20.3.99 ई0 की समय करीब 9 बजे सुबह स्थान जंगल ग्राम सिरजेपुर जिला मेरठ में अन्तर्गत थाना हस्तिनापुर में आपने जीत सिंह को धारदार हथियार तलवार से मारकर चोट पहुँचाकर उसकी हत्या कारित की। आपका यह कृत्य भा0दं0सं0 की धारा 302 के अन्तर्गत दण्डनीय अपराध किया। जो इस न्यायालय के प्रसंज्ञान में है।

एतद् द्वारा आपको मैं निर्देश देता हूँ कि उक्त आरोपों के लिये आपका विचारण उक्त न्यायालय द्वारा किया जावे।

Charge

I, Dinesh Gupta, VIII Additional District & Sessions Judge, Meerut, District- Meerut hereby charge you accused Gurubaksh Singh with following charges :-

First - That on 20.3.99, at about 9 o'clock in the morning you committed the murder of Jeet Singh by assaulting and causing injuries to him by a sharp weapon- sword, in the jungle of village Sirjepur, District- Meerut falling under the Police Station- Hastinapur. This act committed by you is an offence punishable under Section 302 I.P.C. and is in the cognizance of this court.

I do hereby direct that you be tried by the said Court for the said charges.

(English Translation By Court)

10. Accused-appellant pleaded not guilty and claimed to be tried.

11. In order to substantiate its case, prosecution has examined as many as eight witnesses and Court itself recorded statements of CW-1 Kanval Jeet Singh, CW-2 Brij Pal Singh, CW-3 Rishi Pal Singh son of Lal Singh, CW-4 Ajab Singh, CW-5 Nandu, and CW-6 Rakesh.

12. PW-1 Rishi Pal son of Kundan, PW-2 Harbansh, CW-1 Kanval Jeet Singh, CW-3 Rishi Pal Singh son of Lal Singh, CW-4 Ajab Singh and CW-5 Nandu are witnesses of fact. Remaining witnesses PW-3 Jagpal Singh, PW-4 Dr. V.P. Gupta, PW-5 S.I. Ghanshyam Lal

Srivastava, PW-6 Constable Omvir Singh, PW-7 Constable Vijay Pal Singh, PW-8 S.I. Rajveer Singh, CW-2 Brij Pal Singh and CW-6 are formal witnesses.

13. PW-1 Rishi Pal is Informant and eye witness and PW-2 Harbansh, CW-1, CW-3, CW-4 and CW-5 are also eye witnesses of the incident who supported prosecution case.

14. PW-3 Constable Jagapal Singh proved Ex.Ka-2 and 3, PW-4 Dr. V.P. Gupta conducted autopsy over the dead body of deceased and prepared post mortem report, PW-5 S.I. Ghanshyam Lal Srivastava held inquest and prepared inquest report, PW-6 Constable Omvir Singh is witness of inquest, PW-7 Constable Vijay Pal Singh registered Chick F.I.R. as Crime No. 50 of 1999 and prepared G.D., PW-8 S.I. Rajvir Singh is Investigating Officer of case and submitted charge sheet against the accused.

15. Statement of accused-appellant under Section 313 Cr.P.C. was recorded by Trial Court explaining all evidence and other incriminating circumstances. Accused denied prosecution case in toto and claimed false implication on account of enmity in the present case. Accused-appellant chose not to adduce any documentary or oral evidence in support of his defence.

16. Sessions Trial ultimately came to be heard and decided by Additional Sessions Judge, Court No.8, Meerut. Trial Court, after hearing learned counsel for parties and appreciating entire evidence on record, found accused-appellant guilty and convicted him as stated above.

17. Feeling aggrieved and dissatisfied with the impugned judgement and order of conviction, appellant has filed this appeal from Jail through Jail Superintendent.

18. We have heard Sri Shiv Vilas Mishra, learned Amicus Curiae appearing for appellant, Sri Rishi Chaddha, learned A.G.A. for State and have travelled through the entire examination record with the valuable assistance of learned counsel for parties.

19. Learned Amicus Curiae appearing for appellant has assailed conviction of accused-appellant, advancing his submissions in the following manner :

(i) Witnesses produced by prosecution are not reliable.

(ii) There is no strong motive to accused-appellant to commit murder of Jeet Singh.

(iii) Entire witnesses of fact have not been produced by prosecution, therefore, presumption under Section 114 (g) Indian Evidence Act goes against him.

(iv) Medical evidence is not compatible with ocular version.

(v) There are major contradictions in evidence of witnesses rendering prosecution case doubtful.

(vi) Prosecution has not proved its case beyond reasonable doubt and Trial Court did not appreciat the evidence in right perspective and wrongly convicted the accused. Accused-appellant is entitled to benefit of doubt and liable to be acquitted.

20. Learned AGA for State opposed the submissions and stated that accused-appellant is named in F.I.R.; it is a case of day light murder; Independent witnesses have supported prosecution case. Apart from that, CW-1 Kamal Jeet Singh real nephew (Bhanja of accused-appellant) has given statement against him whereas accused has not pointed out any

reason as to why he (CW-1) was giving evidence against him. It has further been argued by learned AGA that blood stained sword has also been collected by police and accused was apprehended by public at some distance from the seen of occurrence. Trial Court has rightly convicted accused-appellant and sought dismissal of appeal.

21. Although time, date, place and nature of injuries as well as assassination of victim could not be disputed from the side of accused-appellant but according to Advocate for accused-appellant, he is not responsible for causing death of Jeet Singh. Even otherwise, from the evidence of prosecution, time, date, place and murder of Jeet Singh stand established.

22. Only question remains for consideration is, "whether accused-appellant committed murder of Jeet Singh and Trial Court has rightly convicted accused-appellant for causing murder of Jeet Singh, an offence punishable under Section 302 I.P.C. or not"?

23. Now, we may proceed to consider rival submissions of learned counsel for the parties and, briefly, evidence of prosecution and some important decisions.

24. PW-1 Rishi Pal, village Chowkidar has deposed that accused-appellant Guru Baksh Singh had come to the house of Jaswant Singh along with Teerath Singh and Jeet Singh and stayed in the night. On the day of incident, he was going across river Ganga to peel sugarcane; when he reached near Ganga, accused-appellant Guru Baksh Singh was abusing in filthy language to Jeet Singh and saying that he would see him that day; Teerath Singh pacified Guru Baksh Singh; thereafter victim Jeet Singh started bathing whereupon accused-appellant Guru Baksh Singh started assaulting Jeet Singh with sword at 9:00 AM; victim Jeet Singh raised alarm (Bachao Bachao); PW-1 and Teerath Singh rushed to save him but Guru Baksh Singh continued assault; and Jeet Singh fell down into water and died. On the noise of witnesses, accused-appellant ran away towards western side of forest. Many persons came there and chased him who was caught by people at 9:15 AM. On being asked by public, he disclosed his identity as Guru Baksh Singh. Dead body of Jeet Singh taken out of water from river. Thereafter, he (PW-1) went to Police Station and presented written report Ex.Ka-1. Incident was witnessed by him, Nandu, Siyaram, Baran Singh and others.

25. PW-2 Harbansh Singh deposed that on the relevant day at about 9:00 AM, he was going across river Ganga from his house for peeling sugarcane. When he reached near bank of Ganga river, noticed that accused-appellant Guru Baksh Singh was attacking Jeet Singh with sword. He raised alarm whereupon Rishi Pal and Nandu also came to the place of occurrence and witnessed incident. Accused-appellant Guru Baksh Singh ran away from the spot leaving Jeet Singh in water. Victim Jeet Singh succumbed to injuries. Witnesses caught accused-appellant Guru Baksh Singh and took out dead body of Jeet Singh from water and kept it on the bank of river Ganga. Accused-appellant Guru Baksh Singh happens to be brother-in-law (Sala) of Jaswant Singh resident of village Sirjepur.

26. CW-1, Kanval Jeet Singh, deposed that three years ago in the evening accused-appellant Guru Baksh Singh, Jeet Singh and Teerath Singh came to his house; accused-appellant Guru

Baksh Singh was his real maternal uncle; all three persons slept in the house after taking meal and next morning at about 7:30 AM, they went to river Ganga to take bath; at about 9:00 AM, he was going towards Ganga river; accused-appellant Guru Baksh Singh was running with blood stained sword in his hand; he (CW-1) and other persons coming from behind apprehended Guru Baksh Singh and when inquired what had happened, then he (accused-appellant) himself admitted that he had killed Jeet Singh with sword. They snatched sword from him and handed over to police. S.I. prepared Fard Ex.Ka-12 of sword and he put his signature on Fard. Witness further stated that he and other persons tied accused-appellant with tree near the house of Brijpal and showed the police.

27. CW-3 Rishi Pal son of Lal Singh deposed that he saw accused-appellant Guru Baksh Singh attacking victim Jeet Singh with sword who was making alarm (Bachao Bachao). Rishi Pal, Harbansh, Ajab Singh, Vidya Ram, Pappu and he himself tried to save Jeet Singh but due to fear they could not do so. Accused-appellant ran away towards western. He did not chase the accused.

28. CW-4 Ajab Singh and CW-5 Nandu also supported prosecution case and deposed that they have witnessed the accused, killing Jeet Singh with sword in the water of river Ganga and he ran away from there. Jeet Singh fell down and died in water.

29. The witnesses withstood sufficient cross-examination by defence but unblemished. Nothing material could be brought so as to disbelieve their statement. Although some minor contradictions have appeared but they do not go to the root of case.

30. PW-4 Dr. V.P. Gupta, found fourteen ante-mortem injuries on the person of deceased which might have been caused by sharp edged weapon like sword and all the witnesses of fact supported that Jeet Singh was attacked by accused-appellant with sword. Therefore, evidence of witnesses is compatible with medical evidence.

31. From the statement of PWs-1, 2 and 4 as well as CWs-1, 3, 4 & 5, it has been established that accused-appellant Guru Baksh Singh caused serious injuries to Jeet Singh with sword due to which he fell down in water and succumbed to death. CW-1 Kanval Jeet Singh is real nephew (Bhanja of accused-appellant) who deposed against his real maternal uncle Guru Baksh Singh that he saw accused-appellant running with sword. When he asked accused-appellant what had happened, accused-appellant himself admitted that he killed Jeet Singh with sword whereupon he and other persons chasing him, apprehended accused-appellant, snatched sword and handed over to police. There is nothing on record to show as to why real nephew i.e. CW-1 would depose against his own maternal uncle. Blood stained sword alleged to be used in the commission of crime, was taken into custody by police from Kanval Jeet Singh (CW-1). Accused-appellant has offered no explanation as to why witnesses deposed against him.

32. So far as argument of learned Amicus Curiae for accused appellant regarding motive is concerned, we are not impressed with the argument for the reasons that it is a case of direct evidence

and day light murder where independent witnesses and his real nephew have deposed against accused-appellant Guru Baksh Singh. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

33. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

34. So far as non-examination of entire witnesses is concerned, in view of Section 134 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872'), we do not find any substance in the submission of learned counsel for appellant.

35. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

36. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

37. In ***State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,*** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

38. So far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance with submissions raised by learned counsel's and find that the same do not go to the root of case and accused-appellant is not entitled to benefit of the same.

39. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

40. We lest not forget that no prosecution case is foolproof and the

same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi), decided on 19.09.2018.**

41. In **Sachin Kumar Singhraha v. State of Madhya Pradesh** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

42. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

43. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e.

go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan &Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta &Ors. v. State of Maharashtra, JT 2010 (12) SC 287].**

44. In the present case, it is fully established that accused-appellant attacked victim Jeet Singh with sword who sustained serious injuries and succumbed to death on spot. Evidence shows that dead body of deceased was found near the bank of river Ganga at the time of inquest. Medical evidence shows that death of Jeet Singh might have occurred due to ante-mortem injuries at the time, as alleged by prosecution. Accused-appellant in his statement under Section 313 Cr.P.C. has given reply that witnesses gave false statement but he did not suggest anything as to why PW-1, PW-2 and CW-1, 3, 4 and 5 gave false statements against him, therefore, there cannot be any hesitation to come to conclusion that accused committed murder of Jeet Singh by causing several injuries.

45. In view of facts and legal position discussed hereinabove, we find that Trial Court has rightly analyzed evidence led by prosecution and found him guilty and convicted accused for having committed murder of Jeet Singh, an offence punishable under Section 302 IPC. Conviction and sentenced awarded by Trial Court is liable to be maintained and confirmed. No interference is warranted by this Court.

46. So far as question of sentence to accused-appellant is concerned, it is always a matter of discretion to be exercised by Court upon consideration of circumstances aggravating and mitigating in individual cases (see: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175])**. Considering the facts and circumstances, weapons used in the commission of offence, sentence awarded by Trial Court is almost minimum. We see no reasons to interfere the same.

47. In view of above discussion, **the appeal lacks merit and is dismissed.** Impugned judgement and order dated 03.08.2002, is maintained and confirmed.

48. Lower Court record along with a copy of this judgment be sent immediately to District Court and Jail concerned for compliance and apprising accused-appellant. 49. Before parting, we provide that Sri Shiv Vilas Mishra Advocate, Amicus Curiae for accused-appellant, shall be paid counsel's fee as Rs. 11,500/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2019

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No. 1613 OF 2007

Ashok Kumar Tiwari...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Meraj Ahmad Khan, Sri Akash Tomar (A.C.)

Counsel for the Opposite Party:
A.G.A.

A. The Narcotic Drugs and Psychotropic Substance Act of 1985- Section 20(b) (ii) (B)- recovery of *Charas*-Conviction-Challenge to-Once Police Party had come to know about possession of Contraband (Charas) which Appellant was possessing, it was incumbent and mandatory on the part of the police party to have carried out inter se, search first among its own members, but the police party failed to observe it-therefore, consequence of this omission would be that the recovery cannot be accepted to be genuine one but it can be said to have been planted by the police-conviction order set aside. (Paras 10 12 14 15 16)
Appeal allowed. (E-6)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Akash Tomar, learned Amicus Curiae for the appellant, Sri Om Narain Tripathi, learned A.G.A.-I assisted by Sri Sanjay Kumar Rajbher and Sri Jitendra Kumar, learned A.G.A.s, Sri Ajay Kumar Singh and Sri Rajiv Kumar Rai, learned brief holders for the State and perused the material brought on record.

2. The present appellant - Ashok Kumar Tiwari has preferred this criminal appeal against the judgment and order of conviction dated 21.2.2007 passed by the Court of Additional Sessions Judge, Court No.5, Kanpur Nagar in Sessions Trial No. 424 of 2005 *(State vs. Ashok Kumar Tiwari)*, arising out of Case Crime No.80 of 2005, under Section - 20 (b) (ii) (B) of the N.D.P.S. Act, 1985 (hereinafter referred to as 'Act, 1985'), Police Station - Govind Nagar, District - Kanpur Nagar, whereby the appellant has been convicted and sentenced to rigorous imprisonment for seven months coupled with fine Rs. 1,500/- (Rupees One Thousand Five Hundred Only) with default stipulation to undergo imprisonment for one month.

3. Facts relevant for adjudication of this appeal, as reflected from record appears to be that S.I. Sri Ashok Kumar Pandey, the informant P.W.1 was on patrolling duty on 11.3.2005 in his area for maintaining peace. When he along with his police party reached at Dada Nagar Factory, in front of the same he saw two persons coming from State Bank crossing side and had wallets in their hand, wherein something was kept. They on being sighted by the police, got startled and began to move away. The police party after speeding up apprehended them around 10:00 p.m. in front of 10-B - Dada Nagar Factory. On being inquired, the accused told his name as Ashok Kumar Tiwari s/o Uma Shanker Tiwari, resident of Kachchi Basti, Vivekanand Nagar, Police Station - Govind Nagar, District - Kanpur Nagar. On search being made of his person, from the right side back pocket of the jeans, 120 grams of '*charas*' (contraband) was recovered kept in a white- coloured polythene bag. Besides, the police party also recovered some iron

clips numbering twelve belonging to the Railway Department.

4. The police also made recovery from another person regarding whom, no reference is being made because this appeal does not relate to that of the other person. On being asked about the authority to keep the contraband '*charas*' he could not show any authority. However, he stated that he usually takes '*charas*' for his ebriety for drugs and he utilises it as such, while a little part is sold out for expenses. The police party tried to arrange independent public witness on the spot but no one agreed to be a witness to the fact of recovery. The accused was also offered his choice to be searched before a Gazetted Officer, whereupon the offer was declined. However weighing equipment was arranged and the recovered contraband was weighed on the spot. Then it weighed 120 grams and the same was kept under seal. Specimen seal was prepared and the accused was apprised of his offence and was taken into custody. A memo of arrest and recovery was prepared on the spot by P.W.1 S.I. Ashok Kumar Pandey. It was read over to the accused and his signature was obtained on it. After complying with the mandatory provisions of Act, 1985, the accused along with the recovered material (contraband) was brought to the police station, where a case was registered at 00:15 hours (12:15 A.M.) on 12.3.2005 at aforesaid police station. The recovery memo is Exhibit Ka-1, whereas the Chick F.I.R. is (Exhibit Ka-5). Similarly, a case was registered at the aforesaid police station at aforesaid crime number on 12.3.2005 at aforesaid time against the applicant, under Section 18/20 of the N.D.P.S. Act. Thereafter, investigation of the case ensued and the same was entrusted to P.W.6 S.I. Ram Shyam Misra, who recorded statement of various witnesses, inspected the spot and prepared the spot map (Exhibit Ka-7) and also recorded statement of various persons. On 23.3.2005, the sealed recovered '*charas*' was sent to the Forensic Science Laboratory for chemical examination and after completing investigation on 10.5.2005 filed charge-sheet against the accused- Ashok Kumar Tiwari (Exhibit Ka-8). The report of Forensic Science Laboratory was obtained by the I.O. on 20.5.2005 and that was made part of the case diary. The appellant was heard on point of charge against him and the trial court was satisfied with prima facie case against the appellant, consequently it framed charge under Section - 20 (b) (ii)(B) of the N.D.P.S. Act, 1985. The charge was read over and explained to the accused, who denied the charge and opted for trial.

5. The prosecution in all produced six prosecution witnesses. P.W.1. S.I. Ashok Kumar Pandey, who is the informant. P.W.2 Head Constable- Sri Jai Jai Ram, who accompanied the police party at the time of the alleged arrest and recovery of the accused. P.W.3 Head Constable- Hukum Singh, who is Malkhana Moharrir and has proved safe keeping of the recovered material at the police malkhana and has proved the relevant entry of the malkhana register as Exhibit Ka-2. P.W.4 Constable- Karam Chandra Yadav, who had taken the sample/the material recovered to forensic science laboratory and the docket prepared has been proved as Exhibit Ka-3. P.W.5 Head Constable- Rajendra Prasad, who has noted the relevant entry of the recovery memo in the concerned Check F.I.R. at Police Station - Govind

Nagar on 12.3.2005 at 00:15 hours (12:15 A.M.). The copy of the Check F.I.R. has been proved as Exhibit Ka-5 and the case was registered at the relevant G.D. of the aforesaid date and time at aforesaid police station, copy whereof is Exhibit Ka-6. P.W.6 S.I. Ram Shyam Misra, who has conducted investigation and has filed the charge-sheet against the applicant.

6. Evidence for the prosecution was closed and statement under Section - 313 Cr.P.C., was recorded, wherein the accused denied the allegations and submitted that Kallu Tiwari and Bachchu Tiwari of his locality are on good terms with the police. They usually meet these police personnels. These two persons had killed son of his '*bua*' (sister of father of the accused). They are inimical to the accused. Both are on good acquaintance with constables- Charan Singh and Jai Jai Ram. Complaint was also moved before the higher authorities, due to which, both these in collusion with the police have falsely booked the appellant in this case. Nothing has been recovered from his possession.

7. The defense did not lead any evidence.

8. The trial court after marshalling of facts and evaluating the evidence and upon consideration of respective submission recorded aforesaid finding of conviction thus sentenced the accused as aforesaid.

9. Consequently, this appeal.

10. Learned Amicus Curiae, Sri Akash Tomar has vehemently contended that in this case, the entire proceeding has been carried out in utter disregard to the mandatory provisions of the Act, 1985 and the relevant provisions under Section - 50 of Act, 1985 have not been followed in letter and spirit and in case, due to which entire search allegedly carried out on the spot becomes illegal and the very search itself is vitiated, then the entire case become highly suspicious. In this case, the police party headed by P.W.1 S.I. Ashok Kumar Pandey after apprehending the accused had come to know about fact that the accused is possessing the contraband '*charas*', whereupon offer was made for search be conducted either before a Magistrate or a Gazetted Officer, but the same was declined and search was opted to be carried out by the police itself. But the prime factor is that prior to carrying out the search of the accused, the police party did not care to work out any search inter se of its members and there is no whisper either in the recovery memo (Exhibit Ka-1) or in the statement of P.W.1 Ashok Kumar Pandey or the other witnesses of fact (P.W.2) that prior to conducting search of the accused by the police party any inter se search was made out by the members of the police party in order to ascertain whether the police party was possessing any unauthorised/unobjectionable material. How can police party straightway carry out the search of the accused without first carrying out inter se search of themselves. The point is that two persons of the accused's locality Bachchu Tiwari and Kallu Tiwari have intimate acquaintance with constables Charan Singh and Jai Jai Ram and they usually visit their house. The fact is that both the aforesaid Bachchu Tiwari and Kallu Tiwari had murdered the son of '*buwa*' (aunt) of the accused. Both the aforesaid Bachchu Tiwari and Kallu Tiwari acting in close collusion with the police have got the

accused falsely implicated in this case. Various complaints have been made against them previously to the higher authorities. Nothing incriminating, in fact, has been recovered from the possession of the accused. He is innocent.

11. Learned A.G.A. has supported the finding of conviction and the sentence awarded and has claimed that the finding of conviction is just and consistent and the same is based on material/contraband recovered from the possession of the applicant. There is no violation of the mandatory provisions of search as contained under Section - 50 of the Act, 1985.

12. Upon consideration of the submission and the rival claims, the moot point that arises for adjudication of this appeal relates to fact, whether the prosecution has been able to establish the charge under Section - 20 (b) (ii) (B) of the N.D.P.S. Act, 1985 beyond reasonable doubt against the accused.

13. At the outset, it can be observed that the prosecution witnesses of fact have no doubt proved apprehension of the accused around 10.00 p.m. on 11.3.2005, somewhere in front of Dada Nagar Factory and after apprehending the accused, it is alleged that on search being made, 120 grams of '*charas*' kept inside the back pocket of jeans worn by the accused was recovered. However, an option was extended to the accused to get himself searched in the presence of a Gazetted Officer or a Magistrate, but the entire recovery memo and the testimony of the prosecution witnesses of fact, say P.W.1 and P.W.2, is absolutely silent on the point, whether any inter se search was made by the police party among themselves prior to the carrying out of the search of the accused on the spot in order to ensure that they are not in possession of any noxious material of any sort. Therefore, it is obvious that it was not ascertained on the spot by the police party as to whether any unauthorized material is in their possession or not. This leaves many questions to the root of the authenticity of the alleged contraband recovered from the possession of the accused.

14. For the sake of argument, it can be stated that the arrest was sudden and there was no prior information about any contraband being in possession of the appellant. Therefore, the point of prior search, inter se, made between and among the personnel of the police party was not possible, but the argument does not stand to its legs for the reason that as per the testimony of S.I. Ashok Kumar Pandey as recorded in his examination-in-chief on page no.8 of the paper-book, it has been categorically stated that he apprehended the accused at around 10.00 p.m. at aforesaid place on 11.3.2005 and at that point of time, he was told by the accused that he is possessing '*charas*'. Then as per his testimony, offer was made to the accused to get himself searched before a Magistrate or a Gazetted Officer, which was refused. There is no mention either in the recovery memo or in the testimony of P.W.1 and P.W.2 even to the least that any effort, whatsoever, was made for any inter se search being made on the spot among the police personnel for ensuring certainty to the fact of recovery that the police party was not possessing any suspicious material and this vital factual aspect cannot be ignored merely because the arrest was sudden. Once, the police party had come to know about possession of contraband '*charas*', which the appellant was possessing, it was incumbent and

mandatory on the part of the police party to have carried out inter se, search first among its own members, but the police party failed to observe it. Now, the consequence of this omission would be that the recovery cannot be accepted to be genuine one but it can be said to have been planted by the police. The particular circumstances of this case and the statement of the accused as submitted under Section - 313 Cr.P.C. discloses fact that two persons namely Bachchu Tiwari and Kallu Tiwari are inimical to the accused and who are acquainted with a few members of the police party, who are police constables and the aforesaid Bachchu Tiwari and Kallu Tiwari have murdered son of '*buwa*' (aunt) of the accused and complaint have been moved against them to the higher authorities, due to which they are highly inimical towards the accused and because of their good acquaintance and terms with constables Charan Singh and Jai Jai Ram, a plot has been clandestinely hatched to falsely implicate the accused with the recovery of '*charas*' and other things. This statement cannot be sidelined because the police constable- Jai Jai Ram is also a witness to the fact of recovery alleged.

15. Thus, the outcome of the entire recovery proceeding goes under cloud and becomes highly suspicious and the recovery of 120 'grams' of '*charas*' by itself cannot be accepted to be true as alleged by the prosecution for the reasons aforesaid. Consequently, the argument floated at the bar by the learned Amicus Curiae, Sri Akash Tomar is upheld and it is observed that the entire recovery process becomes highly dubious and vitiated and it is cardinal principle of criminal jurisprudence that in case of recovery under the mandatory provisions of the Act, 1985, if the factum of recovery becomes dubious, then the entire case goes. On the above point of recovery, the trial court has not contemplated even in the least and the trial court overlooked this vital aspect and ignoring that vital aspect erroneously recorded finding of conviction, which finding of conviction cannot be sustained and justified in its form under facts and circumstances of this case.

16. Consequently, the conviction recorded and the sentence awarded against the accused-appellant also stands vitiated and is liable to be set aside.

17. Resultantly, this appeal succeeds and the same is **allowed**. The judgment and order of conviction dated 21.2.2007 passed by the Court of Additional Sessions Judge, Court No.5, Kanpur Nagar in Sessions Trial No. 424 of 2005 (State vs. Ashok Kumar Tiwari), arising out of Case Crime No.80 of 2005, under Section - 20 (b) (ii) (B) of the N.D.P.S. Act, 1985, Police Station - Govind Nagar, District - Kanpur Nagar is hereby set aside and the accused-appellant is exonerated of the charge in question.

18. Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

CRIMINAL APPEAL No. 7354 OF 2018

Sher Khan ...Appellant
Versus
State of U.P. and Anr. ....Opposite Parties

Counsel for the Appellant:
Sri Rajesh Kumar Singh

Counsel for the Opposite Parties:
A.G.A., Sri Avneesh Tripathi, Sri Ratnesh Kumar Shukla.

A. Juvenile Justice (Care and Protection of Children) Act, 2015- sections 2(13), 9(2), 94 – Application - age of juvenility can be determined on the basis of High school Certificate/Marksheet- if there is no doubt with regard to genuineness and authenticity thereof - when there arises reasonable doubt in respect thereof same cannot be relied blindly and court is empowered under law to ignore the same- therefore, court below rightly precluded it to be a suspicious document-Moreover, Adhar Card, information of voting, extract of voting list and Pan Card also shows that the Appellant was more than eighteen years of age- rejection order upheld-
(Paras 7,11,15 & 16)

Appeal dismissed

Case law discussed: -
2011(5) ALJ 580, (2010) 3 SCC 235., (2009) 13 SCC 211, (2006) 5 SCC 584
(2012) 9 SCC 750, (2013) 1 SC Cri. R36
2012 (77) ACC 654(SC) (E-6)

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard learned counsel for the appellant and learned A.G.A. and perused the record attached by the appellant with this appeal.

2. This criminal appeal has been preferred against the impugned judgment and order dated 17.10.2018, passed by Sessions Judge, Hapur, in ST No. 160 of 2018, arising out of Case Crime No. 326 of 2017, under Sections 302, 307, 147, 148, 149, 323, 324 I.P.C., Police Station: Simbhawali, District Hapur, whereby the application filed by the mother to declare Sher Khan to be juvenile has been rejected.

3. As per first information report, on 31.08.2017 at about 04:00 PM Tajmohammad cut away CHARA (grains) from the field of Intezar and on making complainant by Jishan & Shahvej, younger brother of Intezar, whereupon both were beaten by Tajmohammad, Raju and Adil. Intezar, Shahvej and Ejaz went to police station to lodge report against them. On 06:30 P.M., Ejaz, Tajmohammad, Yameen, Adil, Farman, Waseem, Raju, Bazmohammad, **Sher Khan (appellant)** and Niyaz Mohammad came to the house of Rohil with danda and knife and assaulted on Rohil, Shadab, Nafees and Zahid with intention to cause death and stabbed Zahid and Nafees and went away. Consequently, Zahid died.

4. In Criminal Misc. Bail Application No 4579 of 2018, the appellant Sher Khan was directed to be released on bail by order of this court dated 21.03.2018. On 25.08.2018, mother Ruqayya on behalf of the accused-appellant gave an application in the court of Session Judge, Hapur for declaring him juvenile alleging that the accused-appellant is born on 15.8,2002 and the date of incident is 31.08.2017 and such her son was 15 years and 16 days and therefore he was juvenile at that time. His marks-sheet of high school of year 2017-18 along with affidavit of applicant has been attached in support.

5. An objection was filed with affidavit by complainant Nadeem for prosecution stating that the application has been given on false ground and the high school marks-sheet

filed by applicant is forged. The roll no. 06516175 of Samaj Kalyan Inter College, Bangouli, Hapur shown on the marks-sheet has been issued by UP Board in the name of Samiya Almash for class X Examination 2017 and the same has been shown to have been of 2018 whereas no such marks-sheet is found to have been loaded on the web-site of year 2018 of UP Board whereas all marks-sheets from year 2013 to 2018 have been loaded on the web-site. The marks-sheet filed by applicant does not bear any signature of Secretary and seal of UP Board. The forged marks-sheet has been attested by the principal. As per voter list, accused Sher Khan is above 23 years in age and in his Aadhar Card, his date of birth has been mentioned to be 01.01.1995 which makes his age above 23 years. In support, extract of voter list, pan card, aadhar card, marks-sheets of Saniya Aalmas, Shahrukh Khan, Sanu Chauhan, information of voter regarding Sher Khan, Pan application status and aadhar card of Nadeem.

6. After hearing both the parties and perusing the record, the learned court below passed the impugned order rejecting the application for the declaration of juvenility of Sher Khan.

7. Aggrieved by the impugned order, the appellant has filed this appeal on the ground that the order has been filed without application of mind and is based on surmises and conjecture and against evidence on record. It was the jurisdiction of the Children Court to entertain and decide such application and as such the order of the court below is without jurisdiction. A decision on juvenility has to be based on high school marks-sheet and other document filed by opposite party are irrelevant. The matter should have been sent to J.J. Board for inquiry under law in juvenility of the appellant. Therefore, the order is not sustainable and is liable to be set aside.

Determination of the question of Juvenility

8. Section 2(l3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 defines a child in conflict with law *"as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence"*. Section 2(35) defines juvenile as *"a child below the age of eighteen years."*

9. Section 9(2) makes provision for a claim of juvenility to be raised before any court at any stage, even after final disposal of a case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not. Therefore, the argument of the learned counsel that the court was not authorized to decide the plea of juveni1ity has got no force.

10. The proviso adds that a claim of juvenility may be raised before any court at any stage, even after final disposal of the case. The claim of such a juvenile shall be considered, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

11. **Section 94** of the Act provides the procedure to be followed by the courts or the Boards for the purpose of determination of age in every case concerning a child in conflict with law. It provides that the Court or Board shall

determine the age by undertaking the process of age determination by seeking evidence by obtaining as follows:-

(i) he date of birth certificate from the school, matriculation or equivalent certificate from the concerned examination Board if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and(ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the committee or the Board;

12. It has been further provided that such age determination shall be completed within 15 days from the date of order of the Board and the age so determined shall be deemed to be true age of the person for the purpose of this Act.

13. In ***Shah Nawaz vs. State of U.P. (SC), 2011(5) ALJ 580,*** referring to ***Raju and Anr. vs. State of Haryana (2010) 3 SCC 235*** where the Court had admitted "mark sheet" as one of the proof in determining the age of the accused person, ***Hari Ram vs. State of Rajasthan &Anr., (2009) 13 SCC 211, Ravinder Singh Gorkhi vs. State of U.P. (2006) 5 SCC 584*** where the issue of School Leaving Certificate was involved and the Court took the view that such certificate in order to become evidence of age, it should be shown that it was issued in the ordinary course of business of the school and the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Evidence Act. It was held that the entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence for determination of age of an accused person. Therefore, the matriculation marks-sheet and certificate is a conclusive evidence of age and there remains no further need to seek any other proof of age. Again, in ***Ashwani Kumar Saxena vs State of MP (2012) 9 SCC 750*** and ***Jodhbir Singh vs State of UP2013(1) SC Cri. R36,*** it has been held that if matriculation certificate/marks-sheet is available, there is no opportunity for the Board to go for other evidence for the determination of the age of juvenile. Even though, new Act has been enforced, the above view still holds the field as there is hardly any difference in respect of determination of age of juvenile.

14. But having said so, the court has to be sure about the genuineness and authenticity of such certificate/marks-sheet, particularly when there is sufficient material on record to create doubt on such certificate/marks-sheet. In ***Om Prakesh vs. State of Rajasthan, 2012(77) ACC 654 (SC),*** the trial court itself could not arrive at a conclusive finding regarding the age of the accused on the basis of school record and therefore, it was held that the opinion of the medical experts based on X-ray and ossification test will have to be given precedence over the shaky evidence based on school records. The Supreme Court remarked that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave

and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and like offences, *the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority*. The benefit of the principle of benevolent legislation attached to Juvenile Justice Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.

15. The purpose of the above discussion is that the age of juveni1ity can be determined on the basis of high school certificate/marks-sheet if there is no doubt with regards to genuineness and authenticity thereof. When there arises reasonable doubt in respect thereof, the same cannot be relied blindly and the court is empowered under law to ignore the same. In the case in hand, the appellant claimed him to be juvenile only on the basis of high school/ matriculation marks-sheet. From the perusal of the record attached with this appeal and the impugned order passed by the learned court below, it is clear that the marks-sheet of appellant has been issued bearing signature and seal of the principal, Samaj Kalyan Inter College, Bangouli and the same has been further attested by him. It has been argued by the OP that, now, the UP Board issues marks-sheet cum certificate and that has not been filed by the appellant. This argument finds further support from the three marks-sheets cum certificates of Saniya Aalmas, Shahrukh Khan & Sanu Chauhan for the year 2017 and 2018. No such marks-sheet cum certificate has been produced by the appellant till date. If his marks-sheet was genuine, he could have filed the certificate also. Till date, no such certificate has been produced by the appellant. Therefore, the learned court below rightly concluded it to be a suspicious document. Moreover, the Aadhar Card, information of voting, extract of voting list and Pan card also shows that the appellant was more than 18 years in age.

16. There is one more reason which makes the contention of the appellant suspicious. The date of incident as per FIR is 31.8.17. The plea of juveni1ity has been raised for the first time by giving application dated 25.8.2018. Prior to that, the appellant was granted bail by order of this court dated 21.3.2018 passed in Criminal Misc. Bail Application No 4579/2018. The mark-sheet filed by the appellant is in respect of examination of high school for the year 2018 the examination of the same took place in February, 2018, almost after six months from the date of occurrence and therefore, there is

weight in the argument of the learned A.G.A. that the possibility is there that the appellant appeared in such examination to manipulate and obtain a proof of age to make him eligible for the benefit of the provisions of the Juvenile Justice Act. No doubt that there is no stage provided under law for the claim of juvenility and such plea can be raised at any time during trial or even at appellate stage. But, a belated claim surrounded by such suspicious circumstances, aggravates the doubt, as is the situation in the present case.

17. On the basis of above discussion, I find no illegality and perversity in the impugned order and the appeal has got no force and is liable to be dismissed.

18. The appeal is **dismissed.**

19. Office is directed to transmit the certified copy of this order to the court concerned for information.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.10.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE VIPIN SINHA, J.

Criminal Appeal No. 155 OF 2003

Karesh Pal @ Billoo and Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Apul Mishra, Sri Dharmendra Singh, Sri Ajay Srivastava.

Counsel for the Opposite Party:
A.G.A.

A. Juvenile Justice (Care and Protection of Children) Act, 2000- sections 7A, 15- and Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 98 -Application- Claiming benefit of juvenile justice Act- The application under section 7A of the Act, 2000, presented after appeal stood finally decided. Wholly misconceived.
(Paras 4, 8, 10, 11)

Application dismissed. (E-6)

(Delivered by Hon'ble Arun Tandon, J.
& Hon'ble Vipin Sinha, J.)

1. The applicant/appellant was convicted and sentenced by the trial court vide judgment dated 19.12.2002 for an offence under Sections 376 (2) (g), 323/149 of I.P.C. The Criminal Appeal filed before this Court in which this application has been filed was dismissed on 05.10.2007. A Special Leave Petition was filed against the judgment dated 5.10.2007. The Apex Court dismissed the same on 28.3.2008. Thus the conviction and sentenced imposed stands confirmed upto Apex Court.

2. The applicant, taking aid of the order passed in a Public Interest Litigation, being Criminal P.I.L. No.855 of 2012 wherein directions have been issued on 24.5.2012 to the District Judges throughout the State of U.P. and to the Legal Services Authorities to initiate proceedings before the Juvenile Justice Board to determine the age of such prisoners who are serving out sentence and were juvenile on the date of the commission of offence has filed this application seeking the benefits under Section 7A of The Juvenile Justice (Care and Protection of Children) Act, 2000 and

Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 Rules framed thereunder (herein after referred as Act 2000 and Rules 2007 respectively).

3. The applicant does not appear to have claimed any juvenility either during the trial or in appeal before this Court or before the Apex Court.

4. After the orders were passed in the aforesaid Criminal P.I.L. on 24.5.2012 and an exercise was undertaken accordingly, the case of the applicant also came to be examined by the Juvenile Justice Board, Agra. The applicant, on the basis of his educational qualification certificates placed before the Juvenile Justice Board, was declared to be juvenile as on the date of the commission of the offence. The order of the Juvenile Justice Board, however, fell short of any direction for release. Upon obtaining the said order from the Juvenile Justice Board dated 4.7.2013, the applicant - Praveen alias Tailor made an application before the Apex Court under Section 7A (1) proviso of the Act 2000. The said application was permitted to be withdrawn with liberty to the applicant to approach "the appropriate court for appropriate relief".

5. The applicant thereafter filed an application before the Trial court for his release, in terms of the said directions issued by the Apex Court. The court below namely the Addl. Sessions Judge, Court No.6, Meerut, passed orders on 26.5.2015 observing that the Apex Court has not issued any directions to the said Court to entertain any such application. Therefore, it was not possible for the Court to proceed further. It was also observed by the learned Addl. Sessions Judge that the conviction of the applicant has been confirmed by the High Court and by the Apex Court. In such a situation the application was not maintainable and was, accordingly, dismissed as no relief could be granted by the trial court.

6. On the basis of the said order, the present application has been filed making a prayer that the sentence and conviction be set aside and the applicant be released on bail under Section 7A of the Act, 2000. The prayer clause does not appear to be happily worded inasmuch as there is no occasion now for this Court to set aside the judgment and grant bail to the applicant.

7. The issue is as to whether the applicant can be released by this Court by entertaining this application at this stage.

8. The Act 2000 under Section 7A makes a provision for review of such cases where a juvenile is detained against law even in a disposed off case. Rule 98 of Rules, 2007, as framed by the Central Government makes a provision for review of such cases in disposed off matters either by the Juvenile Justice Board or by the State Government as the case may be on appraisal of such fact. The said authorities are empowered to pass appropriate orders for immediate release of the juveniles.

9. The application made by the applicant before the Apex Court appears to have been dismissed. It is possible that it is for the said reason that the S.L.P. was withdrawn.

10. Section 7A of the Act, 2000 as well as Rule 98 of the Rules, 2007 read as under:-

*"**Section 7A. Procedure to be followed when claim of juvenility is raised before any court-**(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:*

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

*"**Rule 98. Disposed off cases of juveniles in conflict with law.-**The State Government or as the case may be the Board may, either suo motu or on an application made for the purpose, review the case of a person or a juvenile in conflict with law, determine his juvenility in terms of the provisions contained in the Act and rule 12 of these rules and pass an appropriate order in the interest of the juvenile in conflict with law under section 64 of the Act, for the immediate release of the juvenile in conflict with law whose period of detention or imprisonment has exceeded the maximum period provided in section 15 of the said Act."*

11. Having examined the provisions of Section 7 A of Act 2000 and the Rule 98 of the Rules 2007, we are of the considered opinion, in the facts of the case, that the appropriate remedy available to the appellant is to approach the Juvenile Justice Board / State Government for appropriate order being made in the matter of his release if he has been confined to imprisonment exceeding the maximum period provided under Section 15 of the Act, 2000. The application under Section 7A of the Act 2000, as presented in the appeal which stood finally decided under the judgment and order of this Court dated 05.10.2007, appears to be wholly misconceived.

12. The application is dismissed with liberty to the petitioner to seek his remedy accordingly.

13. This order is however subject to the appeal, if any, filed against the order of the Juvenile Justice Board declaring the applicant to be a juvenile on the date of incident.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.09.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

CRIMINAL APPEAL No. 2405 OF 2006

Shiv Kumar and Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Karuna Shanker Rastogi, Sri Dharm Trivedi, Sri J.P. Yadav, Sri Manoj Kumar Misra, Sri Nishit Upreti, Sri Shiv S. E. Chitamber, Sri Soniya Mishra

Counsel for the Opposite Party:
Govt. Advocate

A. Indian Evidence Act - Section 106- murder of wife-motive - accused husband of the deceased - prosecution lead evidence of last seen, shortly before commission of crime at the dwelling house Settled law – if accused does not offer or offers an explanation which is found to be false, as to injury received by wife, it is strong circumstance that committed the offence.
Section 106 , Indian Evidence Act,1872 fully establishes guilt of accused/appellant and chain of evidence is so complete as not to leave any reasonable ground for a conclusion consistent with innocence of accused. (Para 20 to 30, 32, 33, 36 & 42).

Appeal dismissed.

Case law discussed:
1. (2008) 3 SCC 210
2. (2010) 8 SCC 593
3. 1989 Supp (2) SCC 706
4. (2005) 3 SCC 114
5 .(2016) 1 SCC 501
6.(2000) 8 SCC 382
7. (2001) 8 SCC 311
8. 1944 AC 315
9. (2017) SCC OnlineDelhi 7343

(E-6)

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. Heard Ms. Soniya Mishra, learned counsel for the appellants and Sri Umesh Verma, learned Addl. G.A. for the State.

2. The challenge in this appeal is to the judgment dated 15.11.2006 passed by learned Additional Sessions Judge (F.T.C.-2), Lakhimpur Kheri, in Sessions Trial Case No.778 of 2001, whereby the appellants were convicted for the offence under Sections 302/34 of the Indian Penal Code (hereinafter referred to as "I.P.C.") and both the appellants were sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- each, in default of payment of fine to further undergo imprisonment for three months.

3. Background facts as projected by the prosecution to fasten guilt on the appellants are as follows:-

4. Sri Om Prakash Dixit father of the deceased lodged a complaint that his daughter, namely, Smt. Meena was married with appellant No.1, Shiv Kumar on 28.06.1982; Smt. Meena was turned out of her matrimonial house on 01.04.1984. Smt. Meena then filed a petition for maintenance in June, 1985 and in the written statement of the said petition, the appellant No.1, Shiv Kumar denied the factum of marriage with Smt. Meena, but vide order dated 19.09.1990, the court awarded maintenance @ Rs.200/- per-month; appellant No.1; Shiv Kumar filed a revision petition against the said order which was dismissed. Thereafter, the appellant No.1, Shiv Kumar went to the house of complainant and sought pardon and took back Smt. Meena on 20.02.1998; during the said period, complainant used to inquire about the wellbeing of his daughter. On 04.08.1998, the complainant received an information that his daughter, Smt. Meena was unwell and when he went to the house of the appellants, he found the dead body of his daughter in his house and the same appeared to be an old one and stink was coming and there were injuries on the forehead and body had become blue; the complainant lodged a complaint at Police Station Pasangva on 05.08.1998, the same was registered by the Police in General Diary (G.D.) but no First Information Report (hereinafter referred to as "F.I.R.") was registered. Later on, the complainant

came to know that his daughter was killed by appellant No.1, Shiv Kmar and his parents due to demand of dowry and award of maintenance. Then, the complainant gave a typed complaint to the Superintendent of Police, Kheri on 23.08.1998, on the basis of said complaint F.I.R. No.139 of 1998 (case crime No.246/1998) for the offence under Section 302 I.P.C. was registered against Shiv Kumar, Ram Sahaya and Smt. Munni Devi on 05.09.1998. After completion of investigation, chargesheet for the offence under Section 302 I.P.C. against the appellants/accused, namely, Shiv Kumar and Ram Sahaya was filed.

5. After complying with the provisions of Section 207 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."), the challan was committed to learned Sessions Judge, Kheri. After haring arguments on charge, learned Additional Sessions Judge, Kheri found a prima facie case to try both the accused/appellants for the offence under Section 302/34 of I.P.C. Accordingly, charge under Sections 302/34 I.P.C. was framed on 20.09.2002. The appellants pleaded not guilty to the charge and claimed trial.

6. Vide order dated 24.01.2004, learned Additional Sessions Judge summoned Smt. Munni Devi under Section 319 of Cr.P.C. Thereafter, charge under Sections 302/34 I.P.C was framed against Smt. Munni Devi on 24.07.2004, she pleaded not guilty to the charge and claimed trial.

7. During trial, accused Smt. Munni Devi died and the proceedings against her were abated vide order dated 27.08.2004.

8. In order to bring home the guilt of the appellants, the prosecution examined as many as seven witnesses. PW-1 Sri Brijesh Kumar is a witness of inquest report, he has proved *panchayatnama* (inquest report) as Ex. KA-1. PW-2 Sri Shyam Bihari did not support the case of prosecution and he was declared hostile. PW-3 Sri Rakesh Kumar Dixit is the brother of the deceased. He has deposed that his father, namely, Omprakash Dixit (complainant) died on 04.06.2001. He has proved the complaint lodged by his father as Ex. KA-2. PW-4 Dr. A.K. Tyagi, Radiologist, District Hospital conducted autopsy on the body of the deceased and he has proved the postmortem report as Ex. KA-3. PW-5 S.I. Dinesh Kumar Singh is the first Investigating Officer, he has deposed that he prepared site plan on pointing out of the complainant which is Ex. KA-5. He deposed about various steps taken by him, he has proved the seizure memo of seal, request letter for conducting postmortem and other documents as Ex. KA-6 to Ex. KA-10. PW-6 Inspector M.P. Singh is the second Investigating Officer, he has deposed that after transfer of S.I. Dinesh Kumar Singh, investigation was handed over to him, he received the viscera report, on 12.01.1999 accused Shiv Kumar and Ram Sahaya were arrested, after completion of investigation he prepared chargesheet which is Ex. KA-11. PW-7 Constable Rudra Pratap Tripathi recorded F.I.R. and proved copy of F.I.R. as Ex. KA-12 and copy of *kayami* report as Ex. KA-13.

9. After completion of prosecution evidence, statement of both the accused persons under Section 313 of Cr.P.C. was recorded and incriminating evidence was put to them, the accused persons denied the same and claimed that they are innocent. Appellant No.1, Shiv Kumar stated that the deceased Smt. Meena had

gone to the house of her parents because she did not like the lifestyle of the appellants, her father took her to his house; he is an agriculturist and for that purpose he used to keep pesticide for the safety and maintenance of crops, deceased was using and keeping the pesticide and it may be that she had consumed the same by mixing in the food article by mistake. Appellant No.2, Ram Sahaya also reiterated the same. The accused persons/appellants chose to lead defence evidence but did not examine any defence witness. On 28.08.2006, the appellants closed their evidence and thereafter filed written submissions.

10. After considering the rival contention of the parties and appreciating the evidence on record, learned trial court found the appellants to be guilty having committed the offence under Section 302/34 I.P.C. and sentenced the appellants vide impugned judgment and order dated 15.11.2006.

11. Being aggrieved by the said judgment and order dated 15.11.2006, the appellants have filed the present criminal appeal.

12. During the pendency of the appeal, the appellant no.2, Ram Sahaya S/o Dori died on 15.08.2016 and the appeal in respect of appellant No.2, Sri Ram Sahaya was dismissed as abated vide order dated 17.07.2019.

SUBMISSIONS ON BEHALF OF THE PARTIES

13. Learned counsel for the appellants urged that appellant No.1, Shiv Kumar is the husband of the deceased, Smt. Meena, the marriage between the deceased and appellant No.1, Shiv Kumar was solemnized on 28.06.1982, no child was born out of the said wedlock and Smt. Meena died on 04.08.1998. The F.I.R. was registered on 05.09.1998 after delay of one month and there is no explanation for the delay. He also submitted that the complainant, Omprakash Dixit was not examined.

14. Learned counsel for the appellants submitted that the case of prosecution is based on circumstantial evidence; there is no direct evidence available on record. He further submitted that the case of prosecution is based on the testimonies of Rakesh Kumar Dixit (PW-3) who is brother of the deceased and Dr. A.K. Tyagi (PW-4) who conducted postmortem on the body of the deceased; statement of Sri Rakesh Kumar Dixit cannot be relied upon to convict the appellants.

15. Lastly, learned counsel for the appellants contended that the appellants are agriculturists, the deceased used to keep pesticide for safety and maintenance of crops and it may be that the deceased had consumed the same by mixing it in food articles by mistake. According to him, the conviction under Sections 302/34 of I.P.C. is not proper and the evidence on record attracts Section 306 of I.P.C.

16. Per contra, learned Addl. G.A. for the State submitted that the prosecution has been able to prove its case on the basis of oral evidence and also postmortem report. He also submitted that the alleged incident is corroborated by the testimony of Rakesh Kumar Dixit (PW-3) and Dr. A.K. Tyagi. He further submitted that the motive for causing death was that the deceased had no issue and the demand

of dowry was not fulfilled by the deceased and her father.

17. Learned Addl. G.A. for the State supported the case of the prosecution and submitted that the testimony of all the prosecution witnesses unerringly pointed towards the guilt of the appellants.

18. Learned Addl. G.A. for the State also submitted that the autopsy on the body of the deceased was got conducted on 06.08.1998, as per the postmortem report (Ex. KA-3), probable time since death was about 3-5 days. According to him, if the deceased died about 3-5 days before the postmortem, the appellants should have informed to her parents on the day when she died but no information was given to the parents of the deceased.

19. We have given our anxious thought to the submissions advanced by learned counsel for the appellants and learned Addl. G.A. for the State and also carefully perused the material available on record.

LAW RELATING TO CIRCUMSTANTIAL EVIDENCE

20. Before venturing into rival submissions advanced on behalf of the parties, it is relevant to mention here that there is no eye witness to the incident. The prosecution's case rests on circumstantial evidence. This Court is of the view, when the case of prosecution is based upon the circumstantial evidence, the circumstances should be conclusively proved and point to the guilt of the accused. The circumstances should not be compatible with any hypothesis except with the guilt of the accused. The law in this regard is fairly well settled. The Hon'ble Supreme Court in the case of **'Sattatiya Alias Satish Ranjanna Kartalla vs. State of Maharashtra',** (2008) 3 SCC 210, in para-10 and 17made following observations:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

17. At this stage, we also deem it proper to observe that in exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime."

21. In another case titled as **'G. Parshwanath vs. State of Karnataka',**

(2010) 8 SCC 593, the Hon'ble Supreme Court made the following observations when considering a case hinging on circumstantial evidence:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts."

22. The legal position in case based on circumstantial evidence was summarized by the Hon'ble Supreme Court in **'Padala Veera Reddy vs. State of Andhra Pradesh and others',** 1989 Supp (2) SCC 706, as under:-

"(1) The circumstances from whch an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

LAST SEEN THEORY

23. We would first like to discuss the evidence of last seen. The prosecution has relied upon the testimonies of PW-1, Brijesh Kumar and PW-3, Rakesh Kumar Dixit as being relevant for this circumstance. Of these, only PW-3, Rakesh Kumar Dixit is the witness who has actually spoken about the deceased being last seen in the company of the appellants at her matrimonial home. First, turning to the evidence of Rakesh Kumar Dixit (PW-3), he has categorically deposed that his father, Omprakash Dixit received an information from the matrimonial home of the deceased that she is not well and thus, his father visited there and found dead body of the deceased. The picture that emerges from the above discussion is that PW-3, Rakesh Kumar Dixit was consistent that dead body of the deceased was recovered from the house of appellants only.

24. The fact that the dead body of the deceased was found 3-5 days later, on 04.08.1998 when the complainant visited

to the house of appellants to meet his daughter and that too on the information received by him that his daughter was not well at her matrimonial house, which makes this circumstance of last seen a strong piece of evidence qua the appellants. The legal position in this regard has been explained by the Hon'ble Supreme Court in the case of **'State of U.P. vs. Satish',** (2005) 3 SCC 114:

"22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2."

25. In another case of **'State of Karnataka vs. Chand Basha',** (2016) 1 SCC 501, the Hon'ble Supreme Court explained:

"14.....This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established."

DEATH OF DECEASED BEING HOMICIDAL IN NATURE

26. The death of the deceased Smt. Meena Devi W/o Shiv Kumar is homicidal and not natural. The prosecution has examined Dr. A.K. Tyagi (PW-4) who conducted postmortem examination on the body of the deceased on 06th August, 1998 at 03.00 PM in District Hospital, Lakhimpur Kheri. According to the postmortem report Smt. Meena was aged about 40 years, young lady of good built, R.M. passed off from both upper and lower extremities, PM staring on back-liquifide, skin pealed off at places over the body, abdomen distended, scalp hairs missing, maggots present over the body. The time since death was about 3-5 days. The doctor who conducted postmortem could not ascertain the cause of death and viscera was preserved.

27. The viscera report (Ex. KA-4) reveals that malathion (organophosphate insecticide) was present in stomach, intestine, liver and kidney.

SECTION 106 OF THE INDIAN EVIDENCE ACT, 1872

28. The appellants-accused in their statements under Section 313 of Cr.P.C. have simply denied the allegations against them and stated that the pesticide used to remain in their house as deceased used to keep the same and it may be that by

mistake she had consumed the same by mixing it in the food, however, neither any suggestion was put to the prosecution witness, Rakesh Kumar Dixit (PW-4) or any other witness regarding the same nor any evidence in defence has been led by the appellants to prove the same. Consequently, this Court is of the view that Section 106 of the Indian Evidence Act, 1872 is attracted to the facts of present case. Section 106 of the Indian Evidence Act, 1872 reads as under:-

"Section 106 Burden of proving fact especially within knowledge-when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

29. The law with regard to Section 106 of Indian Evidence Act is well settled and some of the relevant judgments are reproduced herein below;

(A) In the case of **'State of W.B. vs. Mir Mohammad Omar and others',** (2000) 8 SCC 382, the Hon'ble Supreme Court observed as under:

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.

35.....

36.....

37. The section is not intended to relieve the prosecution of its burden to

prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.
(emphasis supplied)"

(B) In the case of **'Ram Gulam Chaudhary and others vs. State of Bihar',** (2001) 8 SCC 311, the Hon'ble Supreme Court held as under:

"24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura-blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the appellants. The appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr Mishra.
(emphasis supplied)"

30. Thus, if an offence takes place inside the privacy of a house as in the present case and in such circumstances where the assailants have all the opportunity to plan and commit the offence and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if strict principle of circumstantial evidence, as notice above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. In the case of **'Stirland vs. Director of Public Prosecution',** reported as 1944 AC 315, it has been observed that a Judge does not provide over a criminal trial merely to see that no innocent man is punished, but also to see that a guilty man does not escape.

31. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and

circumstances of the case. Here, it is necessary to keep in mind Section 106 of the Indian Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this Section throws some light on the content and scope of this provision and it reads:-(b) a is charged with traveling on Railway without a ticket. The burden of proving that he had a ticket is on him.

32. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Indian Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed or the deceased died. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer an explanation.

33. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is strong circumstance which indicates that he is responsible for commission of the crime.

34. A Division Bench of Delhi High Court in the case of **'Tulsi Ram vs. State',** (2017) SCC Online Delhi 7343, has held as under:-

"44. It has been proved by the prosecution that the deceased was found dead in the dwelling house where she was residing with the appellant and was also last seen together with him. It becomes incumbent on him to offer a plausible explanation for the death of his wife." (emphasis supplied)

35. In a case based on circumstantial evidence where no eye witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to complete it. This view has been taken in a catena of decisions.

36. In the instant case, when admittedly, deceased, Smt. Meena Devi was present in her matrimonial house and the death had occurred inside the house of the appellants only, so presumption under Section 106 of the Indian Evidence Act can be raised as the fact of death of deceased was exclusively in the knowledge of the appellants.

37. Moreover, the postmortem report (Ex. KA-3) reveals that the probable time of death was 3-5 days, the postmortem was conducted on 06.08.1998. This means that the tragic death took place on 2nd or 3rd August,

1998. But the information was given to the father of the deceased on 04.08.1998 i.e., after about 2-3 days of the death. Further, the information was given that the deceased was not well whereas she had already expired before 04.08.1998.

38. The circumstances in the present case are of conclusive nature which fully establishes the guilt of both the appellants. In fact, the chain of evidence is so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of both the appellant-accused.

DELAY IN REGISTRATION OF F.I.R.

39. The complainant received an information on 04.08.1998 that his daughter was not well, on receiving said information, her father went to the matrimonial house of his daughter on 05.08.1998 and he found the dead body of his daughter; he made a complaint to Police on 05th August, 1998, an entry was made in General Diary (G.D.) but F.I.R. was not registered. The postmortem was got conducted on 06.08.1998 and the viscera was preserved. Thereafter, the complainant/father of the deceased made a complaint to Superintendent of Police, Kheri on 23.08.1998 and only thereafter F.I.R. under Section 302 of I.P.C. was registered against Shiv Kumar, Ram Sahaya and Smt. Munni Devi on 05.09.1998. Hence, the delay in lodging F.I.R. has been duly explained.

NON-EXAMINATION OF COMPLAINANT

40. The counsel for the appellants contended that complainant, Sri Omprakash Dixit was not examined by the prosecution. It is relevant to mention here that it has come in the statement of Rakesh Kumar Dixit (PW-3) that Sri Omprakash Dixit died on 04.06.2001. Thus, the same is of no relevance.

CONCLUSION

41. On an assessment of the entire gamut of the evidence on record, we find that the prosecution has been able to establish the following circumstances:-

(i) The deceased was married with appellant No.1, Shiv Kumar on 28.06.1982, no child was born from the said wedlock and she was not having good relations with her husband as she was subjected to cruelty in lieu of demand of dowry;

(ii) the deceased, Meena instituted proceedings for maintenance against appellant No.1, the appellant No.1 denied the relationship of husband and wife in the said proceedings, a sum of Rs.200/- per month was awarded as maintenance vide order dated 19.09.1990;

(iii) the appellant No.1 filed a revision petition against the said order which was dismissed and the appellant No.1 had to pay arrears of maintenance to the tune of Rs.16,000/- (iv) the appellant No.1 took the deceased from her parental house on 20.02.1998, to avoid payment of maintenance;

(v) on 04.08.1998, an information was given to the house of deceased's parents that she (Meena) was ill;

(vi) when the father of the deceased, Om Prakash Dixit (now deceased) reached at the matrimonial house, he found the dead body of deceased, body had become blue, foul smell was coming from the body of deceased, maggots were present;

(vii) it appeared that the body was old;

(viii) the complainant immediately informed to the police;

(ix) as per postmortem report maggots were found over the body, doctor A.K. Tyagi (PW-4) opined that the deceased might have died about 3-5 days prior to the postmortem;

(x) no information regarding death of the deceased was given to her father or brother and death was concealed for about three days;

(xi) appellants/accused persons concealed the death of deceased;

(xii) the body was found in the house of the appellants and they all were living in the same house;

(xiii) in viscera report malathion (organophosphate insecticide) was found, which is a poison;

(xiv) no acceptable explanation has been given by the appellants as to how the deceased, Meena died;

(xv) the appellants in their statement under Section 313 of Cr.P.C. simply stated that the deceased might have consumed poison by mistake but no such defence was taken in the cross-examination of prosecution witnesses.

42. In view of the above circumstances, we are of the considered opinion that circumstances in the present case are of conclusive nature, read with Section 106 of the Indian Evidence Act, 1872 fully establishes the guilt of the appellants-accused persons. In fact, the chain of evidence is so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of both the appellants. The aforesaid circumstances show that the act of murder had been committed by the appellants only.

43. Consequently, the present appeal being bereft of merit is dismissed.

44. The trial court record along with a copy of this judgment be sent to trial court forthwith.

45. The appellant, Shiv Kumar is in judicial custody. A copy of this judgment be also sent to the appellants through Superintendent Jail concerned immediately.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.09.2019

BEFORE
THE HON'BLE KARUNESH SINGH PAWAR, J.

CRIMINAL APPEAL No. 2057 OF 2007

Ram Karan and Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Akhtar Abbas, Sri Bhanu Dutt Dwivedi, Sri Sanjay Kumar Yadav, Sri Syed Husain Abbas.

Counsel for the Opposite Party:
G.A., Sri Kaushal Kishore Tewari

A. Juvenile Justice (Care and Protection of Children) Act,2000-Sections 7, 7A, 9, 64 and Juvenile Justice (Care and Protection of Children) Rules 2007-Clause 12 sub clause 3 - Application-Claim to be juvenile-rejection- issue of juvenility Since, on date of occurrence i.e. 08.11.1999, as per High School mark sheet, hence, he was juvenile-
(Paras 4, 5 & 11)

Application allowed.

Case Law Discussed:-
2016(9) ADJ 627 (E-6)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

Re: C.M. Application No. 75877 of 2019

1. Heard learned counsel for appellants and learned A.G.A. for the State.

2. This application has been filed for declaring appellant No.2 as juvenile under Section 9 of Juvenile Justice (Care and Protection of Children) Act, 2015

3. Learned counsel for applicant/appellant No.2 has submitted that applicant No.2 has appeared in High School Examination, 1998 conducted by U.P. Board. It is further submitted that in the High School Certificate issued by the U.P. Board, the date of birth of the applicant is recorded as 06.05.1983.

4. It is next submitted that the occurrence of the crime is on 08.11.1999. It is further submitted that the age of the deponent/applicant No.2 on the date of occurrence as per high school certificate issued by the U.P. Board annexed at Annexure No.1 to the application is 16 years 6 months and 2 days. Hence it is contended that at the time of the incident deponent/applicant No.2 was juvenile. The deponent/appellant No.2 has given application in trial court for declaring him juvenile on 06.08.2007. The trial court vide order dated 03.09.2007 rejected the application of the juvenile given by the appellant No.2. Learned counsel for the appellant No.2 further submitted that Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'Act, 2000') was enacted. He further submitted that Section 7-A lays down the procedure to be followed by the claim of the juvenility as raised before any court. The relevant Section 7-A is reproduced hereinbelow:

*"**7-A. Procedure to be followed when claim of juvenility is raised before any court.-** (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence the court shall make an enquiry take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person and shall record a finding whether the person is a juvenile or a child or not stating his age as nearly as may be:*

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to be Board for passing appropriate order and the sentence if any, passed by a court shall be deemed to have no effect."

5. Learned counsel for appellant No.2 further submitted that Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "Rules, 2007") were framed under the Act, 2000 and clause 12, sub clause 3 of Rules, 2007 provides the procedure to be followed in determination of age. The relevant clause 12 sub clause 3 is reproduced as under:

***"12. Procedure to be followed in determination of Age- (3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the*

case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the Clauses (a) (i), (ii), (iii) or in the absence whereof, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

6. It is next submitted that as per the clause 12(3)(a)(i) in every case concerning a child or juvenile in conflict with law, the age has to be determined after conducting an enquiry by the Court or Board or, as the case may be, by the Committee. The qualification provided in Act, 2000 is matriculation or equivalent certificates, if available.

7. Learned counsel for the appellant No.2 lastly submitted that learned trial court while rejecting the claim of juvenility has given a specific finding that P.W.1 produced the high school mark-sheet of the appellant No.2 and according to that appellant No.2 was juvenile. However learned trial court entered into hypertechnical approach and as such has rejected the application for declaring the juvenile of the appellant No.2 even after giving such finding.

8. In this context, learned counsel for appellant No.2 as well as learned A.G.A. for the State has drawn the attention of the Court towards Full Bench Judgment of this High Court in ***Jai Prakash Tiwari Vs. State of U.P. and another, 2016 (9) ADJ 627.*** The relevant Paragraph 23 of the judgment is reproduced hereinbelow:

"23. The relevant provisions governing the procedure to be followed in determination of age of a juvenile in conflict with law is contained in Rule 12, which provides for as follows:

"12. Procedure to be followed in determination of Age.-(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

9. Learned counsel for appellant No.2 while rebutting the submission has drawn the attention of the court towards provision of Section 7-A read with clause 12 sub clause 3 of Act, 2007 and submitted that this Court if it is of the opinion that the accused person was juvenile on the date of commission of occurrence, the Court shall make an enquiry in terms of Section 7-A sub Section 1 read with procedure provided under Sub Rule 3 Rule 12 of the Act, 2007 and in support of this he has drawn attention of the Court towards Full Bench Judgement of this Court in ***Sher Singh @ Sheru Vs. State of U.P. passed in Criminal Appeal No. 1883 of 2013 vide***

order dated 21.09.2016 in which while answering the issue No. II the court has held as under:

"Accordingly, the reference in question is answered as follows:

Issue no.I

"Whether the right of a juvenile to raise the issue of juvenility can be denied, by dismissing a writ petition as infructuous and then permitting him to raise the issue in a criminal appeal when the same issue had been raised before the Juvenile Justice Board and an appeal had been decided in accordance with Section 52 of the 2000 Act as in the present case, on applying the doctrine of finality?"

The right of a juvenile to raise the issue of juvenility cannot be denied by dismissing the Writ Petition as infructuous and in case Writ Petition in question has been filed though wrongly, the issue can be raised in Criminal Appeal even though the same has been raised before the Juvenile Justice Board and appeal has been decided under Section 52 of the 2000 Act once it is demonstrated before the Court that the issue of juvenility has not been answered on the parameters of Sub-Rule 3 of Rule 12 of the 2007 Rules.

Issue no.II

"Whether the law laid down by prescribing a procedure of allowing the question to be raised in a criminal appeal as an alternate substitute through a miscellaneous application under the judgment dated 13.10.2014 by the learned Single Judge is correct or not?"

Once the issue of juvenility has not been decided on the parameters of provisions as are contained under Sub-Rule 3 of Rule 12 of 2007 Rules, then such an issue can be examined by the Competent Criminal Court either on its own and even on a miscellaneous application being moved.

Issue no.III

"Whether in view of the law laid down by the Apex Court particularly in the case of Abuzar Hossain @ Gulam Hossain (supra) and Abdul Razzaq Vs. State of U.P. (supra), the issue presently raised, would also stand covered by the ratio and the observations made therein or not ?"

10. Learned A.G.A. has submitted that once the application of the appellant No.2 was rejected by the trial court the appropriate course was to challenge the order of trial court in revision. Therefore, the application is not maintainable.

11. The trial court has rejected the application on 03.09.2007 and the Rules, 2007 have come in force on 26.10.2007.

12. This Court has further noticed that sub Rule 6 of Rule 12 of 2007 Rules which provides the provisions contained in this Rule was also for those cases which have been disposed off cases such as appellant No.2 where the status of juvenility has not been determined in accordance with the provision contained in sub Rule-3 of Rule 12 of 2007 Rules, then as per the judgment of Full Bench of this Court in Sher Singh @ Sheru (supra) as the issue can be examined by the competent criminal Court either on its own motion on an application moved by the accused. In the present case, the issue of juvenility regarding the appellant No.2 has been wrongly decided by the learned trial court and the application has been rejected even after giving specific finding in favour of the accused/appellant No.2 and the trial court has unnecessarily

entered into hypertechnical things while rejecting the application for juvenility which is contrary to the procedure provided under the Act.

13. Considering the aforesaid law laid down by the Supreme Court as well as the Full Bench of this Court, I am of the view that on the date of occurrence i.e. 08.11.1999, the age of the appellant No.2 was 16 years 6 months and 2 days and hence was juvenile.

14. The application is, accordingly, **allowed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Civil Misc. Habeas Corpus Writ Petition No. 329 of 2019

Anil Bhati ...Petitioner
Versus
Union of India &Ors. ...Respondents

Counsel for the Petitioner:
Sri Brijesh Sahai, Sri Chandrakesh Mishra, Sri Daya Shankar Mishra, Sri Vikas Chandra Srivastava

Counsel for the Respondents:
A.S.G.I., Sri Annapurna Singh, Sri Vinay Saran, Sri Shashi Bhushan

A. Bail order, doubting credibility of prosecution evidence having potentiality to influence mind of detaining authority was relevant and ought to be placed and considered by detaining authority.

Whether bail order of High Court is relevant material requiring consideration by the detaining authority and whether in absence of such consideration, subjective satisfaction stood vitiated - Due to non-application of mind on relevant material, subjective satisfaction stood vitiated - Detention order cannot be saved u/s 5-A of N.S. Act and quashed. (E-1)

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Mrs. Manju Rani Chauhan, J.)

1. We have heard Shri D.S. Mishra, learned senior counsel assisted by Shri Chandrakesh Mishra and Shri Vikas Chandra Srivastava, for the petitioner; Shri Shashi Bhushan, Advocate, holding brief of Shri Annapurna Singh, for the Union of India; Shri Vinay Saran, learned senior counsel assisted by Shri Harikesh Kumar Gupta, for the Intervenor; the learned A.G.A. for the state respondents; and have perused the record.

2. By means of this habeas corpus petition, the petitioner Anil Bhati, currently in Jail, has questioned his detention under the National Security Act, 1980 (for short the Act, 1980) pursuant to the order dated 05.12.2018 passed by the District Magistrate, Gautambudh Nagar (for short DM) under Section 3(2) read with Section 3(3) of the Act, 1980, which has been confirmed by the State Government vide order dated 22.01.2019 and, thereafter, the detention period has been extended. The petitioner has prayed that after setting aside the detention order he be released.

3. A resume of relevant facts would be apposite. From the return filed by the Jailor, District Jail, Kaushambhi (for short the Jailor), it appears, the petitioner Anil Bhati was admitted in District Jail, Muzaffarnagar on 17.03.2018 pursuant to remand order dated 8.12.2017 issued by the Chief Judicial Magistrate, Gautambudh Nagar in case crime no.751

of 2017, P.S. Bisrakh, District Gautambudh Nagar, which related to an incident dated 16.11.2017. While he was in custody, remand orders were obtained in five other cases on the basis of petitioner's subsequent implication in those cases. On administrative ground, on transfer, the petitioner was admitted in District Jail, Kaushambhi on 07.07.2018. While the petitioner was in jail in connection with those cases, he was served with the impugned detention order dated 05.12.2018 passed by the DM. The grounds of detention served upon the petitioner indicate that the subjective satisfaction to detain the petitioner under the Act, 1980 was drawn on the basis of his involvement in Case Crime No.751 of 2017 (supra) as the incident relating to it had allegedly disturbed the public order. However, for the purpose of drawing satisfaction in respect of the propensity of the petitioner to repeat such act, upon being released on bail, his implication in four other cases was narrated. In paragraph 8 of the grounds of detention it was mentioned that the bail applications of the petitioner in respect of Case Crime No.751 of 2017 (supra) and Case Crime No. 378 of 2018, P.S. Bisrakh, District Gautambudh Nagar, under sections 2/3 of U.P. Gangsters (Prevention of Anti-Social Activities) Act, 1986, were pending in the High Court and a date was fixed for their consideration but because the co-accused Arun Yadav has been granted bail in Case Crime No. 751 of 2017, there is imminent likelihood of the petitioner being released on bail therefore detention under the Act, 1980 was considered necessary with a view to prevent him from repeating activity prejudicial to the maintenance of public order. The grounds of detention also indicate that the DM was satisfied that if bail is granted in the main case i.e. Case Crime No.751 of 2017 (supra) then securing bail in other cases, which were not so serious, would not be difficult.

4. The learned counsel for the petitioner has questioned the detention order on several grounds. However, as we are satisfied with one of those grounds on which the petition can be allowed, we do not propose to address all the grounds raised.

5. Before we proceed to notice and discuss the relevant points urged before us, it may be observed that the grounds of detention reveal that at the time of passing the detention order the DM was under the impression that the bail application of the petitioner in Case Crime No.751 of 2017 (supra) was pending and a date had been fixed for its consideration by the High Court. Such impression is reflected from paragraph 8 of the grounds of detention served upon the petitioner. The DM, however, appeared to be aware that the co-accused of that case, namely, Arun Yadav, was granted bail. He, therefore, expressed his satisfaction that there existed real possibility of the petitioner being released on bail in that case.

6. The learned counsel for the petitioner submitted that the co-accused Arun Yadav; the petitioner (Anil); and another co-accused Sonu were all granted bail by a common detailed / speaking order dated 14.11.2018 (Annexure 2 to the writ petition) passed by the High Court in three connected bail applications, namely, Criminal Misc. Bail Application No. 21380 of 2018: Arun Yadav vs. State of U.P.; Criminal Misc. Bail Application No. 19942 of 2018: Anil vs. State of U.P.; and Criminal Misc. Bail Application No.

17413 of 2018: Sonu @ Dharam Dutt Sharma vs. State of U.P. The bail order reveals that the bail applications of all the three applicants was allowed. Meaning thereby that the bail application of Anil (the corpus) was also allowed by the same order dated 14.11.2018 by which the bail application of Arun Yadav had been allowed. It has been submitted that the existence of common bail order is averred in paragraph 6 of the writ petition of which there is no denial in paragraph 6 of the counter affidavit filed by the DM. Therefore, it is crystal clear, the DM while issuing the detention order had not applied his mind to the relevant material which has vitiated his subjective satisfaction as also the order of detention.

7. To demonstrate that there was no application of mind on the bail order, the learned counsel for the petitioner invited attention of the court to paragraphs 22 and 28 of the writ petition, which are extracted below:

"22. That it is further pertinent to mention that the petitioner was allowed bail by this Hon'ble Court, 21 days prior to the impugned detention order i.e. on 14.11.2018 and just to somehow curtail the petitioner liberty the impugned detention order was hastily passed by the respondent no.3 on 5.12.2018.

28. That the grounds of detention dated 05.12.2018 signed by the District Magistrate, vividly indicate that the petitioner was still in jail and is endeavoring for his bail and post bail he may again commit act prejudicial to public order. Here it is most humbly stated that the petitioner was allowed bail vide order dated 14.11.2018 passed by Hon'ble Rajul Bhargava, J. of this Hon'ble Court in Criminal Misc. Bail Application No. 21380 of 2018, which once again demonstrates that the impugned detention order and its grounds of detention have been passed mechanically, without any due application of mind. It is further stated that since the petitioner is not having any Police record then there was no reason to apprehend that he will again commit acts prejudicial to public order."

8. Attention of the court has also been invited to paragraph 15 of the counter affidavit filed by the DM which is a reply to paragraph 22 of the petition. Paragraph 15 of the counter affidavit filed by the DM reads as under:

"15. That the contents of paragraph no.22 of the writ petition are denied being incorrectly stated. In reply it is stated that the petitioner had moved the bail application, which was pending before the court concerned and there was real possibility of releasing him on bail and on releasing on bail, there was all probability that he may indulge in prejudicial activities, with a view to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order, the petitioner has been rightly detained under section 3(2) of National Security Act after complete subjectively satisfaction on the basis of material available on the record and there is no violation of any fundamental right as provided in Constitution of India to every citizen of this country."

9. Attention of the court has also been invited to the contents of paragraph 17 of the counter affidavit filed by the DM which is a composite reply to paragraph nos. 25 to 36 of the writ petition. A perusal thereof would reveal

that the averments made in paragraph 28 of the writ petition were not dealt with specifically and no statement was made by DM either denying the existence of the bail order or claiming that he read the entire bail order and found that it granted bail to the petitioner also. Though, in the last sentence of paragraph 17 of the counter affidavit, it has been stated as follows:

".....The deponent considered possibility of petitioner being released on bail from concerned court and upon release, his further indulgence in similar type of activities, which will be prejudicial to the maintenance of public order, with a view to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order, the petitioner has been rightly detained under section 3(2) of National Security Act after complete subjectively satisfaction on the basis of material available on the record and there is no violation of any fundamental right as provided in Constitution of India to every citizen of this country."

10. By referring to the above extracted contents of the writ petition and the counter affidavit filed by the DM, the learned counsel for the petitioner submitted that the DM had failed to apply his mind on a relevant material i.e. the bail order passed by the High Court granting bail to the petitioner. It has been urged that the bail order is a speaking order which deals threadbare with the prosecution case brought against the petitioner and when read as a whole it creates a doubt as regards involvement of the petitioner in case crime no.751 of 2017 (supra). Hence it was a relevant material that ought to have been placed before the detaining authority and considered by it; and its non-consideration has vitiated the subjective satisfaction and, therefore, the detention order is liable to be quashed.

11. The learned counsel for the petitioner urged that it is settled legal position that where an order of detention is passed with reference to an activity in respect of which the detenue has been granted bail by a speaking order, which suggests possibility of false implication, then the bail application as well as the bail granting order are relevant material and must be placed by the sponsoring authority before the detaining authority to enable the detaining authority to apply its mind on the said material and be satisfied whether to pass an order of detention or not. It has been urged that the bail application and the bail granting order are both relevant because they contain the defence taken by the detenue which has impressed the Court to direct release of the detenue on bail. It has been urged that here the detaining authority was not even aware that the detenue has been granted bail in the concerned case. It is thus clear that he did not even peruse the bail granting order which related not only to the co-accused but also the detenue. Hence, it is a case of complete non-application of mind on relevant material thereby vitiating the order of detention.

12. Per Contra, the learned A.G.A. as well as the learned counsel appearing for the intervenor have submitted that the relevance of the bail order was only to indicate the imminent possibility of the detenu being released from jail and as satisfaction has been recorded in that regard, mere statement in the grounds of detention that the bail application of the petitioner was pending whilst that of the

co-accused Arun Yadav was granted would not vitiate the order of detention, particularly, when, otherwise, the grounds of detention disclose existence of cogent material to draw satisfaction that the activity of the petitioner had been prejudicial to the maintenance of public order and that on his release he was likely to repeat such activity and, therefore, to prevent him from doing so, detention order was necessary. In addition to above, it has been urged by them that this court had dismissed the petition of co-accused Arun Yadav challenging the order of detention upon finding that the activity pertaining to case crime no.751 of 2017 (supra) had breached public order. It was also pointed out that the order dismissing the petition of the co-accused was challenged before the Apex Court but the Apex Court summarily dismissed the Special Leave Petition.

13. Before we proceed to consider the weight of the rival submissions, it would be apposite for us to observe that the order dated 03.05.2019 passed by a co-ordinate Bench of this Court in Habeas Corpus Writ Petition No. 171 of 2019 filed by co-accused Arun Yadav was produced before us during the course of arguments. From a perusal of the said order we find that the point raised by the learned counsel for the petitioner that the satisfaction of the detaining authority stood vitiated due to non-application of mind on the bail order passed in favour of the petitioner was neither pressed nor discussed in the petition of the co-accused. Moreover the point raised in this petition, in all probability, might not have been available to co-accused Arun Yadav because from the grounds of detention of the present petitioner it appears that the detaining authority was aware that the co-accused Arun Yadav had been granted bail, whereas in respect of the petitioner it is stated in the grounds of detention that the bail application is pending. Hence, we are of the considered view that dismissal of the writ petition filed by the co-accused Arun Yadav against the order of detention is of no consequence on the merit of the points urged in this petition and, therefore, we would have to examine the merit of the points raised in this petition regardless of dismissal of the writ petition filed by the co-accused.

14. To appreciate the weight of the points urged by the learned counsel for the petitioner, it would be apposite for us to take a conspectus of various decisions of the apex court on the requirement of placement of all the relevant material available with the sponsoring authority before the detaining authority at the time of issuance of the order of detention.

15. In **Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat, (1979) 1 SCC 222**, the apex court in paragraph 6 of the judgement, as reported, held as follows:

"6. It is well-settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. In Sk. Nizamuddin v. State of West Bengal the order of detention was made on September 10, 1973 under Section 3(2)(a) of MISA based

on the subjective satisfaction of the District Magistrate that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and this subjective satisfaction, according to the grounds of detention furnished to the petitioner, was founded on a solitary incident of theft of aluminium wire alleged to have been committed by the petitioner on April 14, 1973. In respect of this incident of theft a criminal case was filed inter alia against the petitioner in the Court of the Sub-Divisional Magistrate, Asansol, but the criminal case was ultimately dropped as witnesses were not willing to come forward to give evidence for fear of danger to their life and the petitioner was discharged. It appeared clear on record that the history-sheet of the petitioner which was before the District Magistrate when he made the order of detention did not make any reference to the criminal case launched against the petitioner, much less to the fact that the prosecution had been dropped or the date when the petitioner was discharged from that case. In connection with this aspect this Court observed as follows:

"We should have thought that the fact that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. That circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, no order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the pendency of a criminal case against him to the District Magistrate."

It is true that the detention order in that case was ultimately set aside on other grounds but the observations are quite significant. These observations were approved by this Court in Suresh Mahato v. District Magistrate, Burdwan. ***The principle that could be clearly deduced from the above observations is that if material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order."***

(Emphasis Supplied)

16. In **Dharamdas Shamlal Agarwal v. Police Commr., (1989) 2**

SCC 370, in paragraph 12 of the judgement, as reported, after taking a conspectus of the authorities, the apex court reiterated the same principles as laid in the judgement in Ashadevi's case (supra). The relevant portion is extracted below:

"12. From the above decisions it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order."

17. Reiterating the law laid down in Ashadevi's case (supra), in **Ahamed Nassar v. State of T.N., (1999) 8 SCC 473**, the apex court in paragraph 20 of the judgement, as reported, observed as follows:

".....A man is to be detained in the prison based on the subjective satisfaction of the detaining authority. Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the detaining authority. The sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the sponsoring authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could affect his decision."

18. After observing as above, the apex court went on to observe that all relevant material that could be available at the time of issuance of the order of detention must be placed before the detaining authority and considered by it. Non-consideration of relevant material which could influence the mind either way would vitiate the subjective satisfaction due to non-application of mind and would render the order of detention vulnerable. The relevant portion of the judgement in *Ahamed Nassar's case (supra)* is extracted below:

27.....Thus, there should be consideration of all relevant materials in case such materials were within the reach of the detaining authority till a formal detention order was issued.

28. In the case of Mohd. Shakeel Wahid Ahmed v. State of Maharashtra also detention was challenged as relevant material came into existence after signing of the detention order but before issuance of a formal order. The Advisory Board opined in the case of another detenu Shamsi that there was no sufficient cause for Shamsi's detention but this material was not placed before the detaining authority. The defence taken by the State was that the detention order is dated 8-10-1981 while the Advisory Board's opinion is dated 19-10-1981. The Constitution Bench of this Court rejected this contention and held:

"The explanation offered by Shri Capoor as to why the opinion of the Advisory Board in Shamsi's case was not placed before him is that the report of the Advisory Board in Shamsi's case which is dated October 19, 1981, was not in existence when he "formulated and

ordered to issue the detention order against the petitioner' in this case. We see quite some difficulty in accepting this explanation. In the first place, the fact that it was on October 8, 1981 that Shri Capoor had directed the detention of the petitioner is a matter of no consequence. The order of detention was issued, that is to say passed, on November 7, 1981 and we must have regard to the state of circumstances which were in existence on that date. Shri Capoor seems to suggest that the Advisory Board's opinion dated October 19, 1981 came into existence after he had made up his mind to pass an order of detention against the petitioner on October 8, 1981 and therefore he could not take, or need not have taken, that opinion into account. The infirmity of this explanation is that the order of detention was passed against the petitioner on November 7, 1981 and the Advisory Board's opinion in Shamsi's case was available to the State Government nearly three weeks before that date."

29. The above was a case where detention order was signed on 8th October but formal order was only signed on 7-11-1981. The relevant material, viz., opinion of the Advisory Board came into existence on 19-10-1991, i.e., between the aforesaid two dates. Non-placement of the opinion, which came into existence after signing of the detention order before the detaining authority was held to vitiate the detention. Thus issuance of the formal order is held to be the relevant date up to which if any relevant material comes in possession of the authority concerned it has to be placed before the detaining authority. In the present case, we find the letter of the detenu dated 23-4-1999 was received on 26-4-1999, i.e., before issuance of formal detention order dated 28-4-1999. It was incumbent for the Secretary concerned to have placed it before the detaining authority. So we conclude, non-placement of those two letters which were relevant, vitiates the impugned detention order.
(Emphasis Supplied)

19. From a conspectus of the judgements noticed above, the legal principle deducible is that if material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. Therefore, every conceivable material which is relevant and vital which may have a bearing on the issue and available, or could with ordinary diligence be available, with the sponsoring authority, up to the date of issuance of the detention order, should be placed before the detaining authority. The sponsoring authority should not keep it back, based on its interpretation that it would not be of any help to a prospective detenue. What is important is that such material should have been placed before the detaining authority, and considered by it, before issuance of the detention order. Once such material is placed before the detaining authority, after consideration of such material, the detaining authority may still be subjectively satisfied that a case has been made out to preventively detain the detenue. Whether the material is relevant or not, the test is whether it has the potentiality to influence the mind of the detaining authority one way or the other as to whether an order of detention be issued. As to whether the material could be considered relevant depends upon the facts of each case and the court,

exercising its power of judicial review, is empowered to examine that aspect. But once such material has been considered by the detaining authority before issuance of the order of detention, the subjective satisfaction of the detaining authority cannot be questioned on the ground that upon consideration of that material it could not have been satisfied to preventively detain the detenue.

20. Now, we shall examine the law as to whether copy of the bail application and the order granting bail to the detenue is a relevant material which ought to be placed before the detaining authority and considered by it before issuance of detention order.

21. Before we notice the decisions on the aspect it would be apposite to observe that an order granting bail to the detenue may be of relevance for two reasons. Firstly, to indicate the imminent likelihood of the detenue being released from jail and, secondly, to disclose the aspects which might have weighed with the court to grant bail to the detenue and, in some cases, the conditions of bail may also be relevant. Where bail granting order is a speaking order, throwing light on the possibility of false implication, or where it deals with the defence of the detenue, ordinarily, such bail granting orders are considered relevant and they ought to be placed before the detaining authority and considered by it before issuance of the detention order.

22. In **M. Ahamedkutty v. Union of India, (1990) 2 SCC 1**, the apex court had taken the view that ordinarily a bail application and the order granting bail to the detenu would be relevant, if the grounds of detention are based on that case, and must be placed before and considered by the detaining authority and, if so considered, copy thereof must be supplied to the detenue to enable him to make an effective representation. A failure in that regard would violate the fundamental right to make effective representation against order of preventive detention guaranteed by Article 22(5) of the Constitution of India. The aforesaid legal principle was applied and followed by a three-judges bench of the apex court in **P.U. Abdul Rahiman v. Union of India, 1991 Supp (2) SCC 274.**

23. In **Abdul Sathar Ibrahim Manik v. Union of India, (1992) 1 SCC 1**, a two-judges bench of the apex court had the occasion to deal with a situation where the bail application of the detenue was rejected. The argument raised on behalf of the detenue that the bail application and the bail rejecting order was relevant document and ought to have been placed before the detaining authority and if placed ought to have been supplied to the detenue, was rejected by the court by distinguishing the law laid down in M. Ahamed Kutty's case (supra). The relevant portion of this judgement is extracted below:

"In Ahamedkutty case no doubt there is an observation having regard to the facts therein that non-consideration of the bail application and the order of releasing would amount to non-application of mind and that would affect the detention order. The Division Bench made these observations while considering the contention that the order granting bail and the bail application, though referred to, were not relied upon. It is not laid down clearly as a principle that in all cases non-consideration of the

bail application and the order refusing bail would automatically affect the detention. The relevant observations in this context made by this Court in Ahamedkutty case may be noted:

"If in the instant case the bail order on condition of the detenu's reporting to the customs authorities was not considered the detention order itself would have been affected. Therefore, it cannot be held that while passing the detention order the bail order was not relied on by the detaining authority. In S. Gurdip Singh v. Union of India, following Icchu Devi Choraria v. Union of India and Shalini Soni v. Union of India, it was reiterated that if the documents which formed the basis of the order of detention were not served on the detenu along with the grounds of detention, in the eye of law there would be no service of the grounds of detention and that circumstance would vitiate his detention and make it void ab initio."

It is further observed in this case that:

"Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without themthe grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case."

Placing considerable reliance on this passage, the learned counsel contended inter alia that in the instant case from either point of view namely (i) if the bail application and the order refusing bail were not considered or (ii) if considered the non-supply of the copies of the same to the detenu would affect the detention order. In other words, according to him, non-consideration of these two documents by the detaining authority would itself affect the satisfaction of the detaining authority. If on the other hand they are taken into consideration and relied upon the non-supply of the same to the detenu would result in violation of Article 22(5) of the Constitution rendering the detention invalid. We are unable to agree with the learned counsel. We are satisfied that the above observations made by the Division Bench of this Court do not lay down such legal principle in general and a careful examination of the entire discussion would go to show that these observations were made while rejecting the contention that the bail application and the order granting bail though referred to in the grounds were not relied upon and therefore need not be supplied. The case is distinguishable for the reason that the Division Bench has particularly taken care to mention that "Considering the facts ... the bail application and the bail order were vital materials". In that view these observations were made. Further that was a case where the detenu was released on bail and was not in custody. This was a vital circumstance which the authority had to consider and rely upon before passing the detention

order and therefore they had to be supplied.
(Emphasis supplied)

24. In **K. Varadharaj v. State of T.N., (2002) 6 SCC 735**, a two-judges bench of the apex court had the occasion to discuss and reconcile the two earlier decisions of the apex court, that is, in M. Ahamedkutty's case (supra) and Abdul Satthar's case (supra), and in paragraphs 5 to 7 of the judgement, as reported, the apex court held as follows:

"5. We have considered the argument advanced on behalf of the parties as also perused the records. The issue that arises for our consideration in this case is not really res integra. In the case of Ahamedkutty this Court held:

Considering the facts the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, ...

It is based on this observation of the Court that learned counsel for the appellant argued that non-consideration of the bail application and order made thereon would vitiate the order of detention. But we should notice that the said observation of this Court was made on facts of that case, therefore, we cannot read into that observation of this Court that in every case where there is an application for bail and an order made thereon, the detaining authority must as a rule be made aware of the said application and order made thereon. In our opinion the need of placing such application and order before the detaining authority would arise on the contents of those documents. If the documents do contain some material which on facts of that case would have some bearing on the subjective satisfaction of the detaining authority then like any other vital material even this document may have to be placed before the detaining authority. In our opinion, the judgment of this Court in Ahamedkutty does not lay down a mandatory principle in law that in every case the application for bail and the order made thereon should be placed before the court. We are supported in this view of ours by the judgment relied on by the State in Abdul Sathar. In the said case considering the earlier judgment in Ahamedkutty and explaining the observation quoted by us in the said judgment of Ahamedkutty this Court held:

"We are satisfied that the above observations made by the Division Bench of this Court do not lay down such legal principle in general and a careful examination of the entire discussion would go to show that these observations were made while rejecting the contention that the bail application and the order granting bail though referred to in the grounds were not relied upon and therefore need not be supplied. The case is distinguishable for the reason that the Division Bench has particularly taken care to mention that "considering the facts ... the bail application and the bail order were vital materials'. In that view these observations were made. Further that was a case where the detenu was released on bail and was not in custody. This was a vital circumstance which the authority had to consider and rely upon before passing the detention order and therefore they had to be supplied."

6. From the above observations, it is clear that placing of the application for bail and the order made thereon are not always mandatory and such requirement

would depend upon the facts of each case. We are in respectful agreement with the view expressed by the abovesaid two judgments which in our opinion are not conflicting.

7. We will now consider the question whether in the instant case the facts required the detaining authority to be aware of the contents of the bail application as also the order of the court thereon. From the facts of this case, we must note that the fact that the detenu was in custody was taken note of by the detaining authority by reference to his remand order therefore that is a vital fact which is taken note of by the court. The contents of the bail application also in our opinion do not contain any vital material notice of which the detaining authority had to take. However, in our opinion there was a vital fact in the order of the court notice of which ought to have been taken by the detaining authority. The said fact is that the court specifically noted in the bail order that the Public Prosecutor had no objection for grant of bail therefore the court was inclined to grant bail to the appellant. This is a circumstance, in our opinion, which ought to have been noticed by the detaining authority because the counsel representing the State in express terms said that he, which would also mean his client which is the State, did not have any objection to the grant of bail. Therefore, in our opinion this is a vital fact notice of which the detaining authority ought to have taken. We do not say that merely because a concession was made by a counsel for the State in a bail application that would be binding on the detaining authority but it is necessary that such opinion expressed by a counsel for the State ought to have been taken note of and since this is a vital fact, non-consideration of this fact in our opinion vitiates the order of detention."

25. In **Sunila Jain v. Union of India, (2006) 3 SCC 321**, the apex court after taking a conspectus of previous judgements on the issue as to whether under all circumstances bail application and bail granting order would be relevant, in paragraphs 18 and 19 of the judgement, as reported, laid down certain legal principles. The relevant paragraphs are extracted below:

"18. The decisions of this Court referred to hereinbefore must be read in their entirety. It is no doubt true that whether a detenu on the date of the passing of the order of detention was in custody or not, would be a relevant fact. It would also be a relevant fact that whether he is free on that date and if he is, whether he is subjected to certain conditions in pursuance to and in furtherance of the order of bail. If pursuant to or in furtherance of such conditions he may not be able to flee from justice, that may be held to be relevant consideration for the purpose of passing an order of detention but the converse is not true. Some such other grounds raised in the application for bail and forming the basis of passing an order of bail may also be held to be relevant. It would, however, not be correct to contend that irrespective of the nature of the application for bail or irrespective of the nature of the restrictions, if any, placed by the court of competent jurisdiction in releasing the detenu on bail, the same must invariably and mandatorily be placed before the detaining authority and the copies thereof supplied to the detenu.

19. The decisions relied upon by Mr Mani in our opinion do not lay down as universal

rule that irrespective of the facts and circumstances of the case it would be imperative to place all applications for bail as also the orders passed thereupon before the detaining authority and copies thereof supplied to the detenu. On the petitioner's own showing, only that part of the application for grant of bail that the offence in question is bailable, was relevant. No other submission had been raised at the Bar. Whether a provision of law is bailable or not is a question of law. The same is presumed to be known to the courts and/or the detaining authority. It may not be necessary even to be stated in the application for bail. If a person had been released on bail on the ground that the offence is bailable, it would not be necessary to bring the said fact before the detaining authority. The detaining authority will have to satisfy himself on the basis of the materials placed on record, as to whether the order of preventive detention should be passed against the detenu or not. The constitutional mandate can be said to be violated, provided: (1) the impairment has been caused to the subjective satisfaction to be arrived at by the detaining authority; and (2) if relevant facts had not been considered or the relevant or vital documents have not been placed before the detaining authority.
(Emphasis Supplied)

26. In **Rushikesh Tanaji Bhoite v. State of Maharashtra, (2012) 2 SCC 72**, the detenue had already been released on bail but the detaining authority did not show his awareness and passed the order of detention. The apex court set aside the order on that ground itself. The relevant portion of the judgement is extracted below:

"7. The admitted position is that the detenu was arrested in connection with the above crime on 15-8-2010 and he was released on bail by the Judicial Magistrate, First Class, Dharangaon on that very day. One of the conditions imposed in the order of bail was that the detenu would appear at Dharangaon Police Station on every Monday between 10.00 a.m. to 12 o'clock till the charge-sheet was filed. Later on, the detenu made an application before the Judicial Magistrate, First Class, Dharangaon seeking relaxation of the above condition. That application was allowed and the above conditionwas relaxed by the Judicial Magistrate concerned on 4-1-2011.

8. It would be, thus, seen that the order releasing the detenu on bail in the crime registered on 14-8-2010 and the order relaxing the bail condition were passed by the Judicial Magistrate, First Class, Dharangaon much before the issuance of the detention order dated 10-1-2011. However, the detention order or the grounds supplied to the detenu do not show that the detaining authority was aware of the bail order granted in favour of the detenu on 15-8-2010.

9. In a case where the detenu is released on bail and is enjoying his freedom under the order of the court at the time of passing the order of detention, then such order of bail, in our opinion, must be placed before the detaining authority to enable him to reach at the proper satisfaction.

10. In the present case, since the order of bail dated 15-8-2010 was neither placed before the detaining authority at the time of passing the order of detention nor the detaining authority was aware of the order of bail, in our view, the detention order is rendered invalid. We cannot attempt to assess in what manner and to what extent consideration of the order granting bail to the detenu would have effected the satisfaction of the

detaining authority but suffice it to say that non-placing and non-consideration of the material as vital as the bail order has vitiated the subjective decision of the detaining authority."
(Emphasis Supplied)

27. From a conspectus of the judgements noticed above, the legal principle deducible is that if the detenue has already been granted bail, then the bail application as well as the bail granting order would be a relevant material if its contents would have a bearing on the subjective satisfaction of the detaining authority whether to pass the order of detention or not. Ordinarily, where bail application places facts or material that throws light on possibility of false implication and bail is granted by the court then in the facts and circumstances of that case it becomes a relevant material and its non-placement and non-consideration would vitiate the subjective satisfaction due to non application of mind on relevant material. Likewise, a speaking bail order dealing with or noticing various submissions that throw light on possibility of false implication would be considered relevant. Similarly, at times, conditions imposed for granting bail which may have material bearing on repeat of such activities, for prevention of which order of detention is contemplated, may also become relevant. Thus, in a nutshell, it could be summed up by observing that a bail application and a bail order would be relevant if the facts and circumstances of the case so justify. And if the facts do make them relevant then they must be supplied to the detaining authority and considered by him before issuance of the detention order. A failure in that regard would vitiate the subjective satisfaction.

28. Having noticed the legal position, we shall now examine, firstly, whether the bail application and the order granting bail to the petitioner in Case Crime No.751 of 2017 (supra) was a relevant material; secondly, whether it was considered by the detaining authority before issuance of the order of detention; and, thirdly, if not considered whether the subjective satisfaction stood vitiated.

29. To answer first of the above three issues we have carefully perused the bail order, which has been brought on record as Annexure 2 to the writ petition of which there is no denial in paragraph 6 of the counter affidavit filed by the detaining authority. A perusal of the bail order reveals that this Court considered and allowed three bail applications by a common order dated 14.11.2018. The first bail application no.21380 of 2018 was filed by co-accused Arun Yadav; the second bail application no.19942 of 2018 was filed by the petitioner; and the third bail application no.17413 of 2018 was filed by co-accused Sonu @ Dharam Dutt Sharma. The court while granting bail noticed the submissions that all the three applicants were not named in the first information report (for short FIR) dated 17.11.2017; that the FIR was lodged by a person who claimed himself to be an eye witness; that the informant named four persons and another in the FIR but, on 25.11.2017, changed his version thereby exonerating the named persons and implicating Arun Yadav (co-accused) and his brother Amit Yadav as suspects; thereafter, one Naresh Tevatia was arrested on 4.12.2017 who made confession about conspiracy with accused Arun Yadav and his driver Sonu. Upon their arrest a 9 mm pistol was recovered at the instance of Arun Yadav. Arun Yadav disclosed the

names of shooters. Thereafter, on 21.12.2018, statement of one Sanjay was recorded who disclosed that 1 or 2 days prior to the incident he saw the petitioner along with other accused hatching conspiracy for murder. It was noticed that this witness was a witness of inquest but did not make any such disclosure earlier. After considering the entire case, the court while granting bail to all the three accused observed as follows:

"I have given an anxious consideration to the submissions made by learned counsels of rival parties and learned AGA for the State. I may record that admittedly it is not disputed by prosecution that the applicants are not actual shooter/ assailants and the accused who were nominated in the first information report were given a clean chit by the first informant and two other witnesses who are closely related to each other and the deceased Shiv Kumar. Name of the applicant - Arun Yadav and Sonu @ Dharam Datt Sharma came into light in the confessional statement of Naresh Tevatia who confessed that he along with other assailants were hired to slay deceased Shiv Kumar. I may further record that the evidence on which the prosecution wants to place reliance is call detail report/ screen shots of whattsapp of applicants and other accused to show that the applicants and other accused were in constant touch with each other and they were supplying information to the assailants regarding the movements of the deceased is only presumptive, inasmuch as, there is no surveillance report to substantiate this fact. The alleged 9 mm pistol recovered at the instance of applicant-Arun Yadav could not be connected with the present crime. The eye-witness account was washed off by the first informant and other witnesses. There is also no evidence about the participation of applicants in the present case.

Considering the overall facts and circumstances of the case as also the submissions advanced by learned counsel for the parties, without expressing any opinion on merits of the case, I am of the view that the applicants are entitled to be released on bail."

30. From the above extract of the bail order it is clear that the court noticed the submissions made on behalf of the bail applicants doubting the credibility of the prosecution evidence against them and made observation that there is no evidence about the participation of applicants in the case. Under the circumstances, this bail order had the potentiality to influence the mind of the detaining authority whether to pass the detention order against the detenue. Hence, by all means the bail order was a relevant document/ material which ought to have been placed as well as considered by the detaining authority before issuance of the detention order.

31. The second issue that arises for our consideration is whether this bail order was before the detaining authority and considered by it at the time of issuing the detention order. In this regard it be observed that though there is no specific pleading in the writ petition that the bail order was not placed before the detaining authority but from the reply to paragraph 22 of the writ petition it appears that the detaining authority was not aware that the petitioner was granted bail inasmuch as in paragraph 22 of the writ petition, the petitioner had specifically stated that bail application was allowed on 14.11.2018,

21 days prior to the detention order but in the reply, as contained in paragraph 15 of the counter affidavit, the detaining authority stated that the bail application was pending. Further, if the detaining authority had cared to consider/ peruse the common bail order passed in all the three bail applications including that of co-accused Arun Yadav he sure would have found that the petitioner has also been granted bail because the order itself indicates that it related to all the three accused. This clearly signifies that at the time of issuance of the detention order neither the detaining authority was aware that the petitioner has been granted bail in case crime no.751 of 2017 (supra) nor he had applied his mind to the order granting bail to the petitioner. The second issue is decided accordingly.

32. Consequently, due to non application of mind on the relevant material, the subjective satisfaction of the detaining authority stood vitiated in the light of the law already noticed above. Once that is so, the detention order is rendered vulnerable and is liable to be quashed. The third issue is decided accordingly.

33. At this stage, we may also observe that in the grounds of detention there is reference of other cases also but those cases have not been referred to as grounds for the order of detention but for the purpose of disclosing the background of the detenue. Moreover, case crime no.378 of 2018, P.S. Bisrakh, District Gautambudh Nagar, under sections 2/3 of the U.P. Gangsters (Prevention of Anti-Social Activities) Act, 1986, which has also been cited as one of the other cases against the petitioner, has been lodged by referring to previous involvement in other cases including case crime no.751 of 2017, therefore, it can safely be held that the detention order was based on a solitary ground pertaining to the activity of the petitioner concerning case crime no.751 of 2017. Thus, if satisfaction on that ground gets vitiated, due to non-application of mind on relevant material relating to it, the detention order cannot be saved by applying the principle laid down in Section 5-A of the Act, 1980.

34. For all the reasons detailed above, this habeas corpus petition deserves to be allowed and is, accordingly, allowed. The detention order dated 05.12.2018 is hereby quashed. The petitioner shall be set at liberty forthwith unless wanted in any other case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Civil Misc. Habeas Corpus Writ Petition No. 391 of 2019

Ashutosh Bhat alias Tipu...Petitioner (in jail)
Versus
Union of India &Ors. ...Respondents

Counsel for the Petitioner:
Sri Avinash Mani Tripathi, Sri Abhishek Mani Tripathi
Counsel for the Respondents:
A.S.G.I., G.A., Sri Thakur Azad Singh

A. Writ of Habeas Corpus - Article 22(5) of the Constitution of India - Detention in exercise of power u/s 3(3) of National Security Act, 1980 - Delay of 8 days in transmission of representation by detaining authority to the State

government-Principal to uphold detention illegal is not the time taken in dealing with representation but is explanation for delay - Words 'as soon as may be' occurring in Article 22 (5) of the Constitution explained - Ordinarily 3 to 5 days may be considered reasonable - In case of delay, there must be explanation - 8 days delay is inordinate requiring explanation - No explanation - Detention rendered illegal.

Petition allowed. (E-1)

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Mrs. Manju Rani Chauhan, J.)

1. We have heard Sri Abhishek Mani Tripathi for the petitioner; the learned A.G.A. for respondents 2, 3, 4 and 5; Sri Thakur Azad Singh for the Union of India; and have perused the record.

2. This habeas corpus petition has been filed by Ashutosh Bhatt alias Tipu, currently under detention at District Jail, Gorakhpur, questioning his detention under the National Security Act, 1980 (for short the Act, 1980) pursuant to the detention order dated 07.10.2018 passed by the District Magistrate, Gorakhpur in exercise of powers conferred upon him by Section 3(3) of the Act, 1980 read with Section 3(2) thereof. A prayer has also been made to set the petitioner at liberty.

3. A resume of essential facts would be apposite. While the petitioner was in jail in connection with case crime no.89 of 2018, P.S. Gorakhnath, District Gorakhpur, under sections 302, 396, 412 IPC and section 7 Criminal Law Amendment Act and section 30 of the Arms Act, he was served with detention order dated 7.10.2018 passed by the District Magistrate Gorakhpur. The grounds of detention referred to direct involvement of the petitioner in an incident dated 12.02.2018 relating to murder of a person by use of firearm during the course of a ceremony which gave rise to case crime no.89 of 2018 (supra). By alleging that the incident disturbed public order and that there was likelihood of the petitioner being released on bail, where after he would indulge in repeat of such activity that would disturb public order, with a view to prevent him from doing so, the order of detention was passed.

4. At the outset, the learned counsel for the petitioner has submitted that although there are several grounds for him to press and agitate in this petition but since the continued detention of the petitioner has been rendered illegal on account of unexplained inordinate delay in transmission of the representation by the detaining authority to the State Government, he would advance his submissions on that point only.

5. It has been submitted that against the order of detention, the petitioner had submitted representation at District Jail, Gorakhpur in five sets on 18.10.2018. The State Government received the representation along with para-wise comments and the letter of the District Magistrate dated 01.11.2018 on 06.11.2018, which was rejected by it on 19.11.2018. The Central Government received the representation along with para-wise comments of the District Magistrate on 26.11.2018 through letter dated 12.11.2018 of the Deputy Secretary, Government of U.P., which was rejected by the Central Government on 30.11.2018. It has been urged that from the return filed by the Jail Authorities it is clear that the representation of the petitioner against the

order of detention was submitted in five sets at District Jail, Gorakhpur on 18.10.2018 and from there it was sent to the office of the District Magistrate, Gorakhpur through Special Messenger on 18.10.2018 itself. The District Magistrate, Gorakhpur, however, sent it to the State Government vide letter dated 01.11.2018. There is no cogent explanation for the delay in onward transmission of the representation for the period between 19.10.2018 and 31.10.2018.

6. In his return, the District Magistrate, Gorakhpur sought to explain the delay in onward transmission of the representation by stating that after receipt of the representation, on 19.10.2018 comments were called from Senior Superintendent of Police, Gorakhpur (for short SSP) and those comments were received in his office on 31.10.2018. Immediately, thereafter, on 01.11.2018, the representation was forwarded to the State Government.

7. As in the return there was no explanation as to why 12 days were taken by the SSP in submitting his comments, on 06.08.2019, this Court had passed a detailed order requiring the District Magistrate, Gorakhpur to file his personal affidavit dealing with all the aspects mentioned in the said order. The order dated 06.08.2019 is extracted below:

"In this habeas corpus petition, the return filed by the fifth respondent (Superintendent, District Jail, Gorakhpur) indicates that the petitioner submitted his representation in five sets at District Jail, Gorakhpur on 18.10.2018 which was sent to the office of District Magistrate, Gorakhpur through Jail Authorities on 18.10.2018 through special messenger.

In the return filed by the State Government, from paragraph 6 thereof, it appears that the return dated 18.10.2018 was received in the concerned section of the State Government on 06.11.2018 along with the letter of District Magistrate, Gorakhpur, dated 01.11.2018.

In the return filed by the District Magistrate, namely, K. Vijayendra Pandiyan, in paragraphs 9 and 19, he has stated as follows:-

"9. That the contents of paragraphs no.8, 9 and 10 of the writ petition are denied being incorrectly stated. In reply thereto, it is stated that the petitioner submitted his representation dated 18.10.2018 in five (05) sets at District Jail, Bulandshahar on 18.10.2018, which was sent to the office of District Magistrate, Bulandshahar through Jail Authorities on the very same day i.e. on 18.10.2018. Thereafter, on 19.10.2018, the deponent called for the report from the Senior Superintendent of Police, Gorakhpur, whereupon the Senior Superintendent of Police, Bulandshahar has submitted its report to the office of the deponent on 31.10.2018. After perusing the same, the parawise reply of the representation was prepared and thereafter, the representation of the petitioner was rejected by the District Magistrate, Gorakhpur / deponent on 01.11.2018 and the communication of the rejection of said representation along with the order, was communicated to the petitioner through Jail Authorities on the very same day i.e. on 01.11.2018. It is apt to mention herein that the prescribed procedure has been followed and there is no inordinate delay in deciding the petitioner's representation, as the time taken is due to procedural necessities.

19. That it is most humbly submitted that the petitioner submitted his representation dated 18.10.2018 in five (05) sets at District Jail, Bulandshahar on

18.10.2018, which was sent to the office of District Magistrate, Bulandshahar through Jail Authorities on the very same day i.e. on 18.10.2018. Thereafter, on 19.10.2018, the deponent called for the report from the Senior Superintendent of Police, Gorakhpur, whereupon the Senior Superintendent of Police, Bulandshahar has submitted its report to the office of the deponent on 31.10.2018. After perusing the same, the parawise reply of the representation was prepared and thereafter, the representation of the petitioner was rejected by the District Magistrate, Gorakhpur / deponent on 01.11.2018 and the communication of the rejection of the said representation alongwith the order, was communicated to the petitioner through Jail Authorities on the very same day i.e. 01.11.2018.

It is apt to mention herein that the prescribed procedure has been followed and there is no inordinate delay in deciding the petitioner's representation, as the time taken is due to procedural necessities."

From the averments made in paragraphs 9 and 19 of the affidavit filed by the District Magistrate, Gorakhpur what concerns the Court is that there is complete non application of mind on the part of the District Magistrate in signing the return on oath. He refers himself, though being District Magistrate, Gorakhpur as District Magistrate, Bulandshahar and, not only that, he addresses Senior Superintendent of Police, Gorakhpur as Senior Superintendent of Police, Bulandshahar. Further, he has referred to District Jail, Gorakhpur as District Jail, Bulandshahar. It is not expected of such a responsible officer to file an affidavit in such a casual manner.

Further, we find that there is no disclosure in the affidavit filed by the District Magistrate as to what took so long for the Senior Superintendent of Police, Gorakhpur in submitting his report, which was called from him on 19.10.2018. The counter affidavit also does not disclose whether any reminder was sent from the office of the District Magistrate prompting the Senior Superintendent of Police concerned to submit his report.

In view of the above, we deem it appropriate to call upon the District Magistrate, Gorakhpur to file his personal affidavit dealing with all the aforesaid aspects.

Put up this matter on 19th August, 2019.

Let a copy of this order be supplied to the learned A.G.A. for information and compliance."

8. Pursuant to the order dated 06.08.2019, the District Magistrate, Gorakhpur has filed two affidavits today. In the first affidavit he has disclosed about the extension of detention period to the maximum permissible, that is of 12 months starting from the date of detention. In the second affidavit he has expressed regret and apology for typographical mistakes in his earlier return and has sought to explain the delay in onward transmission of the representation by claiming that the delay in receiving comments from the SSP was because the Station House Officer, P.S. Gorakhnath, Gorakhpur (for short SHO) had provided comments to the SSP on 29.10.2018. In paragraph 10 of the second affidavit it is stated that the SSP called for comments from the SHO on 20.10.2018.

9. Why it took 8 days for the SHO concerned to provide his comments is not

explained in the affidavit. Further, there is no explanation offered by the District Magistrate as to whether he had issued a reminder to the SSP or the SSP had issued reminder to the SHO for the comments.

10. The learned counsel for the petitioner submitted that in the case of **Rajmamal vs. State of Tamil Nadu and another, (1999) 1 SCC 417**, continued detention was declared illegal in absence of explanation for delay of five days in dealing with the representation. The learned counsel for the petitioner has also placed reliance on decisions of the Apex Court in **Pebam Ningol Mikoi Devi vs. State of Manipur: (2010) 9 SCC 618, paras 33 to 37; Abdul Nasar Adam Ismail vs. State of Maharashtra, (2013) 4 SCC 435, para 19** so as to contend that unexplained delay in onward transmission of the representation vitiates the continued detention of the detenue as it violates the fundamental right of a detenue guaranteed under Article 22 (5) of the Constitution of India.

11. Per-Contra, the learned A.G.A. has submitted that the explanation for delay, if any, in onward transmission of the representation at the level of the D.M. has been provided as, ordinarily, comments on the representation are called from police authorities and, therefore, if the D.M. had called for comments from the S.S.P., it cannot be said that the D.M. deliberately delayed the onward transmission of the representation. He further submitted that few days are always taken in submitting para-wise comments therefore the delay of about 8 days in submitting comments will not be fatal.

12. The learned counsel for the Union of India submitted that the Central Government took only few days in deciding the representation after it was received in the office.

13. We have considered the rival submissions.

14. In **Rajammal v. State of T.N., (1999) 1 SCC 417**, a three judges bench of the apex court, after noticing the judgement of the Constitutional Bench of the Apex court rendered in **K.M. Abdulla Kunhi v. Union of India (1991) 1 SCC 476**, in paragraphs 7 and 8 of its judgment, as reported, held as follows:

7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a Constitution Bench of this Court in K.M. Abdulla Kunhi v. Union of India. The following observations of the Bench can profitably be extracted here:

"It is a constitutional mandate commanding the authority concerned to whom the detenu submits his representation to consider the representation and dispose of the same

as expeditiously as possible. The words "as soon as may be' occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the detention law concerned, within which the representation should be dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

8. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

15. Thereafter, the apex court proceeded to notice the facts of the case and held that unexplained delay of 5 days in between 9.12.1988 and 14.2.1988 has vitiated the continued detention. The relevant **paragraphs 9 and 11 of the judgement in Rajammal's case (supra)**, as reported, is being extracted below:

9. What happened in this case was that the Government which received remarks from different authorities submitted the relevant files before the Under-Secretary for processing it on the next day. The Under-Secretary forwarded it to the Deputy Secretary on the next working day. Thus there is some explanation for the delay till 9-2-1998. Thereafter the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only on 14-2-1998. Though there is explanation for the delay till 9-2-1998, we are unable to find out any explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14-2-1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.

11. We are, therefore, of the opinion that the delay from 9-2-1998 to 14-2-1998 remains unexplained and such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed. We, therefore, allow this appeal and set aside the impugned judgment. We direct the appellant-detenu to be set at large forthwith.

16. From the decision noticed above, the deducible legal principle is that the duration or the length of the time taken in deciding or dealing with the representation is not what is the deciding factor as to uphold the detention or to declare it illegal. The deciding factor is

the explanation for the delay, if any. In other words, whenever there appears inordinate delay, at any stage of dealing with the representation, it is for the authority concerned to explain the delay. It is not enough to say that the delay was very short. Even longer delay can well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

17. It is equally well settled by a catena of decisions that an unexplained delay in transmission of representation against a preventive detention order violates the fundamental right of the detenue guaranteed under Article 22(5) of the Constitution of India thereby rendering the continued detention illegal (**vide Pebam Ningol Mikoi Devi v. State of Manipur: (2010) 9 SCC 618, paras 33 to 37; Abdul Nasar Adam Ismail v. State of Maharashtra, (2013) 4 SCC 435, para 19)**. The rationale behind the above view is, if the representation is not promptly sent to the authority competent to decide, to whom it is addressed, the phrase "shall afford him (detenue) the earliest opportunity of making representation against the order", as found in Article 22(5) of the Constitution of India, would be rendered nugatory.

18. In **Abdul Nasar's case (supra)** in paragraph 19 of the judgment it was held as follows:

"19. **In Pebam Ningol Mikoi Devi**, seven days' unexplained delay in forwarding the representation to the Central Government was held to be fatal. In **Aslam Ahmed Zahire Ahmed Shaik**, the detenu had handed over his representation to the Superintendent of Jail on 16-6-1998 for onward transmission to the Central Government. It was kept unattended for a period of seven days and, as a result, it reached the Government 11 days' after it was handed over to the Superintendent of Jail. The Superintendent of Jail had not explained the delay. Relying on Vijay Kumar v. State of J&K, the continued detention of the detenu was set aside. At the cost of repetition, we must note that in this case, the Superintendent of Jail has not filed any affidavit explaining the delay. Therefore, this delay, in our opinion renders continued detention of the detenu, illegal."

19. In **Jaggu v. State of U.P., 2008 SCC OnLine All 1348 : (2008) 70 AIC 491 : (2008) 5 All LJ (NOC 1037)**, a Division Bench of this court found that long unexplained delay in submitting report by police authorities, which results in delay in onward transmission of representation, vitiates the continued detention. The relevant extracts from the judgment of this Court in the case of Jaggu (supra) are reproduced below:

"3. The detenu made a representation dated 13.9.2007 to the State Government, which was handed over to the jail authorities on 14.9.2007. The jail authorities sent the representation to the office of District Magistrate on 15.9.2007. On the same day, the District Magistrate called for comments from the Senior Superintendent of Police, Ghaziabad and the report of Senior Superintendent of Police was received by the District Magistrate on 1.10.2007. Thereafter, the District Magistrate transmitted the representation to the Central Government, the State Government and the Advisory Board on 2.10.2007.

4. Learned Counsel for the petitioner has urged that there is no explanation of 15 days' delay i.e. from 16.9.2007 to 30.9.2007, as to why the report was sent by the Senior Superintendent of Police after 15 days. One could understand that the report could be sent by the Senior Superintendent of Police within a day or two, but he could not sit over the matter for 15 days and send his report to the District Magistrate after 15 days. Further, from the counter affidavit of the District Magistrate, it is dear that there is no explanation given in the counter affidavit for the delay from 16.9.2007 to 30.9.2007.

5. The Apex Court in Rajammal v. State of Tamil Nadu, has held that un-explained delay of five days was fatal and the decision order would bad in law and contrary to the constitutional obligation on the Central Government to consider and decide the representation of the detenu without any delay.

6. In Harish Pahwa v. State of U.P. the Supreme Court has taken the similar view.

7. Similar view has been taken by the Supreme Court in the case of Union of India v. Harish Kumar, relied upon by the learned Counsel for the petitioner.

8. For the aforesaid reasons, further detention of the petitioner under the National Security Act is held to be illegal."

20. From the law noticed above, it is clear that there should not be inordinate delay in submitting comments on the representation. Although, no specific time limit can be fixed in that regard but, ordinarily, 3 to 5 days may be considered reasonable. However, when the delay appears to be inordinate then explanation must be offered by the authorities concerned.

21. We find that the SHO concerned took eight days to submit comments on 29.10.2018 when they were called from him by the SSP on 20.10.2018. Taking eight days to submit comments, particularly, by a police station which had been the base station from where recommendations for detention emanated, in our view, is inordinate for which an explanation was necessary. As we find that there is no explanation for this delay, despite this Court's order dated 06.08.2019, the continued detention of the petitioner has been rendered illegal. The petition is therefore allowed. The petitioner shall be set at liberty forthwith unless wanted in any other case. There is no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Civil Misc. Habeas Corpus Writ Petition No. 672 of 2019

Saurabh Pandey &Anr. ...Petitioners
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioners:
Sri Raj Kumar Singh, Sri Sunil Kumar Singh

Counsel for the Respondents:
G.A.

A. Age of juvenile - Principles to determine – Section 2(14), 37(1)(c) and 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 - Primacy to be given to birth certificate from school or matriculation certificate, in absence thereof to certificate of corporation/municipality/panchayat and

in absence of all these the medical evidence be taken.

Child Welfare Committee found corpus minor as per school certificate - Absence of averment denying attendance of corpus in that school or genuineness of Principal, who issued the certificate - School certificate rightly relied upon - Medical report is not liable to be considered - Order of Child Welfare Committee placing corpus, even pregnant, to Protection Home is within power conferred by Section 37 of J.J. Act, 2015. (E-1)

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Virendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioners; learned A.G.A. for the respondents 1 to 4 and perused the record.

2. This habeas corpus petition seeks production and release of Pooja (petitioner no.2-corpus), who, since 02.03.2019, is in the care and protection of Nari Niketan, Nidharia, Ballia pursuant to order dated 02.03.2019 passed by Child Welfare Committee, Ballia.

3. A perusal of the order dated 02.03.2019 passed by the Child Welfare Committee, which is there on record as Annexure 7 to the petition, reveals that the Child Welfare Committee considered it appropriate to place the corpus in the care and protection of Nari Niketan upon finding: that the date of birth of the corpus is 10.08.2002; that a first information report has been registered at P.S. Kotwali, District Ballia as Case Crime No.475 of 2018, under Sections 363, 366, 120-B IPC and Section 7/8 of Pocso Act, at the instance of Dabloo Pandey, father of the corpus, alleging that the corpus, who is aged 16 years, has been enticed away by the accused Saurabh Pandey (petitioner no.1 herein); and that the corpus is unwilling to go with her parents.

4. The learned counsel for the petitioners has urged that from the medical examination report of the victim the corpus appears to be aged about 18 years and is pregnant, therefore she cannot be sent to Nari Niketan against her wishes.

5. The learned AGA has opposed the petition by claiming that the corpus is minor as per the date of birth recorded in her educational certificate. It has been urged that the age of a child victim is to be determined by applying the principles provided by Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short J. J. Act, 2015), under which, primacy is to be accorded to date of birth entered in educational certificate over medical evidence.

6. Having noticed the rival submissions, before we proceed to address the issues, it would be apposite to observe that the Apex Court had consistently been of the view that the principles applicable for determining the age of juvenile in conflict with law are to be applied for determining the age of child victim (***vide Jarnail Singh Vs. State of Haryana, (2013) 7 SCC 263; State of M.P. Vs. Anoop Singh, (2015) 7 SCC 773; and Mahadeo Vs. State of Maharashtra, (2013) 14 SCC 637).***

7. Section 94 of the J. J. Act, 2015 provides for presumption and determination of age. Sub-section (2) of section 94 of the J. J. Act, 2015, which is relevant, is extracted below:

"(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall

undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order."

8. From above, it is clear that primacy is to be accorded to the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, and, in the absence thereof, to the birth certificate given by a corporation or municipality or panchayat. Only in absence of above evidence medical evidence is to be taken.

9. Section 37 (1) (c) of the J. J. Act, 2015 empowers the Child Welfare Committee to place a child in need of care and protection in a Children's Home or fit facility for temporary care.

10. Section 2 (14) of the J. J. Act, 2015 defines a child in need of care and protection. Clauses (iii), (viii) (xii) of sub-section (14) of Section 2 of the J. J. Act, 2015 are relevant for the purpose of deciding this case. The said clauses along with the opening part of sub-section (14) of section 2 of the J. J. Act, 2015 are extracted below:

"Section 2(14) "child in need of care and protection" means a child-

(i) to (ii).....

(iii) who resides with a person (whether a guardian of the child or not) and such person-

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv) to (vii).....

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) to (xi).....; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;"

11. In **Independent Thought v. Union of India, (2017) 10 SCC 800**, the apex court after taking a conspectus of the provisions contained in the Constitution of India, the Indian Penal Code, the Prevention of Children from Sexual Offences Act, 2012 (Pocso Act) and the J. J. Act, 2015, held as follows:

"107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is - this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC - in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years - this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC - this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

12. In the instant case, the Child Welfare Committee, by order dated 02.03.2019, directed the corpus to be placed in Women Protection Home upon finding her to be minor, with date of birth 10.08.2002, as per school certificate obtained from the Principal, GovernmentBalikaInterCollege, Ballia.

13. In the writ petition, there is no averment that the corpus never attended the school. There is no averment that the Principal whose certificate has been relied upon is not Principal of the Institution where the corpus had studied.

14. Under the circumstances, the medical report pertaining to the age of the corpus is not liable to be considered at this stage and in these proceedings, in as much as primacy is to be accorded to the date of birth recorded in educational certificate over medical evidence.

15. Once the corpus is found a child, as defined by Section 2 (12) of the J.J. Act, 2015, and, allegedly, a victim of a crime (in this case Case Crime No.475 of 2018 detailed above), she would fall in the category of child in need of care and protection in view of clauses (iii), (viii) and (xii) of sub-section (14) of section 2 of the J.J. Act, 2015. Hence, the order passed by the Child Welfare Committee placing the corpus in a protection home would be within its powers conferred by section 37 of the J.J. Act, 2015.

16. In view of the above, as the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the provisions of the J.J. Act, 2015, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order of the Child Welfare Committee, the petitioner is at liberty to

take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015.

17. Subject to above, the petition is disposed off.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A(Rent Control) No. 11130 of 2019

Deepak Kumar Baijal ...Petitioner
Versus
Prescriberd Authority/Additional District Magistrate-VII,Kanpur Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandan Sharma, Sri Piyush Sinha, Sri Ravi Shankar Prasad.

Counsel for the Respondents:
C.S.C. Sri J.P. Singh, Sri Atul Dayal

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Sections 21(1)(a), 12(1) & (3). Vacancy under Section 12 can be declared even if an appeal against order of release is pending.

Order passed by the R.C. &E.O. under Section 12 (3) challenged on the ground of jurisdiction citing pendency of appeal against release application. No prohibition under the U.P. Act No. 13 of 1972 that if an appeal against the order of release under Section 21(1)(a) of the Act is pending then vacancy under Section 12 cannot be declared. (Para 11)

It is open to the landlord to file an application under Section 21(1)(a) and also file an application under Section 12(3) of the Act. The landlord cannot be compelled to wait till such time as the appeal is decided. (Para 11)

Precedent followed: -

1.Sarla Devi (Smt.) Vs. PushpaAgnihotri (Smt.) 2008 (2) ARC 725

2.Sukhant Gupta Vs. Rent Control and Eviction Officer, Kanpur and another 1991 (2) ARC 445

3.Naubat Ram Sharma Vs. Addl. District Judge IX, Moradabad and others, 1987 (2) ARC 121

4.Munnilal Vs. Prescribed Authority, Agra and others, 1992 ACJ 789 (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ravi Shankar Prasad, learned Senior Advocate, assisted by Sri Piyush Sinha, learned counsel for the petitioner and Sri Atul Dayal, learned Senior Advocate, assisted by Sri J.P. Singh, learned counsel for the respondents.

2. The petitioner has filed today an impleadment application dated 24.07.2019, to implead the owner of the house, namely, Sri Sanjay Mittal, son of late K.K. Mittal as per detail mentioned in the prayer clause of the application. The application is allowed. Sri Sanjay Mittal is **allowed to be impleaded as respondent No.4.**

3. This writ petition has been filed under Article 226 of the Constitution of India praying for the following relief:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 07.06.2019 (Annexure - '1' to this writ petition) passed by the Prescribed Authority, respondent no.1.

(b) Issue a writ, order or direction in the nature of mandamus commanding upon the respondents not to interfere with the peaceful possession of the petitioner in

premise, House No.111/316 Harsh Nagar, P.S. Najirabad, Kanpur Nagar.

4. Briefly stated facts of the present case are that Vinay Kumar Jain and Vijay Kumar Jain both are the sons of Satya Narain Jain. Sri Satya Narayan Jain was the original owner and landlord of House No.111/316, Harsh Nagar, P.S. Najirabad, Kanpur Nagar. After his death his two sons, namely, Vinay Kumar Jain and Vijay Kumar Jain became owner and landlord of the aforesaid house. Subsequently, Vijay Kumar Jain has sold his share in the aforesaid house to his brother's wife Smt. Rekha Jain by a registered sale deed dated 08.11.2006. Vinay Kumar Jain and his wife Rekha Jain sold the aforesaid entire house to the newly impleaded respondent no.4 by a registered sale deed dated 06.12.2017, registered on 12.12.2017.

5. One Sri Kashi Nath Baijal was the tenant in a portion of the aforesaid house. He had three sons, namely, Pramod Kumar Baijal, Deepak Kumar Baijal and Jyoti Kumar Baijal. During his life time an order dated 24.07.1992 was passed by the Rent Control and Eviction Officer, Kanpur Nagar, declaring the vacancy of the disputed portion of the house in question. Sri Baijal challenged that order in Rent Revision No.148 of 1992 which was allowed by judgment dated 14.09.2004 passed by the Additional District Judge, Court No.1, Kanpur Nagar, concluding as under:-

"Thus, from he above discussions, it is clear that there was no occasion for the R.C. & E.O. to review the order passed by his predecessor for not declaring the vacancy. Once an order was passed for declaring that no vacancy exists then the said order could not have been reviewed by the R.C. & E.O. Furthermore, the property in dispute was not vacant and the revisionist was having the possession of the same in pursuance of the tripartite agreement and his possession was the of a sub-tenant. That after retirement the revisionist paid rent to the then owner and the owner/landlord accepted the rent and there was no vacancy and he became owner. In these circumstances, the revision deserves to be allowed and the order dated 24.7.1992 including the order dated 18.1.92 declaring vacancy and the order dated 23.1.92 ordering allotment in favour of O.P. No.1 deserve to be quashed, and accordingly the revision deserves to be allowed as the R.C. & E.O. has illegally exercised the jurisdiction vested in him in passing the impugned order."

6. From the aforesaid judgment dated 14.09.2004 in Rent Revision No.148 of 1992, it appears that original tenant was State Bank of India and subsequently Kashi Nath Baizal was admitted as a tenant.

7. Sri Pramod Kumar Baizal was the eldest son of the tenant - Sri Kashi Nath Baizal who acquired House No. 10/M/1, Block - 10, Scheme 40, Dabhauli, Kanpur Nagar, in vacant state by a registered sale deed dated 16.01.1984. Subsequently, Pramod Kumar Baizal died on 23.05.2001. His wife Madhu Baizal inherited the said house and got it free hold in her name by free hold deed dated 04.02.2005 and thereafter sold it in the year 2006. Another son, namely, Jyoti Kumar Biazal acquired a Flat No.5, 2nd Floor, Plot No.4, MIG Schme, Patrakarpuram, Kanpur Nagar, jointly with his wife Smt. Maya Baizal on 12.01.2011. He also acquired a very big house bearing Municipal No.62, Surendra

Nagar, behind Durga Model School, Old Rawatpur, Kanpur Nagar, which as per his own written submission filed in case no.14 of 2018 (Shiv Sahay Misra Vs. Deepak Kumar Baizal and others); has been occupied by him after it was vacated by the outgoing tenant - Mrs. Uma Kapoor. According to the petitioner, the son of Jyoti Kumar Baizal is running a Marriage Hall under the name and style of "Dream Creation". Smt. Durga Baizal, wife of the original tenant Kashi Nath Baizal had died on 08.06.2017. Sons of late Kashi Nath Baizal were residing with Kashi Nath Baizal in the disputed house.

8. From the facts briefly noted above it is evident that the family members of the tenant Kashi Nath Baizal, who were residing with him had acquired three residential accommodations in vacant state as mentioned above. On these facts the provisions of Section 12(3) of the Act stand clearly attracted. The disputed house was being used as residential building. The family members of the tenant Kashi Nath Baizal as aforementioned have acquired in vacant state one flat and two houses out of which the house acquired in the year 1984 was sold in the year 2006. Still they have in their possession one flat at Patrakarpuram and a very big house bearing Municipal No.62, Surendra Nagar, Old Ravatpura, Kanpur Nagar and they are in possession of the aforesaid flat and the house which are situate in the same city i.e. Kanpur Nagar where the disputed house is situate. Therefore, by legal fiction as created in sub-section 3 of Section 12 of U.P. Act No.13 of 1972, the tenant shall be deemed to have ceased to occupy the building under his tenancy and the vacancy has occurred by operation of the statutory provisions of sub section 1 of Section 12 of U.P. Act No.13 of 1972.

9. Briefly on the facts as aforenoted, the impugned order dated 07.06.1919 in case no. 14 of 2018 (Shiv Sahay Mishra Vs. Deepak Kumar and others) has been passed by the Rent Control and Eviction Officer/Additional City Magistrate (7) Kanpur Nagar, under Section 12 of U.P. Act No.13 of 1972 in respect of the disputed portion of the House No.111/316, Harsh Nagar, P.S. Najirabad, Kanpur Nagar, which does not suffer from any infirmity for the reasons and facts aforenoted.

10. Learned counsel for the petitioner now submits that a release application being P.A. Case No. 26 of 2009 (Vijay Kumar Jain Vs. Durga Baizal and others) was filed by the erstwhile owner Vijay Kumar in the year 2009 which was allowed by order dated 02.11.2011 against which a Rent Appeal no.155 of 2011 was filed by the tenants which is pending and, therefore, the R.C. & E.O. was having no jurisdiction to pass the impugned order under Section 12 of the U.P. Act No.13 of 1972. I do not find any force in this submission.

11. The provisions of Section 12 of U.P. Act No. 13 of 1972 provides for deemed vacancy by operation of law on happening of certain events as prescribed under the provisions itself. Section 21(1)(a) provides for release of the accommodation on the ground of bonafide need of the landlord. In the present set of facts the release application was filed by the erstwhile owner. There is no prohibition under the U.P. Act No. 13 of 1972 that if an appeal against the order of release under Section 21 (1)(a) of the Act is pending then vacancy under Section 12 of the Act can not be declared. Similar controversy came for consideration before a coordinate bench of this Court in

Sarla Devi (Smt.) Vs. Pushpa Agnihotri (Smt.) 2008 (2) ARC 725 (paras 6 & 7) and following the earlier judgments in **Sukhant Gupta Vs. Rent Control and Eviction Officer, Kanpur and another 1991(2) ARC 445, Naubat Ram Sharma Vs. Addl. District Judge IXth, Moradabad and others, 1987 (2) ARC 121 and Munnilal Vs. Prescribed Authority, Agra and others, 1992 ACJ 789,** it has been held that it is open to the landlord to file an application under Section 21(1)(a) of the Act and also file an application under Section 12(3) of the Act. The landlord can not be compelled to wait till such time as the appeal is decided.

12. For all the reasons aforestated, I do not find any merit in this writ petition. Consequently, the writ petition fails and is hereby **dismissed**.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ A(Rent Control) No. 10463 of 2019

Sanjay Alias Mathura ...Petitioner/Tenant.
Versus
Onkar Arora ...Respondent/Landlord.

Counsel for the Petitioner:
Sri Awadhesh Kumar Malviya.

Counsel for the Respondent:
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A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 34 (1). U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972: Rules 16 and 22. Issuance of commission cannot be to assist a party to collect evidence – it is not a right vested in the litigant. Application for issuance of commission U/S 34 to conduct inspection filed at the stage where parties had closed their evidence. Not permissible at the stage of arguments to fill up lacunae in evidence.

The general provisions regarding the issuance of commission as contained under Order XXVI C.P.C would be applicable to any commission issued for the purposes described under Section 34 (1) (c) by any of the authorities under the Act of 1972. (Para 12)

The object of the provision for issuance of commission cannot be to assist a party to collect evidence or to initiate a roving enquiry. (Para 18)

Precedent followed: -

1.Ranbir Singh Sheoran Vs. VIth Additional District Judge, Muzaffar Nagar &Ors., 1997 (2) ARC 347

2.Son Pal Vs. Vth Additional District Judge, Aligarh &Ors., 1999 (2) ARC 596

3.Avinash Chandra Tewari Vs. ADJ, Court No.3, Unnao &Ors., 2010 (2) ARC 84

4.Hari Kishore Vs. Smt. Subhasini Devi and others, 2019 (134) ALR 817 (E-4)

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri A.K.Malviya, learned counsel for the petitioner.

2. The present writ petition seeks to challenge the order dated 01.05.2019 passed by the Judge, Small Causes Court, Saharanpur in P.A. Case No. 26 of 2016 whereby the application *(Application No. 52-Ga)* filed by the petitioner under Section 34 (1) (c) of U.P. Act No. 13 of 1972 read with Rule 16 of U.P. Urban Buildings (Regulation of Letting, Rent

and Eviction) Rules, 1972 has been rejected.

3. The records of the case indicate that upon an application for release having been filed under Section 21 (1) (a) by the respondent-landlord setting up his bonafide need, P.A. Case No. 26 of 2016 (Onkar Arora Vs. Sanjay alias Mathura) was registered. The parties had put in their appearance and after exchange of pleadings, the evidence of both the parties was closed on 10.07.2018, and after 25.07.2018 the case was being listed for arguments. On 07.03.2019 the arguments on behalf of the applicant-landlord were concluded, and the matter was posted for arguments of the defendant-tenant. It was at this stage that an application *(Application No. 52-Ga)* was filed by the petitioner-tenant for obtaining a demarcation report by Amin Commissioner in respect of certain other properties which were said to be in possession of the applicant-landlord. The aforementioned application came to be rejected by the Prescribed Authority vide order dated 01.05.2019 and thereafter the present petition has been filed.

4. Contention of the counsel for the petitioner is that an application having been made under Section 34 (1) (c) of the U.P. Act No. 13 of 1972 for inspection and issuance of a commission for demarcation of other properties which were in possession of the respondent-landlord the court below has erred in rejecting the said application.

5. It is undisputed that after the parties had put in their appearance and pleadings had been exchanged the evidence of the parties had been closed on 10.7.2018 and after 25.7.2018 dates were being fixed for arguments. The arguments on behalf of the respondent-landlord had been concluded on 7.3.2019 and thereafter the case was posted for arguments on behalf of the defendant-tenant and it was at this stage of the proceedings that the petitioner-tenant had sought a direction for inspection and issuance of a commission under Section 34 (1) (c) of the Act of 1972.

6. In order to appreciate the controversy involved in the present case the provisions of Section 34 (1) of the Act of 1972 may be adverted to.

*"**Section 34 - Power of various authorities and procedure to be followed by them:-** (1) The District Magistrate, the Prescribed Authority or any[Appellate or Revising Authority] shall for the purposes of holding any inquiry or hearing [any appeal or revision] under this Act have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 (Act No. V of 1908), when trying a suit, in respect of the following matters namely,-*

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) receiving evidence on affidavits;

(c) inspecting a building or its locality, or issuing commission for the examination of witnesses or documents or local investigation;

(d) requiring the discovery and production of documents;

(e) awarding, subject to any rules made in that behalf, costs or special costs to any parts or requiring security for costs from any party;

(f) recording a lawful agreement, compromise or satisfaction

and making an order in accordance therewith;

(g) any other matter which may be prescribed."

7. Rule 22 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 which is with regard to the powers under the Code of Civil Procedure 1908 conferred on the District Magistrate, the Prescribed Authority and the Appellate or Revising Authority may also be referred to. Rule 22 is being extracted below.

*"**Rule 22 - Powers under the Code of Civil Procedure, 1908 [Section 34(1)(g)]-**The District Magistrate, the Prescribed Authority or the Appellate or revising authority shall, for the purposes of holding any inquiry or hearing any appeal or revision under the Act, shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters namely,-*

(a) the power to dismiss an application, appeal or revision for default and to restore it for sufficient cause:

(b) the power to proceed ex parte, and to set aside, for sufficient cause, an order passed ex parte:

(c) the power to award costs and special costs to any successful party against an unsuccessful party:

(d) the power to allow amendment of an application, memorandum of appeal or revision:

(e) the power to consolidate two or more cases of eviction by the same landlord against different tenants:

(f) the power referred to in Sections 151 and 152 of the Code of Civil Procedure, 1908 to make any order for ends of justice or to prevent the abuse of the process of the authority concerned."

8. It is seen that Section 34 (1) confers on the District Magistrate, the Prescribed Authority and also the Appellate or Revising Authority, for the purposes of holding an inquiry or hearing in any appeal or revision under the Act of 1972, the same powers as are vested in the Civil Court under the Code of Civil Procedure 1908, when trying a suit, in respect of the specified matters.

9. The object of the aforementioned provision is to lay down the powers of various authorities in respect of certain specified matters and to prescribe the procedure for conducting the proceedings contemplated under the Act. It lays down a procedure to be followed in the proceedings before the District Magistrate, the Prescribed Authority and also the Appellate or Revising Authority while holding an inquiry or hearing an appeal under the provisions of the Act of 1972.

10. The provisions under Section 34 thus provide a complete code in so far as the powers and the procedure to be followed by the Authorities under the Act are concerned. It may however be taken note of that Section 34 of the Act of 1972 and the Rule 22 of the Rules, 1972 are procedural in nature and they cannot be interpreted so as to enlarge the powers conferred on the authorities under the Act. The provisions are clearly to be interpreted in furtherance of their object.

11. Clause (c) of sub-section (1) of Section 34 makes a provision for inspection of a building or its locality or issuing commission. The District Magistrate, the Prescribed Authority or

the Appellate or Revising Authority in exercise of powers under Section 34 (1) (c) can thus issue a commission for the examination of witnesses or documents or local investigation.

12. The powers for inspecting a building or its locality or issuing a commission under Section 34 (1) (c) by the District Magistrate, the Prescribed Authority, or the Appellate or Revising Authority, are to be in the manner as are vested in the civil court under the Code of Civil Procedure 1908. The general provisions regarding the issuance of commission as contained under Order XXVI C.P.C. would thus be applicable to any commission issued for the purposes described under Section 34 (1) (c) by any of the authorities under the Act of 1972.

13. It is well settled that the powers conferred for issuance of commission are discretionary and it is the sole domain of a court to issue a commission or not and application for local inspection or issuance of a commission cannot be claimed as a matter of right by a litigant. The case set up by a litigant is to be proved by him by adducing evidence thereof and the court cannot come to the aid of a litigant for the purpose of collecting evidence. It is only when the Court feels that a spot inspection would be necessary for a proper and effective adjudication of the dispute and to arrive at a just conclusion, it may issue a commission, but it is not a right vested in the litigant.

14. In the case of ***Ranbir Singh Sheoran Vs. VIth Additional District Judge, Muzaffar Nagar &Ors.1,*** it has been held as under.

"The local inspection by Court is made only in those cases where on the evidence led by the parties Court is not able to arrive at a just conclusion either way or where the Court feels that there is some ambiguity in the evidence which can be clarified by making inspection. Local inspection by the Court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence."

15. Again in the case of ***Son Pal Vs. Vth Additional District Judge, Aligarh &Ors.2,*** it has been held as under.

"Whether or not a local inspection or commission is necessary for a just decision of case can only be decided after the Court hears the argument and it is for the Court, thereafter, to decide whether to go for local inspection or to issue commission. Instead of addressing arguments, it appears that the petitioner is causing unwarranted delay in disposal of the appeal."

16. The same view has again been reiterated in the case of ***Avinash Chandra Tewari Vs. A.D.J., Court No. 3, Unnao &Ors.3.*** wherein it was held as follows :-

"To go for local inspection or issue of commission for the proper disposal of the controversy pending is a sole prograive of the Court to decide whether to move the same or not. Hence, it is late in a day to quarrel that it is not mandatory on the part of the Court to issue commission. When an application is moved for the said purpose. The local inspection or commission by Court is made only in those cases where on the evidence led by the parties, Court is not able to arrive at a just conclusion either way or where the Court feels that there is some ambiguity in the evidence which can be clarified by making local inspection or

commission. Local inspection or issue a commission by the Court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence."

17. The aforementioned legal position has been considered in a recent judgment of this Court in ***Hari Kishore Vs. Smt. Subhasini Devi and others4.***

18. In view of the foregoing discussion the legal position, as it emerges, is that in a case where the parties have closed their evidence any application filed for appointment of a commissioner at the stage of arguments would not be permissible as it would amount to permitting the party to fill up lacunae in its evidence. The object of the provision for issuance of commission cannot be to assist a party to collect evidence or to initiate a roving enquiry.

19. In the facts of the present case, the proceedings arising out of the release application filed by the respondent-landlord being at an advanced stage before the Prescribed Authority where evidence of the parties had been closed and the arguments on behalf of the landlord had also been concluded and dates were being fixed for evidence of defendant-tenant, the conclusion drawn by the Prescribed Authority that the application for issuance of commission under Section 34 (1) (c) had been filed at the belated stage only with a view to delay the proceedings cannot be faulted with.

20. Counsel for the petitioner has not been able to point out any material error or illegality in the order impugned which may warrant interference.

21. The petition is devoid of merits and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A(Rent Control) No. 9936 of 2019

Ram Chandra And Another
...Tenants/Petitioners
Versus
Bipin Kumar Agnihotri
...Landlord/Respondent

Counsel for the Petitioners:
Sri Ramendra Asthana.

Counsel for the Respondent:
Sri Bhanu Bhushan Jauhari, Sri Pramod Kumar Srivastava.

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Sections 21(1)(a) & (b), 34(1)(c), Civil Procedure Code, 1908: Order 41 Rule 27, Order 26 Rule 9. The power for issue of Commission is discretionary.

B. Additional evidence –only if the conditions laid down in Order 41 Rule 27, CPC are found to exist – cannot be permitted to be adduced to patch up the weak points in the case.

Respondent's application for release was allowed vide judgment dated 27.02.2018. Affirmed vide order dated 16.04.2019 in appeal. The tenants-petitioners' application for issue of commission was rejected during the pendency of appeal. The present petition, challenging both the orders, was dismissed and the High Court

Held:-Petitioners failed to justify the demand for issue of commission. Filed the application to delay the disposal of appeal. The power

conferred upon the Court for the issue of Commission under S.34(1) (c) of U.P. Act No. 13 of 1972 read with Order 26 Rule 9 is discretionary.
(Para 8 and 9)

C. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case. (Para 12)

Precedent followed: -

1.Avinash Chandra Tiwari Vs. ADJ, 2010 (2) ARC 84 (Para 10)

2.Malyalam Plantations Ltd. Vs. State of Kerala, (2010) 13 SCC 487 (Para 12)

3.Union of India Vs. Ibrahim Uddin, (2010) 8 SCC 148 (Para 13)

4.K. Venkataramiah Vs. A. Seetharama Reddy &Ors., AIR 1963 SC 1526 (Para 13)

5. The Municipal Corporation of Greater Bombay Vs. Lala Pancham &Ors., AIR 1965 SC 1008 (Para 13)

6. Soonda Ram &Anr. Vs. Rameshwarlal &Ors., (1975) 2 SCC 698 (Para 13)

7. Syed Abdul Khader (Para 13)

8. Haji Mohamed Ishaq (Para 13)

9. State of U.P. (Para 13)

10. S. Rajagopal(Para 13)

Precedent distinguished: -

1.New Meena Sahkari Awas Samiti Ltd. Lko Thru Its President Vs. Addl. District Judge, Court No. 2, Lucknow &Ors., 2016 (2) ARC 133 (Para 11)

2. Jaipal Singh Vs. Smt. Sudha Rani, 2018 (3) ARC 800 (Para 11) (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ramendra Asthana, learned counsel for the tenants/petitioners and Sri Pramod Kumar Srivastava, learned counsel for the landlord-respondents.

2. Briefly stated facts of the present case are that undisputedly the respondent is the owner and landlord of the disputed building which is part of T.P. No.353, Sadar Bazar, Shahjahanpur. This portion was let out to the ancestor of the petitioner probably in the year 1963. The tenancy was succeeded by the petitioners which is for a monthly rent of Rs.200/-. The respondent-landlord is an Advocate by profession. His residence is undisputedly in a narrow lane where clients find it difficult to approach him. He wants to establish his chamber at the suitable place. The disputed property is situate on the main road. To establish his chamber/office the respondent-landlord filed an application dated 01.07.2011, under Section 21(1)(a) of U.P. Act No.13 of 1972 for release of the disputed accommodation. Parties led their evidences both oral and documentary. The release application being P.A. Case No.2 of 2011 (Bipin Kumar Agnihotri Vs. Ram Chandra and another) was allowed and the case was decreed by judgment dated 27.02.2018, passed by Civil Judge (S.D.), Shahjahanpur. Aggrieved with this judgment, the tenants-petitioners filed a P.A. Civil Appeal No.19 of 2018 (Ram Chandra and another Vs. Bipin Kumar Agnihotri), which has been decided by the impugned judgment dated 16.4.2019, passed by the District Judge, Shahjahanpur. During pendency of the aforesaid appeal, the tenants-petitioners moved an application 14 Ga dated 15.10.2018, under Order XXVI Rule 9 C.P.C. for issue of commission to find out

the distance in meters between the residential house of the respondent-landlord and the disputed house and the length and width of the disputed house and name of tenants. This application was rejected by the appellate court by District Judge, Shahjahanpur by order dated 6.12.2018, against which the tenants-petitioners filed Writ - A No. 2256 of 2019 (Ram Chandra and another Vs. Bipin Kumar Agnihotri) which was disposed of by order dated 13.02.2019, observing as under:-

"Accordingly, without examining the validity of the impugned order at this stage, the petition is disposed of with liberty reserved in favour of the petitioners to challenge the impugned order alongwith the final order passed in appeal."

3. Now, the tenants-petitioners has filed the present writ petition under Article 226 of the Constitution of India praying for the following relief:-

"(a) call for record of the case and issue a writ, order or direction in the nature of certiorari quashing judgments and orders dated 16.04.2019 (contained in Annexure No.13 to the writ petition passed by the learned District Judge, Shahjahanpur, dismissing with costs P.A. Civil Appeal No.19 of 2018 (Ram Chandra and another Vs. Vipin Kumar Agnihotri) and 27.02.2018 (contained in Annexure No.7 to the writ petition passed by the learned Prescribed Authority/Civil Judge, Senior Division, Shahjahanpur allowing Release Application under Section 21 of the U.P. Act No.XIII/1972 registered as P.A. Case No.02 of 2011 (Vipin Kumar Agnihotri Vs. Ram Chandra and another)."

4. Sri Ramendra Asthana, learned counsel for the tenants/petitioners submits as under:-

(i) The provision of Order XLI Rule 27 and Order XXVI Rule 9 C.P.C. have not been followed by the court below while rejecting the application for commission (paper No.14 Ga) by order dated 06.12.2018. The application for issue Commission could have been decided only at the time of final hearing of the appeal and not otherwise. In support of his submissions, reliance is placed on the judgment of *New* **Meena Sahkari Awas Samiti Ltd. Lko Thru Its President Vs. Addl. District Judge, Court No.2, Lucknow &Ors. 2016(2) ARC 133 (Para 34) and Jaipal Singh Vs. Smt. Sudha Rani 2018 (3) ARC 800 (para 11).**

(ii) Release application does not disclose that the applicant possess sufficient finance for construction of the disputed building which was alleged to be in a dilapidated condition.

(iii) While recording the finding of *bonafide* need the court below has failed to consider the aspects as provided under Section 21(1)(b) of U.P. Act No.13 of 1972 read with Rules 17 of the Rules. The landlord-respondent has alleged in his release application that the disputed property is in a dilapidated condition.

5. Sri Pramod Kumar Srivastava, learned counsel for the landlord-respondents supports the impugned judgment.

6. I have carefully considered the submissions of learned counsels for the parties.

7. The first submission of learned counsel for the tenants-petitioners has no merit. It is undisputed that the release application was filed in the year 2008 and it was allowed by the impugned judgment dated 27.2.2018. Before the Prescribed Authority both the parties have led

number of documentary evidences including large number of photographs to demonstrate the location of the disputed property and the building where the respondent is residing. No application for issue of commission was moved before the Prescribed Authority. After about 8 years of the institution of the release application and that too at the appellate stage the tenants-petitioners moved an application for issue of commission in which even no cause has been shown for issue of commission. The only reason stated in the aforestated application dated 16.10.2018 is in paragraph 2, which is reproduced below:-

''2– यह कि विद्वान अवर न्यायालय के समक्ष वादग्रस्त मकान व वादी के निवास मकान वाद स्थिति वाद रूप से बतायी गयी व वाद तहसील में बतायी गयी किन्तु विद्वान अवर न्यायालय के समक्ष वजरिये कमीशन स्थिति स्पष्ट ना होने के कारण सही निर्णय पर जहां पहुंचा जा सकता है।''

8. From perusal of the application for commission (paper No.14 Ga) it is clear that the tenants-petitioners has even completely failed to disclose any reason to justify his demand for issue of commission. The aforesaid application was rejected by the appellate court by order dated 06.12.2018 in which detailed reason has been recorded for rejection. The appellate court has also recorded a finding that in the release application the boundaries of the disputed house and the names of tenants are mentioned. The appellate court also observed that 25 photographs supported by an affidavit were filed by the landlord-respondent before the Prescribed Authority with respect to both the houses to show its on spot situation. The appellate court also observed that the tenants-petitioners has filed the application for issue of commission only to delay the disposal of appeal. Order XXVI Rule 9 C.P.C. provides for issue of commission to make local investigation if in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, then the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

9. The legal position regarding issue of commission has been well settled. **The power conferred upon the Court for issue of Commission under Section 34(1) (c) of U.P. Act No. 13 of 1972 read with order XXVI Rule 9 C.P.C. is discretionary. The local inspection or Commission by Court is made only in those cases where evidence have been led by the parties, but the Court is not able to arrive at a just conclusion either way or where the Court feels that there is some ambiguity in the evidence which can be clarified by making local inspection or commission. Such inspections are made to appreciate the evidence already on record and the Court is not expected to visit the site for collecting evidence.**

10. In the case of **Avinash Chandra Tiwari Vs. ADJ 2010(2) ARC 84** the Lucknow bench of this court referred to several decisions on the question of issue of commission and held as under:

"11. To go for local inspection or issue of commission for the proper disposal of the controversy pending is a sole progrative of the Court to decide

whether to move the same or not. Hence, it is late in a day to quarrel that it is not mandatory on the part of the Court to issue commission. When an application is moved for the said purpose. The local inspection or commission by court is made only in those cases where on the evidence led by the parties, Court is not able to arrive at a just conclusion either way or where the court feels that there is some ambiguity in the evidence which can be clarified by making local inspection or commission. Local inspection or issue a commission by the court cannot be claimed as of right by any party. Such inspections are made to appreciate the evidence already on record and Court is not expected to visit the site for collecting evidence. (See Randhir Singh Sheoran Vs. 6th Additional District Judge, 1997(2) JCLR 860 and Radhey Shyam Vs. A.D.J., Court no. 13, Lucknow and others, [2010(2) A.D.J., 758].

12. Further, in the present case as stated herein above, the opposite party no. 1 on the basis of the material facts on record given a categorical finding that at this stage, it is not necessary to issue commission, accordingly, rejected the application for issue of the Advocate/Commissioner, moved by the petitioner. Further the court below held that if the application for issue of commission is allowed the same will linger the matter unnecessary, as appeal is pending since the year 2006. The said view taken by the opposite party no. 1 is in accordance with law as laid down by this Court in the case of Sonpal Vs. 4th Additional District Judge, Aligarh and others, 1992 2 ARC, 596.

13. In the case of Smt. Shamshun Nisha Vs. Ist Additional District Judge, Lucknow and others 1992, (1) ARC page 423, it is held as under :

"By means of the present writ petition, the petitioner challenges the order, dated 13.05.1991, passed by Ist Additional District Judge, Lucknow, contained in Annexure No. 6 by which the petitioner's request for local inspection was rejected by the appellate Court. The appellate Court pointed out that the petitioner had been given sufficient opportunity to rebut the evidence of the expert. However, the fact is not disputed that the appeal is still pending and in appeal only an application for local inspection of the site by the Advocate Commissioner has been rejected. Therefore, in my opinion, the said order cannot be challenged in the writ petition."

14. So far as, the judgment which is relied upon by the learned counsel for the petitioner, the M/s Harihar Sugandh (p) Ltd, Anandi Das Kannauj through it's M.D. Vs. Add. Civil Judge (Senior Division), Court no. 3, Kanpur Nagar [2004(57) ALR 224], (435) Special Duty Collector LA.(Supra) and Radheshyam Rastogi (supra) are not applicable in view of the peculiar facts and circumstances of the instant case.

15. Further in the case of Anandi Das Kannauj through it's M.D. Vs. Add. Civil Judge (Senior Division), Court no. 3, Kanpur Nagar [2004(57) ALR 224], it was held that if an application for issue a commission is rejected then, the same can not be res-judicata for moving another application for issue of the commission for collection of evidence, and in the case of Okhla Enclave Plot holder Welfare Association Vs. Union of India and Others(2009 LAR 51(SC) the Hon'ble Supreme Court after hearing and examining issues involved in the present case deemed fit to direct appointment of Commissioner, however, in the present case the court below on the

basis of the material evidence on record, come to the conclusion that there was no necessity for issue of the commission so the petitioner cannot derive any benefit form the above said judgments.

16. Accordingly, as it is a sole domain of the Court to issue a commission or not and the local inspection or commission can not be claimed as a matter of right by a party, so there is neither any illegality nor infirmity in the order under challenge.

17. For the foregoing reason, the present writ petition filed by the petitioner lacks merit and is dismissed."

11. The judgement in the case of **New Meena Sahkari Awas Samiti Ltd. Lko Thru Its President (supra)** relied by learned counsel for the tenants-petitioners is distinguishable on facts. In paragraph 7 of the aforesaid judgment as reported in ARC it has been noted that it was a suit for permanent injunction and the dispute was as to whether the property in dispute is existing over Khasra No.222 as claimed by the petitioner or over *Khasra* Nos.221 and 223 as claimed by the respondent/defendant nos.2 & 3. There was no dispute of the ownership of the concerned parties with respect to the aforesaid three *Khasra* plots. In that situation the issue of commission was found to be necessary. Such are not the facts of the present case. The judgment in case of **Jaipal Singh (supra)** is also distinguishable on facts which is evident from the fact noted in paragraph 7 of the judgment. That was the case where the application moved by the petitioner of that petition was referable to Order XLI Rule 27 C.P.C. Hear is the case where the application has been moved by the tenants-petitioners at the appellate stage under Order XXVI Rule 9 C.P.C. and that too without disclosing any relevant cause to ask for issue of commission.

12. In the case **Malyalam Plantations Ltd. vs. State of Kerla, (2010) 13 SCC 487, (Para-17),** Hon'ble Supreme Court considered the scope of Order XLI Rule 27 C.P.C. and held as under:-

"It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. *Adducing additional evidence is in the interest of justice. Evidence relating to subsequent happening or events which are relevant for disposal of the appeal, however,* ***it is not open to any party, at the stage of appeal, to make fresh allegations and call upon the other side to admit or deny the same. Any such attempt is contrary to the requirements of Order 41 Rule 27 of CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case."***

(Emphasis supplied by me)

13. In the case of **Union Of India vs Ibrahim Uddin, (2010) 8 SCC 148,** (Paras-36 to 41), Hon'ble Supreme Court reiterated the principles of Order XLI Rule 27, C.P.C. laid down by it in its earlier decisions in the case of **K. Venkataramiah v. A. Seetharama Reddy &Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham &Ors., AIR 1965 SC 1008; Soonda Ram &Anr. v. Rameshwaralal &Anr., (1975) 3 SCC 698: AIR 1975 SC 479; Syed Abdul Khader v. Rami Reddy &Ors., (1979) 2 SCC 601 : AIR 1979 SC 553, Haji**

Mohammed Ishaq Wd. S. K. Mohammed &Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798, State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; S. Rajagopal v. C.M. Armugam &Ors., AIR 1969 SC 101 and held as under:-

"36. **The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal**. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. **The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist**. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself.

37. **The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.**

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. **This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case.** It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. **Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.**

40. **The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule.** The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with

the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment."

(Emphasis supplied by me)

14. Thus, the first submission of learned counsel for the tenants-petitioners with respect to the issue of commission deserves to be rejected and is hereby rejected. The order dated 06.12.2018, passed by the appellate court rejecting the application 14 Ga for issue of commission does not suffer from any error of law or facts.

15. The 2nd and 3rd submission of learned counsel for the tenants-petitioners has also no merits. Reasons are that the release application was filed by the landlord-respondent under Section 21(1)(a) of U.P. Act No.13 of 1972 on the ground of his *bonafide* need. Undisputedly, the landlord-respondent is an Advocate by profession and his residence is in a narrow lane and away from main road. The disputed property is situated on the main road. He wants to establish his office at a suitable place for the purposes of his legal profession. He established his *bonafide* need. Both the courts below have recorded concurrent finding of fact based on consideration of relevant evidences on record that the landlord-respondent is in *bonafide* need of the disputed property and the comparative hardship is in his favour. These findings of fact can not be interfered with writ jurisdiction under Article 226 of the constitution of India. No perversity in the findings of fact recorded in the impugned judgment could be pointed out by learned counsel for the tenants-petitioners. Even no argument has been raised before me in this regard.

16. For all the reasons aforestated, I do not find any merit in this petition. Consequently, the writ petition fails and is hereby **dismissed with costs.**

17. After the judgment was dictated in open court, Sri Ramendra Asthana, learned counsel for the tenants/petitioners states on instructions that the tenants-petitioners undertake to vacate the disputed house and handover its vacant and peaceful possession to the landlord-respondent on or before 15.10.2019. He further states on instruction that the tenants-petitioners shall deposit the entire decretal amount, if any, and an additional sum of Rs.10,000/- and shall also submit an undertaking with regard to the vacating and handing over possession to the disputed property to the respondent-landlord on or before 15.10.2019, within three weeks before the court below and in that event the tenants-petitioners may not be evicted till 15.10.2019.

18. Sri Pramod Kumar Srivastava, learned counsel for the landlord-respondent accepts the statement made on behalf of tenants-petitioners but submits that in the event the conditions are not satisfied within the stipulated period then the protection may not be extended to petitioner and in the event the conditions are complied with but vacant possession of the disputed property is not handed over by the tenant-petitioner to the landlord-respondent on or before 15.10.2019 then in that event the tenants-petitioners may be directed to pay sum of

Rs.1000/- per day for each day of default in vacating and handing over of vacant and peaceful possession to the landlord-respondent.

19. Considering the statement made by learned counsels for the parties as noted above, it is provided that in the event the tenants-petitioners submit an undertaking to the aforesaid effect before the court below within three weeks from today and also deposit the entire decretal amount and an additional sum of Rs.10000/- within the same period then in that event the tenants-petitioners shall not be evicted from the disputed property till 15.10.2019. In the event the conditions are not satisfied then the protection as given above to the tenants-petitioners shall not continue. In the event the conditions of the aforesaid undertaking are complied with but tenants-petitioners do not vacate and hand over vacant and peaceful possession of the disputed property to the landlord-respondent on or before 15.10.2019 then without prejudice to other consequences which may follow, the tenants-petitioners shall also pay a sum of Rs.1000/- per day for each day of default in not vacating and not handing over the vacant and peaceful possession to the landlord-respondent after 15.10.2019.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2019

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A(Rent Control) No. 10232 of 2019

Surendra Singh ...Defendant-Petitioner.
Versus
Additional District Judge CourtNo.11,Muzaffarnagar And Ors.
...Plaintiffs-Respondents.

Counsel for the Petitioner:
Sri Nipun Singh

Counsel for the Respondents:
Sri Sumit Daga

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 21(1)(a)
Landlord is the best judge of his need – has a right to expand his business – Court cannot interfere in concurrent findings of fact regarding bonafide need established before authorities

Appeal against order of eviction was dismissed by the impugned order dated 17.04.2019. Dismissing the petitioner tenant's present petition, the High Court. Held:- The financial resources of the landlord-respondents to construct the commercial complex could not be disputed by the tenant- petitioner.
(Para 10)

Precedent followed: -
1.Smt. Shanti Devi and another Vs. (Para 12)

2. S. Venugopal Vs. A Karruppusami and another(Para 13)

3. R.V.E. Venkatachala Gounder Vs. Venkatesha Gupta and Others, (Para 16)

4. Ranjeet Singh Vs. Ravi Prakash, (Para 17)

5. Mohd. Ayub and another Vs. Mukesh Chand, (Para 18)

6. Nidhi Vs. Ram Kripal Sharma (Dead) through legal representatives, (Para 19)

7. Vijay Kumar Gupta and another Vs.(Para 20)

8. Smt. Shamim Begum and others (Para 21)

9. Praveen Kumar Jain Vs. Kamal Gupta (Para 22)

10. Manish Mehra Vs. Ram Lal Gupta and another, (Para 23)

Precedent distinguished: -

1.Mattulal Vs. Radhe Lal, AIR 1974 SC 1596, (Para 24)

2. Deena Nath Vs. Pooran Lal, (2001) 5 SCC 705
(Para 25) (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1- Heard Sri Nipun Singh, learned counsel for the tenant-petitioner and Sri Sumit Daga, learned counsel for the plaintiffs-respondents.

2- Briefly stated facts of the present case are that undisputedly, the petitioner was a tenant of a shop situate in Bagh Keshodas, Roorki Road, Muzaffarnagar. The total area of the property was 2654 Sq. Mts. On the front portion of the aforesaid property there were some shops which were let out. The respondent-landlord wanted to construct a commercial complex over the disputed property. For this purpose, he got prepared the map and also obtained requisite permission. The front portion of the aforesaid property was occupied by seven shops. The petitioner's shop is one of those seven shops. The respondent-landlord/plaintiff has filed P.A. Cases for eviction of the tenants. He filed P.A. Case No.12 of 2009 against the petitioner-tenant on 1.10.2009, under U.P. Act 13 of 1972.

3- In paragraph-10 of their application, the plaintiff-landlord/respondents specifically stated that the construction of ground floor over the aforesaid property has been completed and the plaintiffs are ready and undertake to provide one shop to the petitioner-tenant in place of the disputed shop within 6 to 12 months after the disputed shop is vacated and in the shop so offered, the petitioner-tenant may carry on his business of electric goods. It was further stated that in the event, the petitioner-tenant finds that the shop offered is not appropriate then he may search for a suitable shop within 3 to 6 months, which he may get at Roorki and Ansari roads, where several shops have been built. He also named several markets where the shops were available.

4- The Prescribed Authority allowed the aforesaid P.A. case on two grounds - firstly, the disputed shop is in dilapidated condition and secondly, there is bonafide need of the plaintiff-landlord/respondent. The aforesaid P.A. case was allowed by the Civil Judge (Senior Division), Muzaffarnagar by judgment dated 18.8.2017.

5- Aggrieved with this judgment, the petitioner-tenant filed Rent Control Appeal No.6 of 2017 (Surendra Singh v. Alok Swaroop and others), which was dismissed by impugned judgment dated 17.4.2019 passed by the Additional District Judge (Court No.11), Muzaffarnagar. The appellate court set aside the order dated 18.8.2017 passed by the Prescribed Authority and upheld the findings of the Prescribed Authority on the ground of bonafide need. In support the appellate court relied upon the judgments of Hon'ble Supreme Court in **R.V.E. Venkatachala Gounder v. Venkatesha Gupta and others, (2002)4 SCC 437 and S. Venugopal v. A Karruppusami and another, (2006) 4 SCC 507 (Paragraph 10 and 11)**.

6- Aggrieved with the aforesaid two judgments the petitioner-tenant has filed the present writ petition under Article 226 of the Constitution of India.

7- Learned counsel for the petitioner-tenant submits that the plaintiff-landlord/respondents were in need of the disputed shop only for the purposes of passage to the commercial complex constructed by them and since some of the shops situated on the front portion has either been vacated by Court's judgment or by compromise, therefore, the need of the plaintiff-appellant/respondents stands satisfied.

8- Learned counsel for the plaintiff-landlord/respondents supports the impugned judgments.

9- I have carefully considered the submissions of the learned counsels for the parties and perused the impugned judgments.

10- Admittedly, there were seven tenants occupying the front portion of the property in question including the tenant-petitioner. These front portion (seven shops) situate on Roorki Road (G.T. Road) were single storied. According to the tenant-petitioner he is a tenant of one of the shops at a monthly rent of Rs.115/-. In para-1 of the release application dated 1.10.2009 it was stated that these shops were constructed about 70-75 year ago. The total area of the property in question is about 2,654 Sq. Mts. The landlord-respondents wanted to construct a commercial complex over the aforesaid land. For this purpose, they got the map sanctioned from Muzaffar Nagar Development Authority. They filed release application for release of all the shops. The release application dated 1.10.2009 filed against the tenant-petitioner was registered as P.A. Case No.12 of 2009. The release applications filed against other tenants being P.A. Case No.230 of 2009, **P.A Case No.14 of 2009,** P.A. Case No.15 of 2009, P.A. Case No.16 of 2009 and P.A. Case No.18 of 2009, were allowed and the shops were vacated. The financial resources of the landlord-respondents to construct the commercial complex could not be disputed by the tenant-petitioner. The landlord-respondents offered a shop to the tenant-petitioner on the ground-floor of the aforesaid commercial complex as an alternative accommodation to the tenanted shop. However, the tenant-petitioner has not accepted that offer and did not vacate the shop. The tenant-petitioner is the only tenant occupying a shop in the front portion of the aforesaid commercial complex facing to Roorki-Meerut road. The tenant-petitioner has neither accepted the offered shop at the ground-floor nor arranged any alternative accommodation, although the release application was filed in the year 2009.

11- Both the courts below have recorded concurrent findings of fact based on consideration of relevant evidences on record that the landlord-respondents are in bonafide need of the disputed shop and comparative hardship is in their favour.

12- In **Smt. Shanti Devi and another v. Swami Ashanand and another, (2003) 2 SCC 26 (Para-5),** Hon'ble Supreme Court interpreted the provisions of Section 21(1)(a) of U.P. Act 13 of 1972 and held that this provision is very widely worded. Demolition and reconstruction for occupation by landlord himself either for residential purpose or for purposes of any profession, trade or calling is permissible. The words 'profession, trade or calling' are very wide and include all activities wherein a person may usefully and/ or gainfully engage himself.

13- In **S. Venugopal v. A Karruppusami and another, (2006) 4 SCC 507 (Paragraph 11, 12 and 13)**, Hon'ble Supreme Court considered bonafide need of the landlord on the facts that the disputed property has acquired commercial value and, therefore, the the landlord wished to demolish the old single storey structure and to construct a multi-storeyed building which may fetch him higher rent and has applied to the competent authorities and got the plans approved, and held that the landlord's bonafide need is true.

14- The tenant-petitioner has not disputed the fact even before this Court that the landlord-respondents have offered him a shop on the ground-floor for vacating the disputed shop and that the commercial complex as per sanctioned map has already been constructed by the landlord-respondents over the land in question and the only shop is of the petitioner which obstructed the front portion of the newly constructed commercial complex. Under the circumstances, the bonafide need of the landlord-respondents stands proved under Section 21(1)(a) of U.P. Act 13 of 1972 and also in view of the law laid down by Hon'ble Supreme Court in the case of **Smt. Shanti Devi and another (supra).** Under the circumstances, the conduct of the tenant-petitioner in not vacating the shop, cannot be appreciated, inasmuch as he is the only tenant, who is obstructing better beneficial use of the commercial complex by the landlord-respondents.

15- In **S. Venugopal v. A Karruppusami and another, (2006) 4 SCC 507 (Paragraph 11),** Hon'ble Supreme Court held as under :

"11. In the instant case, we find that the property owned by the landlord, whatever may have been its value in the past, has acquired commercial value and, therefore, the landlord wishes to demolish the old single storey structure and to construct a multi-storyed building which may fetch him higher rent, apart from serving his own needs. The landlord had already applied to the competent authorities and got the plans approved. Taking into consideration all these reasons, we are convinced that the landlord bona fide intends to demolish the old building and to construct a new one. Raising funds for erecting a structure in a commercial center is not at all difficult when a large number of builders, financiers as well as banks are willing to advance funds to erect new structures in commercial areas. This is apart from the fact that the landlord has himself indicated that he was willing to invest a sum of Rs. One and a half lakh of his own, and he owns properties and jewellery worth a few lakhs".

16- In **R.V.E. Venkatachala Gounder v. Venkatesha Gupta and others, (2002)4 SCC 437 and S. Venugopal v. A Karruppusami and another, (2006) 4 SCC 507 (Paragraph 11 and 12),** Hon'ble Supreme Court held as under:

"11.We may refer to two decisions of Madras High Court. In S. Raju and others Vs. K. Nathamani, 1998 (3) LW 214, the Constitution Bench decision has been followed and it has been held that when new buildings with modern amenities have come up in that locality, naturally the building in question may become unsuitable to the surroundings and a liability, in its present condition, to the landlord. Keeping the building in the same condition will amount to asking the landlord to shoulder

the burden for ever. Tenants may be satisfied with the present state of the building since they have to pay only a nominal rent but the Rent Control Legislation, beneficial to the landlord and the tenant both, should be interpreted in that way. For the purpose of proving his bonafides the landlord need only show that he has got the capacity to raise the necessary funds. In A.N. Srinivasa Thevar Vs. Sundarambal alias Prema W/o. Chandrakumar, 1995 (2) LW 14, even before the decision by Constitution Bench in Vijay Singh's case was available, it was held in the light of the decision in P. Orr & Sons that the availability of the **following factors was sufficient to make out a case of bona fide requirement under Section 14(1)(b): "(a) Capacity of the landlord to demolish and to reconstruct is undisputed and also proved satisfactorily; (b) The size of the existing building occupies only one third of the site, leaving two third behind vacant and unutilized; (c) Demand for additional space:** The demised premises is situated in a busy locality. Therefore, there is a great demand for additional space in the locality which could be met by demolishing the existing small building and putting up a larger building providing for future development vertically also, by building pucca terraced building; **(d) The economic advantage:** A modern construction of a larger building shall certainly yield better revenue and also appreciate in value, when compared to the asbestos sheet roofed old building." In that case, it was observed that the existing building was an old, out-model asbestos sheet building proposed to be replaced with better and modern building which would provide for better quality accommodation to the needs of the present days as the preservation of such building in a busy locality of a town shall not only be an eyesore but also against the souring public demand for additional space. Viewed from the angle of general interest of the public which, according to the decision in P. Orr & Sons is one of the considerations, it was observed that a big site should yield to a larger modern building with an increased and enlarged accommodation having better facilities to solve the ever increasing demand for more space. Stalling growth and development for the sake of one tenant who is in occupation of an old model building constructed with mud and mortar and asbestos sheets occupying only one third of the site was held to be not conducive to public interest. We approve the statement of law and the approach adopted by Madras High Court in both the abovesaid decisions. The structural and physical features and the nature of the construction of the building cannot be ignored. Even in P. Orr & Sons, this Court was of opinion that various circumstances, such as the **capacity of the landlord, size of the existing building, the demand for additional space, the condition of the place, the economic advantage and other factors, justifying investment of capital on reconstruction may be taken into account by the concerned authorities, while considering the requirement for reconstruction of the building as the essential and overriding consideration in the general interest of the public and for the protection of the tenant from unreasonable eviction".**

"12. Reverting back to the case at hand, we find that the six tenants are not in full occupation of the entire space available. The landlord proposes to construct a new and modern building in

busy commercial locality of a rising city. The landlord requires a part of the newly constructed building for his own personal use and such part of the newly constructed building as would be in excess of his own requirement he is willing to let out at current rate of rent to his tenants which would obviously augment his earnings. The newly constructed double storeyed building, would certainly provide much more total accommodation than what is available. In such circumstances the offer of the tenant that they are prepared to pay the rent at the current rate, the one which the landlord expects on reconstruction, becomes irrelevant and should not have prevailed with the High Court".

17- In **Ranjeet Singh v. Ravi Prakash, (2004) 3 SCC 682 (Paragraph-4),** Hon'ble Supreme Court considered the scope of Article 226 and 227 of the Constitution of India in matters arising from the application under Section 21 (1)(a) and (b) of U.P. Act No.13 of 1972, and held as under:

"4. Feeling aggrieved by the judgment of the Appellate Court, the respondent preferred a writ petition in the High Court of Judicature at Allahabad under Article 226 and alternatively under Article 227 of the Constitution. It was heard by a learned Single Judge of the High Court. The High Court has set aside the judgment of the Appellate Court and restored that of the Trial Court. A perusal of the judgment of the High Court shows that the High Court has clearly exceeded its jurisdiction in setting aside the judgment of the Appellate Court. **Though not specifically stated, the phraseology employed by the High Court in its judgment, goes to show that the High Court has exercised its certiorari jurisdiction for correcting the judgment of the Appellate Court. In Surya Dev Rai Vs. Ram Chander Rai &Ors. - (2003) 6 SCC 675, this Court has ruled that to be amenable to correction in certiorari jurisdiction, the error committed by the Court or Authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging into a long- drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error.** As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in Surya Dev Rai (Supra) that **the jurisdiction was not available to be exercised for indulging into re- appreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal.** The High Court has itself recorded in its judgment that "considering the evidence on the record carefully" it was inclined not to sustain the judgment of the Appellate Court. On its own showing, the **High Court has acted like an Appellate Court which was not permissible for it to do under Article 226 or Article 227 of the Constitution".**

18- In **Mohd. Ayub and another v. Mukesh Chand, (2012)2 SCC 155 (Paragraph 15),** Hon'ble Supreme Court held as under:

"15. It is well settled the landlord's requirement need not be a dire necessity. **The Court cannot direct the landlord to do a particular business or imagine that he could profitably do a**

particular business rather than the business he proposes to start. It was wrong on the part of the District Court to hold that the appellants' case that their sons want to start the general merchant business is a pretence because they are dealing in eggs and it is not uncommon for a Muslim family to do the business of non-vegetarian food. **It is for the landlord to decide which business he wants to do. The Court cannot advise him. Similarly, length of tenancy of the respondent in the circumstances of the case ought not to have weighed with the courts below".**

19- In the case of **Nidhi v. Ram Kripal Sharma (Dead) through legal representatives, (2017)5 SCC 640 (Paragraph 14 and 16),** Hon'ble Supreme Court held as under:

"14. The legislations made for dealing with such landlord-tenant disputes were pro-tenant as the court tends to bend towards the tenant in order to do justice with the tenant; but in the process of doing justice the Court cannot be over zealous and forget its duty towards the landlord also as ultimately, it is the landlord who owns the property and is entitled to possession of the same when he proves his bonafide beyond reasonable doubt as it is in the case before this Court".

16. Ordinarily, rights of the parties stand crystallised on the date of institution of the suit. However, the court has power to take note of the subsequent events and mould the relief accordingly. Power of the court to take note of subsequent events came up for consideration in a number of decisions. In Om Prakash Gupta vs. Ranbir B. Goyal (2002) 2 SCC 256, this Court held as under:-

"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. Motor & General Traders (1975) 1 SCC 770 this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv)

the rules of fairness to both sides should be scrupulously obeyed".

20- In **Vijay Kumar Gupta and another v. Smt. Sumitra Devi and others, 2014(1) ARC 371 (Paragraph 20),** a Bench of this Court held that it is settled law that the **landlord is the best judge of his need and this Court could not interfere in concurrent findings of fact regarding bonafide need establish before the Prescribed Authority and the appellate authority** by the respondent-landlord. **This Court can interfere only when there is a perversity in the findings recorded or when the courts below have acted without jurisdiction or far in excess of jurisdiction.**

21- In **Smt. Shamim Begum and others v. Dinesh Kumar and others, 2019(1) ADJ 160 (Paragraph Nos. 11 and 12),** a Bench of this Court held that a **landlord has got a right to expand his business and in case, he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlord as to how he should specify his need.** The Court cannot act as a rationing authority and force the landlord not to expand his business or carry on in the same shop.

22- In **Praveen Kumar Jain v. Kamal Gupta, 2019(1) AWC 310 (Paragraph 13)**, a Bench of this Court observed that the **landlord was sole person who could have taken a decision as to which shop fulfils his need and the needs of his family. The tenant or for that matter even the Court could not guide the landlord as to which accommodation he should view to fulfil his need and which accommodation he shall not use.**

23- In **Manish Mehra v. Ram Lal Gupta and another, 2016 (1) ARC 135 (Paragraph No.6),** a Bench of this Court held that **it is the choice of the landlord to use a particular portion of the building for particular purpose.** The tenant cannot be guide in this respect.

24- The judgment in the case of **Mattulal v. Radhe Lal, AIR 1974 SC 1596 (Para-12)** heavily relied by the learned counsel for the tenant-petitioner does not support the case of the tenant-petitioner.

In the said case Hon'ble Supreme Court held that-

"Mere assertion on the part of the landlord that he requires non-residential accommodation in the occupation of the tenant for the purpose of starting or continuing his own business is not decisive. It is for the Court to determine the truth of the assertion and also whether it is bonafide. **The test which has to be applied is an objective test and not a subjective one and merely because a landlord asserts that he wants the non-residential accommodation for the purpose of starting or continuing his own business, that would not be enough to establish that he requires it for that purpose and that his requirement is bonafide.** The word 'required' signifies that mere desire on the part of the landlord is not enough but there should be an element of need and the landlord must show the burden being upon him that he genuinely requires the non-residential accommodation for the purpose of starting or continuing his own business".

25- Similar view has been taken by Hon'ble Supreme Court in the case of **Deena**

Nath v. Pooran Lal, (2001) 5 S.C.C.705 (Paragraph Nos. 15,16 and 17).

26- In the present case, I find that both the courts below have objectively examined the bonafide need of the landlord-respondents and found that he is in bonafide need of the disputed shop. Therefore, these judgments are of no help on the facts of the present case.

27- Under the facts and circumstances of the case, as briefly noted above, the findings of both the courts below with regard to bonafide need of the plaintiff-landlord/respondents cannot be said to suffer from any legal infirmity. The findings recorded by the courts below are findings of fact, which are based on relevant evidences on record.

28- **The legal position and conclusions as stated above are briefly summarized as under:**

(i) Section 21(1)(a) of U.P. Act 13 of 1972 is very widely worded. Demolition and reconstruction for occupation by landlord himself either for residential purpose or for purposes of any profession, trade or calling is permissible. The words 'profession, trade or calling' are very wide and include all activities wherein a person may usefully and/ or gainfully engage himself.

(ii) If the disputed property has acquired commercial value and, therefore, the the landlord wished to demolish the old single storey structure and to construct a multi-storeyed building which may fetch him higher rent and has applied to the competent authorities and got the plans approved, then the landlord's bonafide need is true.

(iii) It is well settled the landlord's requirement need not be a dire necessity. The Court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It is for the landlord to decide which business he wants to do. The Court cannot advise him.

(iv) Landlord is the best judge of his need and this Court can not interfere in concurrent findings of fact regarding bonafide need establish before the Prescribed Authority and the appellate authority. This Court can interfere only when there is perversity in the findings recorded or when the courts below have acted without jurisdiction or far in excess of jurisdiction. A landlord has got a right to expand his business and in case, he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlord as to how he should satisfy his need. Landlord is sole person who can take a decision as to which shop fulfils his need and the needs of his family. The tenant or for that matter even the Court can not guide the landlord as to which accommodation he should view to fulfil his need and which accommodation he shall not use.

(v) To be amenable to correction in certiorari jurisdiction, the error committed by the Court or Authority on whose judgment this Court is exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging into a long- drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also,

it has been held in Surya Dev Rai (Supra) that the jurisdiction was not available to be exercised for indulging into re-appreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal.

(vi) The tenant-petitioner has not disputed the fact even before this Court that the landlord-respondents have offered him a shop on the ground-floor for vacating the disputed shop and that the commercial complex as per sanctioned map has already been constructed by the landlord-respondents over the land in question and the only shop is of the petitioner which obstructed the front portion of the newly constructed commercial complex. Under the circumstances, the bonafide need of the landlord-respondents stands proved under Section 21(1)(a) of U.P. Act 13 of 1972. Under the circumstances, the conduct of the tenant-petitioner in not vacating the shop, cannot be appreciated, inasmuch as he is the only tenant, who is obstructing better beneficial use of the commercial complex by the landlord-respondents.

(viii) Under the facts and circumstances of the case, the findings of both the courts below with regard to bonafide need of the plaintiff-landlord/respondents cannot be said to suffer from any legal infirmity. The findings recorded by the courts below are findings of fact, which are based on relevant evidences on record.

29- For all the reasons aforestated, this writ petition is dismissed with cost of Rs.5,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2019

BEFORE

THE HON'BLE DR.YOGENDRA KUMAR SRIVASTAVA, J.

Writ A(Rent Control) 5646 of 2019

Sanjay Bhardwaj @ Bablu And Anr.
...Petitioners
Versus
Dinesh Chandra Gupta And Others
...Respondents

Counsel for the Petitioners:
Sri Rahul Sahai

Counsel for the Respondents:
Sri Kshitij Shailendra

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. Interpretation - A statute is best interpreted when we know why it was enacted. "Original tenant" u/s 24(2) would be "evicted tenant", evicted u/s 21(1)(b)-rule of heritability extends to statutory tenancy of commercial premises as much as residential premises.

During the pendency of application u/s 24(2), the original tenant died. Substitution of legal heirs allowed. Recall application was dismissed and review was rejected. Dismissing the petitioner-landlord's present petition, the High Court. The words used in an enactment should be construed in a way which best gives effect to the purpose of the enactment. The provisions of S.24(2) and S.21 (1) (b) are required to be read conjointly. Proceedings u/s 24(2) are a continuation of the proceedings u/s 21(1)(b). As a logical corollary S.34(4) would be applicable to proceedings u/s 24(2). (Para 53, 54, 55, 56, 57)

B. The right of re-entry u/s 24(2) is to be seen as a statutory right flowing from the legislative mandate. (Para 59)

Precedent followed: -

1.Ashish Kumar Vs. Additional District Judge, Ayodhya Prakaran, Lucknow, 2010 (3) ARC 238 (Para 12, 31)

2. Sabra Begum Vs. District Judge Meerut &Ors., 1983 ARC 65 (Para 10, 12, 32, 33)

3. Harish Chandra(Para 12, 34, 35)

4. Ram Naresh Tripathi(Para 12, 36)

5. Gian Devi Anand Vs. (Para 37)

6. R. S. Grewal &Ors. Vs. (Para 38)

7. Bimal Kumar Garg Vs. District Judge, Dehradun &Ors., 1979 ARC 384 (Para 40)

8. Tribhuwan Kumar Sharma Vs. Prescribed Authority/ J.S.C.C., Meerut & 3 Ors., 2019 (4) ADJ 790 (Para 12, 41)

9. Wasi Ahmed (Shri) Vs. 2nd Additonal District Judge, Gorakhpur &Anr. 2005 (2) ARC 560 (Para 12, 42)

10. Karamat Ullah Vs. District Judge, Kanpur &Ors., 2000 (2) ARC 212 (Para 42)

11. Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. &Ors. (1987) 1 SCC 424 (Para 44)

12. S. Gopal Reddy Vs. State of Andhra Pradesh, (1996) 4 SCC 596 (Para 12, 45)

13. Seaford Court Estates Ltd. Vs. Asher, (1949) 2 All ER 155 (CA) (Para 46)

14. Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat, (2005) 2 SCC 409 (Para 12, 47)

15. Anwar Hasan Khan Vs. Mohd. Shafi &Ors., (2001) 8 SCC 540 (Para 48)

16. Union of India &Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277 (Para 12, 49)

17. Towne Vs.(Para 49)

18. Lenigh Valley Coal Co. Vs. (Para 49)

19. Maxwell on Interpretation of Statutes (12th Edition by P. St. J. Langan) (Para 50)

20. R (on the application of Quintavalle) Vs. (Para 51)

21. Stock Vs. Frank Jones(Para 52)

Precedent distinguished: -

Smt. Ratna Prasad Vs. Additional District Judge- VIII, Allahabad &Ors., 1978 (4) ALR 306 (Para 10, 26, 27, 29, 30, 31)

(E-4)

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Rahul Sahai, learned counsel for the petitioners and Sri Kshitij Shailendra, learned counsel appearing for the respondents.

2. The present petition has been filed to challenge the order dated 13.12.2018 passed by the District Magistrate/Collector, Budaun in Case No.00912 of 2018 (Jugal Kishore Vs. Harish Chandra) rejecting the application dated 09.10.2018 filed by the petitioners seeking recall of the order dated 27.04.2018 whereby the application filed under Rule 25 of the UP Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 19721 for substitution of the respondents as legal heirs/representatives of late Jugal Kishore had been allowed. The petitioners have further sought to challenge the order dated 02.03.2019 passed by the District Magistrate/Collector, Budaun in terms of which the review application filed against the aforementioned order has also been rejected.

3. The brief facts pertaining to the case are being set out herein below.

4. A release application, was filed by the petitioner-landlord under Section

21(1)(b) of the U.P. Act No.13 of 19722, registered as P.A. Case No.37 of 1985, in respect of a shop situate at Ticketganj in District Budaun on the ground that the shop was in a dilapidated condition and was required for purposes of demolition and new constructions. The release application was rejected by the Prescribed Authority/Additional Civil Judge (Senior Division), Budaun vide order dated 27.03.1997. Against the said order Rent Appeal No.39 of 1997 under Section 22 was filed which was allowed by the Additional District Judge, Court No.1, Budaun vide order dated 31.03.2009 and in terms thereof the tenant-respondent was directed to vacate the shop within a period of one month whereafter six months' time was granted to the petitioner-landlord to reconstruct the shop in dispute, thereafter the consequences as provided for under Section 24(2) were to follow.

5. A writ petition, *Civil Misc. Writ Petition No.23517 of 2009* was filed by the respondent-tenant challenging the order dated 31.03.2009 which was dismissed vide order dated 21.05.2009.

6. The contention of the learned counsel for the petitioner-landlord is that the possession of the shop was finally handed over on 05.04.2012 and subsequent thereto new constructions were raised.

7. The respondent-tenant moved an application under Section 31 claiming his right of re-entry in the premises in question, which was allowed by the Prescribed Authority on 20.03.2014 directing the petitioner-landlord to complete the new constructions within one month and to hand over a shop to the tenant. The landlord moved an application before the District Magistrate on 05.05.2014 apprising him that the new constructions had been completed. An order dated 22.09.2015 was thereafter passed by the Prescribed Authority directing the Amin to ensure delivery of possession of one shop to the tenant/predecessor-in-interest of the contesting respondents.

8. Challenging the aforesaid order dated 22.09.2015 an appeal under Section 22 was filed alongwith an application for interim relief which was rejected vide order dated 07.10.2015. The orders dated 22.09.2015 and 07.10.2015 came to be challenged by the predecessor-in-interest of the petitioner-landlord by filing *Writ-A No.59324 of 2015,* which was allowed vide order dated 30.10.2015 in the following terms:-

"...The order dated 22.9.2015 passed by the Prescribed Authority, thus cannot be sustained. The appeal filed by the landlord therefore is of no consequence. The writ petition is allowed.

At this stage the learned counsel for the respondent submits that the respondent-tenant proposes to move an application before the District Magistrate within two weeks from the date of getting the certified copy of this order.

In case such an application is moved by the tenant within the period of two weeks as stated above, it shall be decided by the District Magistrate on merits keeping in mind the provisions of Sub-Section (2) of Section 24 of the Act without raising any objection to the limitation in filing of the same. An endeavour shall be made to decide the matter as expeditiously as possible

preferably within a period of six months from the date of filing of the application."

9. Consequent to the aforesaid order dated 30.10.2015 in terms of which the tenant-respondent was granted liberty to file an application under Section 24(2) of the Act, 1972 which was to be decided without any objection to the limitation in filing of the same, an application dated 10.11.2015 was filed. During the pendency of the aforementioned application, the original tenant Jugal Kishore died on 23.04.2018, and upon his death an application under Rule 25 of the Rules, 1972 was moved seeking substitution of his legal heirs/representatives which came to be allowed vide order dated 27.04.2018. The petitioner-landlord filed a recall application dated 09.10.2018 which was dismissed vide order dated 13.12.2018. Thereafter a review was filed which has also been rejected vide order dated 02.03.2019, and subsequently the present writ petition has been filed.

10. Contention of the counsel for the petitioners is that upon the demise of the original tenant Jugal Kishore during the pendency of the application under Section 24(2) his legal heirs/representatives can neither be substituted nor be permitted to pursue the application under Section 24(2) and that upon demise of the original tenant the proceedings at his behest would stand abated. It is sought to be argued that the scheme of the Act No.13 of 1972 does not contemplate that the legal heirs of the original tenant would be allowed to continue to pursue the application for re-entry under Section 24(2) upon the demise of the original tenant. It is submitted that Section 34(4) of the Act, 1972 limits the filing of a substitution application only in cases pertaining to determination of standard rent or for eviction, and that Rule 25 is also exclusively relatable to Section 34(4). Placing reliance upon the judgment of this Court in***Smt. Ratna Prasad Vs. Additional District Judge-VIII, Allahabad &Ors.3***and the judgment in the case of ***Smt. Sabra Begum Vs. District Judge, Meerut &Ors.4*** it has been submitted that the right of re-entry being personal to the original tenant would fade away with his demise, and hence the pending proceedings would loose their efficacy.

11. *Per contra*, the counsel appearing for the respondents has supported the orders impugned by submitting that the words "original tenant" used under Section 24(2), refer to the stage of making an application for the purposes of re-entry, and the said words do not mean that the heirs/legal representatives of the original tenant cannot move or pursue the application. It is submitted that the words "original tenant" would include the heirs/legal representatives of the deceased-tenant and the same cannot be confined to only the tenant whom the property was let out. It has been argued that intention of the legislature behind using the words "original tenant" is to prevent an unwarranted situation where upon a building having been released, a stranger or a third party may enter the fray and assert his right to get entry in a building which has been reconstructed pursuant to orders passed under Section 21(1)(b) of the Act, 1972 after its release and demolition. It has been pointed out that the "option of re-entry by tenant" under Section 24 of the Act, 1972 would mean re-entry by the tenant including his legal representatives. It has also been submitted that in view of the definition of "tenant" as contained under Section 3(a)

read with Section 2(11) and Section 146 of the Civil Procedure Code5 and under Section 34(4) of the Act, 1972, the contesting respondents are entitled to re-entry by pursuing the application under Section 24(2) moved by their predecessor, Jugal Kishore, who had died only some time back on 23.04.2018.

12. It has also been submitted that the application under Section 24(2) was moved within the time fixed by this Court vide order dated 30.10.2015 passed in Writ-A No.59324 of 2015. It has been contended that the proceedings under Section 24(2) are not independent or separate, but they are in continuation of the eviction proceedings under Section 21(1)(b). Reliance has been sought to be placed on the judgments in ***Ram Naresh Tripathi Vs. 2nd Additional Civil Judge, Kanpur &Ors.6, Smt. Sabra Begum Vs. District Judge, Meerut &Ors.4, Harish Chandra Tewari &Anr. Vs. 2nd Additional District Judge, Pratapgarh &Ors.7, Tribhuwan Kumar Sharma Vs. Prescribed Authority/J.S.C.C., Meerut & 3 Ors.8, S. Gopal Reddy Vs. State of Andhra Pradesh9, Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat10, Union of India &Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama11, Ashish Kumar Vs. Additional District Judge, Ayodhya Prakaran Lucknow12 and Wasi Ahmad (Shri) Vs. 2nd Additional District Judge, Gorakhpur &Anr.13.***

13. Heard the counsel for the parties and perused the record.

14. The core issue which arises in the present case is as to whether the legal heirs and representatives of the deceased "original tenant" are entitled to get themselves substituted to pursue the application moved by the original tenant seeking re-entry under Section 24(2) of the Act, 1972.

15. In order to appreciate the rival contentions, the relevant statutory provisions under the Act, 1972 may be adverted to:-

"21. Proceeding for release of building under occupation of tenant. *- (1) The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely-*

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust :

(b) that the building is in a dilapidated condition and is required for purposes of demolition and new construction :

x x x x x

24. Option of re-entry by tenant.-*(1) Where a building is released in favour of the landlord and the tenant is evicted under section 21 or on appeal under section 22, and the landlord either puts or causes to be put into occupation thereof any person different from the person for whose occupation according to the landlord's representation, the building was required, or permits any such person to occupy it, or otherwise puts it to any*

use other than the one for which it was released, or as the case may be, omits to occupy it within one month or such extended period as the prescribed authority may for sufficient cause allow from the date of his obtaining possession or, in the case a building which was proposed to be occupied after some construction or reconstruction, from the date of completion thereof, or in the case of a building which was proposed to be demolished, omits to demolish it within two months or such extended period as the prescribed authority may for sufficient cause allow from the date of his obtaining possession, then the prescribed authority or, as the case may be, the District Judge. may, on an application in that behalf within three months from the date of such act or omission, order the landlord to place the evicted tenant in occupation of the building on the original terms and conditions, and on such order being made, the landlord and any person who may be in occupation thereof shall give vacant possession of the building to the said tenant, failing which, the prescribed authority shall put him into possession and may for that purpose use or cause to be used such force as may be necessary.

(2) Where the landlord after obtaining a release order under clause (b) of sub-section (1) of section 21 demolishes a building and constructs a new building or buildings on its site, then the District Magistrate may, on an application being made in that behalf by the original tenant within such time as may be prescribed, allot to him the new building or such one of them as the District Magistrate after considering his requirements thinks fit, and thereupon that tenant shall be liable to pay as rent for such building an amount equivalent to one per cent per month of the cost of construction thereof (including the cost of demolition of the old building but not including the value of the land) and the building shall, subject to the tenant's liability to pay rent as aforesaid, be subject to the provisions of this Act, and where the tenant makes no such application or refuses or fails to take that building on lease within the time allowed by the District Magistrate, or subsequently ceases to occupy it or otherwise vacates it, that building shall also be exempt from the operation of this Act for the period or the remaining period, as the case may be, specified in sub-section (2) of section 2.

x x x x x

34. Powers of various authorities and procedure to be followed by them.- *x x x x x*

(4) Where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceeding, such proceeding May be continued after bringing on the record:

(a) in the case of the landlord or tenant, his heirs or; legal representatives

(b) in the case of an unauthorised occupant, any person claiming under him found in occupation of the building."

16. Rule 25 of the Rules, 1972 which provides the procedure for making an application for bringing legal heirs on record and Rule 20 which is in respect of an application for re-allotment as provided under Section 24(4) may also be referred to:-

"20. Application for re-allotment [Section 24(2)].-*(1) An application by a tenant under sub-section (2) of Section 24 or*

allotment of a new building or any one of them shall be made within one month from the date on which the construction of the building sought to be allotted is complete.

(2) The application shall also state the extent of the tenant's requirements regarding accommodation.

Explanation.-In this rule, the date of completion of construction has the same meaning as in the Explanation (a) of sub-section (2) of Section 2.

x x x x x

***25. Bringing legal representatives on record [Section 34(4)].**-(1) Every application for substituting the names of the heirs or legal representatives, the claimants or occupants of any person who was a party to any proceedings under the Act and died during the pendency of the proceedings shall be preferred within one month from the date of the death of such person.*

(2) The application shall contain the names and addresses and other details of the heirs or legal representatives and their relationship with the deceased and, be accompanied by any affidavit in its support, and thereupon, the application shall be decided after a summary inquiry by the authority concerned."

17. For ease of reference the definition of the word "tenant", in terms of Section 3(a) of the Act, 1972 is also being extracted below:-

*"**3. Definitions.**-In this Act, unless the context otherwise requires-*

(a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death-

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;

(2) in the case of a non-residential building, his heirs;"

18. A plain reading of the aforementioned statutory provisions indicates that sub-section (2) of Section 24 confers a right of re-entry on a tenant who has been evicted in pursuance of an order of eviction passed against him under Section 21(1)(b) on the ground that the building in question was in a dilapidated condition and was required for the purposes of demolition and new construction. The right is in respect of a new building or buildings, reconstructed on the site of the dilapidated structure after demolition thereof. This right consists of making an application for allotment of the newly constructed building or any of such buildings, by the tenant within the time prescribed, and the District Magistrate after considering the requirements of such a tenant is empowered to make allotment in his favour with a liability to pay rent at an amount equivalent to one per cent per month of the cost of construction thereof (including the cost of demolition of the old building but not including the value of land). This right to seek allotment of a new construction is notwithstanding the provisions contained under Section 2(2) of the Act, 1972.

19. As per the procedure prescribed under Section 24(2) the original tenant is required to make an application for allotment of the new building or any of the new buildings to the District Magistrate, which is the usual condition for initiating proceedings for allotment of buildings. The time for making the application has been provided under Rule 20 of the Rules, 1972 in terms of which one month's time from the date of completion of the construction of the building sought to be allotted, has been prescribed. The original tenant has been

granted a right of seeking allotment in accordance with his requirement of the new building or any of the new buildings constructed on the site of the dilapidated building from which he was evicted under Section 21(1)(b).

20. The liability of the tenant to pay rent is to be at an amount equivalent to one per cent per month of the cost of construction thereof (including the cost of demolition of the old building but not including the value of the land). It is noticeable that sub-section (2) of Section 24 is in the nature of an exception to the provisions contained under Section 2(2) wherein it is provided that nothing under the Act shall apply to a building during the period of ten years or fifteen years or forty years, as the case may be, from the date on which its construction is completed. The exception in respect of the cases covered under sub-section (2) of Section 24 has been provided in terms of the language of Section 24(2) as also Section 2(2).

21. It is therefore seen that though the provisions of the Act are inapplicable to a new building constructed for a period of ten years or fifteen years or forty years, as the case may be, as provided under Section 2(2), yet considering the hardship which is implied in the eviction of a tenant under Section 21(1)(b) particularly where the tenant is evicted without the *bona fide* need of the landlord being considered or the assessment of his comparative hardship vis-a-vis the landlord, the legislature has conferred upon such tenant a right to have the newly constructed building allotted to him.

22. It is also seen that existence of an order of release under Section 21(1)(b) on the ground that the building is in a dilapidated condition and is required for the purposes of demolition and new construction is clearly a must for attracting the provisions of Section 24(2) to a case or in other words the provisions under Section 24(2) would come into play only upon an order of release having been passed under Section 21(1)(b).

23. The provisions of Section 21(1)(b) and Section 24(2) are thus required to be read conjointly in order to give effect to the scheme under the Act wherein the legislature has conferred a special privilege or a sort of a lien to the original tenant who has been evicted from the building on the ground that it was in a dilapidated condition, and at the site of which a new building or several new buildings have been constructed.

24. Considering the scheme of the Act, 1972 the expression "original tenant" as used under Section 24(2) would therefore be referable to the "evicted tenant", who has been evicted from the building in proceedings under Section 21(1)(b) of the Act, 1972.

25. In the case of ***K. Srinivasa Rao Vs. K.M. Narasimhaiah &Anr.14,*** while considering similar provisions under the Karnataka Rent Control Act, 1961 it was held that a tenant who had been evicted on the ground of the building being required for immediate demolition or reconstruction was entitled for re-induction in a premises reasonably comparable or corresponding to the premises occupied by him in the old building. The relevant observations made in the judgment are as follows:-

"8. ...There is nothing specific in this connection in the language of sub-section (1) of Section 28. However, a fair

commonsense reading of the provisions of sub-section (1) of Section 28 would show that a tenant against whom eviction decree has been passed under Section 21(1)(j) and who has given notice as contemplated under Section 27 of that Act would be entitled to a tenement in the new building which could be said to be reasonably comparable to or to reasonably correspond to the tenement in respect of which the decree was passed..."

26. Much reliance has been placed by the counsel for the petitioner on the judgment in the case of ***Smt. Ratna Prasad*** (supra) for the proposition that the provisions relating to substitution of heirs under Section 34(4) do not contemplate substitution of heirs of a person who makes an application for allotment of a building. It is submitted that the right of the person who applies for allotment is a personal right and does not survive to the legal heirs. Paras 6 to 12 of the judgment, on which reliance has been sought to be placed, are being extracted below:-

"6. The learned counsel for the petitioner has impugned the validity of the allotment order dated February 13, 1975 (Annexure IV). On a number of grounds. The first contention is that the allotment order could not be passed unless heirs of Sri Prasad were substituted. In this connection reliance has been placed on certain provisions of the Act and the rules framed thereunder. I have carefully gone through them and in my judgment they do not assist the petitioner at all. Section 34(4) is the only provision in the entire Act which relates to substitution of heirs. It reads:

"where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceeding, such proceeding may be continued after bring on record:

(a) in the case of the landlord or tenant, his heirs or legal representatives;

(b) in the case of an unauthorised occupant, in any person claiming under him or found in occupation of the building."

7. The provision makes it clear that substitution of heirs is permitted only in two cases, viz., in proceedings for the determination of standard rent or for eviction of Sri Prasad from any building. Therefore, substitution of heirs could not be claimed under Section 34(4).

8. Reliance has also been placed on Section 34(8) which says;

"For the purposes of any proceedings under this Act and for purposes connected therewith the said authority shall have such other powers and shall follow such procedure, principles of proof, rules of limitation and guiding principles as may be prescribed."

9. The words "any proceedings' no doubt include allotment proceedings also but the sub-section itself makes it clear that in this connection only such procedure or guiding principles will be followed "as may be prescribed'. The words "other powers' used in this sub-section clearly mean powers other than those given in Section 34 but those powers must be prescribed under the Act or the rules. These powers are given in rule 22 of the Act and nowhere contemplate substitution of heirs of a person who makes an application for allotment of a building. Although Section 151, C.P.C. applies to these proceedings but substitution cannot be done under it because there is a special provision in Section 34(4) of the Act for substitution of heirs and the established principle is that aid of Section 151. C.P.C. cannot be taken where there is

any specific provision for any purpose. Even if it be said that there is no provision for substitution for heir of a person who applies for allotment aid of Section 151 cannot he invoked because it is a personal right and does not survive to the heirs. If the scope of Section 151 was so wide there was no necessity to enact. Section 34(4) for this purpose because substitution in every case could be done under Section 151, C.P.C.

10. The learned counsel for the petitioner has also invoked the aid of rule 25 but in vain. This rule states: "Bringing legal representatives on record: [Section 34(4)]

"(1) Every application for substituting the names of the heirs or legal representatives, the claimants or occupants) of any persons who was a party to any proceedings under the Act and died during the pendency of the proceedings shall be preferred within one month from the date of death of such person.

(2) The application shall contain the names and addressed and other details of the heirs or legal representatives and their relationship with the deceased and be accompanied by an affidavit in its support, and thereupon, the application shall be decided after a summary inquiry by the authority concerned."

11. As the marginal note indicates, this rule has its connection with substitution of heirs contemplated by Section 34(4) of the Act. It prescribes period of limitation of presenting an application for substitution. Therefore, even on the basis of this rule heirs of late Sri Prasad could not be brought on the record.

12. I am fortified in the aforesaid view for one more reason. Section 16 of the Act relates to allotment and release of vacant buildings. Sub-clause (a) of Section 16(1) says that subject to the provisions of this Act the District Magistrate may by an order require the landlord to let any building which is, or has fallen vacant or is about to fall vacant or a part of such building, to any person specified in the order. Obviously the words "any person' in this section refer to the applicant for allotment. S.-sec. (8) of this sedation says that the allottee shall be deemed to become tenant of the building from the date of allotment. It means that till he is only an applicant for allotment of a building it is his personal right and the moment an allotment order is passed in his favour becomes a tenant as defined in Section 3(8). It is only after allotment that an applicant becomes tenant and can claim the rights of such a person. Before that, it is purely his personal right which dies with him and the question of substitution of his heirs does not arise. In this connection reference may be made to the case of V. Devaru v. State of Mysore [A.I.R. 1958 S.C. 253.] in which claim with which the plaintiff came to the court was that he was wrongly excommunicated and that was an action personal to him, on the principle of actio personalis Moritar cum persona. When he died the suit was held to abate. In the instant case also it was personal right of Sri Prasad to apply for allotment and on his death the application became non est. Even if he had applied for allotment of the premises in order to live with his wife and children, the nature of his right could not change. If the allotment order was passed in his favour and he had entered into possession of the building, the position would have been different because in that case he would have acquired the status of a tenant

as defined in the Act. In the instant case he died before the allotment order was passed and his application lapsed."

27. It may be pertinent to notice that in the aforementioned case of ***Smt. Ratna Prasad*** (supra) the husband of the petitioner had applied for allotment of the premises in question under Section 16 and before the allotment order could be passed or possession could be delivered he died. It was in the said circumstances that it was held that the allotment order having not been made and the possession having not been delivered the applicant had not yet achieved the status of a "tenant" as defined under Section 3(a) of the Act. He was only an applicant for allotment of the building and it was purely his personal right which died with him and the question of substitution of his heirs did not arise. It was pointed out that it is only after the allotment order has been made that an applicant acquires the status of a "tenant" and can claim his rights in the said capacity.

28. The present case arises out of an application filed by the original evicted tenant seeking his re-entry on the basis of the statutory right conferred upon him under Section 24(2) on the ground of his being evicted under Section 21(1)(b) for the reason that the building was in a dilapidated condition and was required for demolition and reconstruction.

29. As against the case of ***Smt. Ratna Prasad*** (supra) wherein the substitution was being sought in respect of the death of an applicant seeking allotment under Section 16(1)(a), who had yet not achieved the status of a tenant, in the present case substitution is being sought by the legal heirs and representatives of a person who was a statutory tenant and who had been evicted in proceedings under Section 21(1)(b), and who had already applied for allotment exercising the statutory right of re-entry under Section 24(2) conferred upon him in his capacity as the "original tenant".

30. The case of ***Smt. Ratna Prasad*** (supra) is thus distinguishable on facts and would not be applicable in the present case.

31. In a similar set of facts in the case of ***Ashish Kumar Vs. Additional District Judge, Ayodhya Prakaran, Lucknow12,*** where substitution of the legal heirs of a person applying for re-entry was being sought, the judgment in the case of ***Smt. Ratna Prasad Vs. Additional District Judge-VIII, Allahabad &Ors.3*** was considered and distinguished in the following terms:-

"3. The deceased moved application for re-entry, which was adjudicated upon by the prescribed authority and rejected by means of order dated 29.2.2008. The deceased challenging the said order filed rent appeal. During the pendency of the said application the deceased Horilal died leaving behind opposite parties 2 to 4. Opposite party no. 2 is employed in Sahara India, Lucknow and opposite party no.3 in Sonalika Tractor Company. It is further submitted that substitution of legal representative under section 34 (4) of the U.P. Act No. 13 of 1972 is permitted only two proceedings- (i) Proceeding for the determination of standard rent (ii) Proceeding for eviction from a building; whereas the present proceeding does not belong to the aforesaid proceeding, therefore, the

application for substitution is not maintainable.

4. In support of his contentions the learned counsel for the petitioner cited a decision of this Court rendered in the case of 1978 ARC 233, Mrs. Ratna Prasad Vs. The VIIIth Additional District Judge, Allahabad and others.

5. Upon perusal of the aforesaid decision, I find that the facts of the aforesaid case are quite different to the present case. In the aforesaid case though the allotment order was passed but the possession was not delivered. In the said case it has been held that applicant had not acquired status of tenant. In the said case the application for allotment was moved but the house was not allotted. However, since the application for substitution was put up for order, Rent Control and Eviction Officer allotted the house in favour of the applicant who had already died, therefore his wife and children moved application for substitution which was rejected. This court has held that the possession of house was not delivered to the applicant. In the meantime, he died, therefore, his legal heirs have not achieved the status of the tenant, accordingly rejected his application.

6. Under the strength of the aforesaid decision, the learned counsel for the petitioner submits that in the present case also the tenant has already been evicted from the house in question and his application for re-entry has also been rejected. His legal heirs have no status of tenancy, therefore, the order passed by the Special Judge (Ayodhya Prakaran)/Additional District Judge, Lucknow on the application for substitution suffers from error and is liable to be quashed.

7. He also cited decisions of this Court rendered in the cases of Keshav Dwivedi and others Vs. Prescribed Authority, Lucknow, 1975 ALJ , 75 and Smt. Sabra Begum Vs. District Judge Meerut and others, ALJ 1983 65 : 1982 (1) ARC 65 on the point that the provisions of substitutions are not applicable in the present case.

8. In the case of Ghannu Mal and others Vs. Additional District Magistrate (C.S) R.C.E.O., Lucknow and others (writ petition no. 92 of 2001) this Court has considered the provisions of Rule 25 of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Rules, 1972 and held that legislature has protected the right of the legal heirs under Rule 25 of the Rules, 1972. Rule 25 of the Rules is as follows:-

"(1) Every application for substituting the name of (the heirs or legal representatives, the claimants or occupants) of any person who was a party to any proceedings under the Act and died during the pendency of the proceedings shall be preferred within one month from the date of the death of such persons.

(2) The application shall contain the names and addresses and other details of the heirs or legal representatives and their relationship with the deceased and be accompanied by any affidavit in its support, and thereupon, the application shall be decided after a summary inquiry by the authority concerned."

9. Upon perusal of the record it is evident that deceased Horilal in eviction proceeding through written statement has mentioned the names of his family members, in which opposite parties 2 to 4 were included.

10. In the light of Rules 25 of the Rules, 1972 the Additional District Judge, Lucknow has allowed the

application for substitution on the ground that applicants have been shown as family members of the deceased and since Rule 25 protects their right, they have right to continue with the appeal after the death of deceased Horilal. So far as the consideration of their employment is concerned, this is not the stage of the same as only after bringing on record their need can be considered on the application for re-entry in the premises."

32. Reference may also be had to the judgment in the case of ***Smt. Sabra Begum Vs. District Judge, Meerut &Ors.4,*** which has been relied upon by the counsel for the petitioners in support of his contention that Section 34(4) limits the filing of substitution application only in cases pertaining to determination of standard rent or for eviction. The relevant observations made in the judgment are being extracted below:-

"11. Section 34(4) of the Act provides that where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceedings, such proceeding may be continued after bringing on the record, in the case of the landlord or tenant, his heirs or legal representatives. It is under this provision that Rule 25 has been framed.

12. A bare perusal of Section 34(4) read with Rule 25 clearly leads to the conclusion that Rule 25 lays down the period of limitation of 30 days for substitution only in the case of a proceeding for the determination of standard rent of or for eviction from a building which are contemplated under the Act. The present, however, is not a case of a proceedings for eviction under the Act, but of a regulas suit for ejectment filed by the petitioner. The proceedings for eviction which are referred to in sub-section (4) of section 34 are proceedings such as those contemplated under section 21 or elsewhere in the Act."

(Emphasis added)

33. The observations referred to above take note of the provisions under Section 34(4) which provides that where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceedings, such proceedings may be continued after bringing on record in the case of the landlord or tenant, his heirs or legal representatives. It has further been clarified that proceedings for eviction which are referred to in Section 34(4) are proceedings such as those contemplated under Section 21 or elsewhere in the Act, 1972. It is therefore seen that Section 34(4) would be applicable to proceedings for eviction under Section 21 or elsewhere in the Act such as proceedings under Section 24(2), which are a continuation of the proceedings under Section 21(1)(b). The judgment in the case of ***Smt. Sabra Begum*** (supra) thus lends support to the stand taken by the respondents with regard to applicability of Section 34(4) to proceedings under Section 24(2), and it is for this reason that the said judgment has been relied upon by the counsel for the respondents also.

34. On the question as to whether there is any provision under the Act, 1972 for abatement due to non-substitution in any proceedings arising out of Section 21, this Court in the case of ***Harish Chandra Tewari &Anr. Vs. 2nd Additional District Judge, Pratapgarh &Ors.7*** held

that there was no provision for abatement in the Act as under the CPC. The observations made in the judgment in this regard are as follows:-

"14. From a careful examination the aforesaid relevant provisions relating to substitution it is clear that there is no provision for abatement in the Act like Order XXII, Rules 3(2) & 4(2) of the CPC. Even if an application for substitution has been filed beyond time as prescribed under the provisions aforestated, the Court has power to condone delay, if materials available on record makes out a case for condonation of delay, and proceed on merits of the case."

35. Further, in the aforementioned case of ***Harish Chandra Tewari*** (supra) the expression "legal representative" as defined under Section 2(11) of the CPC was taken into consideration and in view of the provisions contained under Section 38 of the Act No.13 the same was held to be applicable. Accordingly, it was held that any person who represents the tenancy or intermeddles would be a legal representative and could be substituted in place of the deceased-tenant. The relevant observations made in the judgment are as follows:-

"14. Under the Act heirs and legal representatives have not been defined. The legal representative has been defined in section 2(11) of the CPC, which reads as follows:-

Section 2(11) of the CPC

(11) "legal representative" means a person who in law represents the estate of a deceased and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

15. Section 38 of the Act makes it clear if any thing is contrary to the provisions of this Act, the provisions of CPC, or Transfer of Property Act shall not apply. As this definition is not contrary to the Act and supports the intention of legislature while making provision for substitution under the Act, a person who represents the estate is legal representative. In the present case petitioners are claiming themselves to be representing the tenancy after death of their father and claim themselves to be a tenant residing alongwith their father at the time of his death as defined under section 2-A of the Act. If they establish that they could represent tenancy they may be substituted as legal representatives. Definition of legal representative as defined in section 2(11) of CPC, read with U.P. Act No. 13 of 1972 makes it clear that if any person represents tenancy in law or intermeddles he is a legal representative and should be substituted in place of deceased tenant."

36. To a similar effect are the observations made by a Division Bench of this Court in ***Ram Naresh Tripathi Vs. 2nd Additional Civil Judge, Kanpur &Ors.5*** wherein the principles under Order XXII Rule 6 of CPC were held to be applicable to proceedings under the Act, 1972 after noticing that there was nothing in Section 34(4) which may be inconsistent with the same. The observations made in the judgment are as follows:-

"10. Again, the purpose of substitution of the heirs of a deceased party is that it may continue the proceedings from the stage at which it was left by the deceased party and may produce the relevant material before the

authority/Court. If the legal representatives of the deceased party did not have that right they would be deprived of an opportunity to produce their evidence and make their submission which could clearly prejudice them. However, in a case where the evidence has been led and arguments have been heard, nothing is left to be done by any party, or on his death by his heirs or legal representatives. All that remains to be done is Court's job, namely, that of preparing and pronouncing the judgment after taking into consideration the evidence adduced and submissions made by either party. In such a case it would be little more than an idle formality to require substitution of the legal representatives of the deceased party. That could merely delay the proceedings without any benefit to either party. It was with this end in view that the Legislature incorporated rule 6 in Order 22, C.P.C., which specifically states that if the death of a party occurs between the conclusion of the hearing and the pronouncement of the judgment, there shall be no abatement. It is true that Order 22, rule 6 C.P.C. has not been made applicable to the proceedings under Act 13 of 1972. We have, however, already referred to the principle behind Order 22, Rule 6 C.P.C. and we see no reason why that principle cannot be applied to the proceedings under Act 13 of 1972. We are fortified in taking this view by the decision of Patna High Court in case of Ram Charan Ram Keshari v. Sri Ambika Rao.15 In that case the Patna High Court relied on a decision of the Supreme Court in the case of Ebrahim Aboo Bakar v. Custodian General of Evacuee Property16, in which the Supreme Court held that the principle contained in Order 22, Rule 6 C.P.C. could apply to the proceedings under Administrative of Evacuee Property Act. The Patna High Court said that if the principle contained in Order 22, Rule 6 can apply to proceedings under the Administrative of Evacuee Property Act, there is no reason why that principle should not apply to the proceedings under Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. We are in agreement with that reasoning.

11. We may also added here that there is nothing in Section 34(4) which may be inconsistent with the application of the principle contained in Order 22, Rule 6. Sub-section (4) of Section 34 merely states that in the event of the death of any party the proceedings may be continued after bringing on record the heirs and legal representatives of the deceased party. We may stress on the words ''continue the proceedings'. In a case where proceedings are already over and all that remains to be done is the delivery of judgment, there is nothing to be continued by the heirs and legal representatives of the deceased party and, consequently, it is not mandatory to bring on record the heirs and legal representatives."

37. The question with regard to heritability of a statutory tenancy of commercial premises came up for consideration in the case of ***Gian Devi Anand Vs. Jeevan Kumar &Ors.17,*** and it was held, in the context of Delhi Rent Control Act, 1815, that the rule of heritability extends to statutory tenancy of commercial premises as much as to residential premises, and that the same rule was to apply in other States where there was no explicit provision to the contrary. It was held that tenancy rights would devolve according to the ordinary

law of succession unless otherwise provided in the statute. The relevant observations made in the judgment are as follows:-

"2. ...'Statutory tenant' is not an expression to be found in any provision of the Delhi Rent Control Act, 1958 or the rent control legislation of any other State. It is an expression coined by the judges in England and, like many other concepts in English law, it has been imported into the jurisprudence of this country and has become an expression of common use to denote a tenant whose contractual tenancy has been determined but who is continuing in possession of the premises by virtue of the protection against eviction afforded to him by the rent control legislation. Though the expression 'statutory tenant' has not been used in any rent control legislation the concept of statutory tenant finds recognition in almost every rent control legislation.

x x x x x

15. ...It is also important to note that notwithstanding the termination of the contractual tenancy by the landlord, the tenant is afforded protection against eviction and is permitted to continue to remain in possession even after the termination of the contractual tenancy by the Act in question and invariably by all the Rent Acts in force in various States so long as an order or decree for evictions against the tenant on any of the grounds specified in such Acts on the basis of which an order or decree for eviction against the tenant can be passed, is not passed.

x x x x x

31. We now proceed to deal with the further argument advanced on behalf of the landlords that the amendment to the definition of `tenant' with retrospective effect introduced by the Delhi Rent Control Amendment Act (Act 18 of 1976) to give personal protection and personal right of continuing in possession to the heirs of the deceased statutory tenant in respect of residential premises only and not with regard to the heirs of the `so called statutory tenant' in respect of commercial premises, indicates that the heirs of so-called statutory tenants, therefore, do not enjoy any protection under the Act. This argument proceeds on the basis that in the absence of any specific right created in favour of the `so-called statutory tenant' in respect of his tenancy, the heirs of the statutory tenant who do not acquire any interest or estate in the tenanted premises, become liable to be evicted as a matter of course. The very premise on the basis of which the argument is advanced, is, in our opinion, unsound. The termination of the contractual tenancy in view of the definition of tenant in the Act does not bring about any change in the status and legal position of the tenant, unless there are contrary provisions in the Act; and, the tenant notwithstanding the termination of tenancy does enjoy an estate or interest in the tenanted premises. This interest or estate which the tenant under the Act despite termination of the contractual tenancy continues to enjoy creates a heritable interest in the absence of any provision to the contrary. We have earlier noticed the decision of this Court in Damadilal's case (supra).This view has been taken by this Court in Damadilal's case and in our opinion this decision represents the correct position in law. The observations of this Court in the decision of the Seven Judge Bench in the case of V. Dhanapal Chettiar v. Yesodai Ammal (supra) which we have earlier quoted appear to conclude the question. The

amendment of the definition of tenant by the Act 18 of 1976 introducing particularly 2(l)(iii) does not in any way mitigate against this view. The said sub-section (iii) with all the three Explanations thereto is not in any way inconsistent with or contrary to sub-clause (ii) of Section 2(l) which unequivocally states that tenant includes any person continuing in possession after the termination of his tenancy. In the absence of the provision contained in subsection 2(l)(iii), the heritable interest of the heirs of the statutory tenant would devolve on all the heirs of the `so-called statutory tenant' on his death and the heirs of such tenant would in law step into his position. This sub-clause (iii) of Section 2(l) seeks to restrict this right insofar as the residential premises are concerned. The heritability of the statutory tenancy which otherwise flows from the Act is restricted in case of residential premises only to the heirs mentioned in Section 2(l)(iii) and the heirs therein are entitled to remain in possession and to enjoy the protection under the Act in the manner and to the extent indicated in sub-section 2(l)(iii). The Legislature, which under the Rent Act affords protection against eviction to tenants whose tenancies have been terminated and who continue to remain in possession and who are generally termed as statutory tenants, is perfectly competent to lay down the manner and extent of the protection and the rights and obligations of such tenants and their heirs. Section 2(l)(iii) of the Act does not create any additional or special right in favour of the heirs of the `so-called statutory tenant' on his death, but seeks to restrict the right of the heirs of such tenant in respect of residential premises. As the status and rights of a contractual tenant even after determination of his tenancy when the tenant is at times described as the statutory tenant, are fully protected by the Act and the heirs of such tenants become entitled by virtue of the provisions of the Act to inherit the status and position of the statutory tenant on his death, the Legislature which has created this right has thought it fit in the case of residential premises to limit the rights of the heirs in the manner and to the extent provided in Section 2(l)(iii). It appears that the Legislature has not thought it fit to put any such restrictions with regard to tenants in respect of commercial premises in this Act.

x x x x x

36. ...The heirs of the deceased tenant in the absence of any provision in the Rent Act to the contrary will step into the position of the decreased tenant and all the rights and obligations of the deceased tenant including the protection afforded to the deceased tenant under the Act will devolve on the heirs of the deceased tenant. As the protection afforded by the Rent Act to a tenant after determination of the tenancy and to his heirs on the death of such tenant is a creation of the Act for the benefit of the tenants, it is open to the Legislature which provides for such protection to make appropriate provisions in the Act with regard to the nature and extent of the benefit and protection to be enjoyed and the manner in which the same is to be enjoyed..."

38. The aforementioned legal position has been reiterated in a recent judgment in the case of ***R.S. Grewal &Ors. Vs. Chander Parkash Soni &Anr.18.***

39. In the context of the Act, 1972 it may be noticed that the word "tenant" has been defined under Section 3(a) in

relation to a building, as meaning a person by whom its rent is payable. Upon the tenant's death, in the case of a non-residential building, in terms of sub-clause (2) of sub-section (a) of Section 3, the expression tenant has been defined to be his heirs. It is thus seen that the expression "tenant" has been defined under the Act in such a way that on death of the tenant, in the case of a non-residential building, his tenancy rights would devolve upon his legal heirs. This devolution of the legal rights on the heirs of a tenant, upon his death, is automatic and by operation of law.

40. The provisions contained under Section 3(a)(ii) of the Act, 1972 were considered in the case of ***Bimal Kumar Garg Vs. District Judge, Dehradun &Ors.19*** wherein it was held that in a case of a non-residential building after the death of the tenant it will go automatically to his heirs. The relevant observations made in the judgment are as follows:-

"3. ...Section 3(a)(ii) of the Act clearly provide that the tenant in relation to a building would mean the person by whom rent is payable and in case of tenant's death, his heirs the building in dispute is a shop, and as such, a non-residential building and therefore, after the death of Kishan Chand it will go automatically to his heirs."

41. Reference may also be had to a recent judgment of this Court in the case of ***Tribhuwan Kumar Sharma Vs. Prescribed Authority/J.S.C.C., Meerut & 3 Ors.8*** which was a case where the release order having been put to execution by the original landlord himself the objection raised by the petitioner-tenant for dismissal of the execution proceedings as infructuous, was repelled by holding that the heirs of the deceased-landlord, upon his death had stepped into his shoes and were competent to take the execution proceedings to its logical conclusion:-

"3. ...in the facts of the instant case, indisputably the release order was put to execution by the original landlord himself. The execution application was filed long back in the year 1986. The petitioner tenant, somehow or the other succeeded in delaying the execution proceedings and in the meantime, the landlord died on 21.3.2010. The execution proceedings was thereafter, prosecuted by his legal heirs and at which stage, the petitioner prayed for dismissal of the same as infructuous. The heirs of the deceased landlord, upon his death have stepped into the shoes of the original landlord and are competent to take the execution proceedings to its logical conclusion..."

42. The mandatory nature of the provisions contained under Section 24(2) with regard to the option of re-entry of the evicted tenant was emphasized in the case of ***Wasi Ahmad (Shri) Vs. 2nd Additional District Judge, Gorakhpur &Anr.13*** wherein referring to an earlier judgment in the case of ***Karamat Ullah Vs. District Judge, Kanpur &Ors.20*** it was held as follows:-

"10. Therefore, it is mandatory for the landlord to raise such new constructions as may meet the ends of justice by providing the option of re-entry to the tenant. The authorities before allowing an application under Section 21(1)(b) of the Act must satisfy themselves in this regard. The appellate authority therefore, rightly directed for

construction of a new shop so that the law is not frustrated.

11. The view taken by the appellate authority finds support from the judgment of this Court in case of Karamat Ullah Vs. District Judge, Kanpur and others reported in 2000(2) ARC Page 212 wherein this Court has held as follows:

"If we examine the provisions of Section 21(1) (b) along with Section 24(2) and Rule 17, under the Scheme of the Act the only harmonial (sic. harmonious) construction will be that the requirement of conditions of Rule 17 has been made essential with an object to ensure that the tenant's right of re-entry as enshrined in Section 24(2) is not frustrated. Therefore, before an application under Section 21 (1)(b) is to be allowed it becomes the duty of the authority concerned to examine minutely the sanctioned plan submitted by the landlord for the construction of new building in order to ensure that the tenant's option of reentry as safeguarded under sub-section (2) of Section 24 will not be defeated or frustrated. Wherein a given case if no such provision is made in the plan submitted by the landlord for reconstruction, it would follow that the tenant's right of reentry as guaranteed to him under Section 24(2) of the Act has not been secured and where he is deprived of that valuable right which he could exercise on completion of new building, no order under Section 21(1) (b) of the Act can lawfully be made."

43. The right of re-entry of a tenant under Section 24(2) is therefore clearly a consequence of the order of release having been passed under Section 21(1)(b), and the proceedings under Section 24(2) are to be seen in continuation of the proceedings for eviction under Section 21(1)(b), as per the scheme of the Act.

44. In this regard reference may be had to the judgment in the case of ***Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. &Ors.21*** wherein it was held as follows:-

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place..."

45. Following the aforementioned judgment a similar observation was made in the case ***S. Gopal Reddy Vs. State of Andhra Pradesh9*** which reads thus:-

"12. It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute

seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary..."

46. In the context of adopting a purposive approach to interpretation of a statutory provision reference may be had to the observations made by Lord Denning in the judgment in the case of ***Seaford Court Estates Ltd. Vs. Asher22,*** which are as follows:-

"The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life' to the intention of the legislature.... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

47. The principle of reading a statute as a whole was reiterated in the case of ***Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat10*** wherein it was observed as follows:-

"30. By now it is well settled Principle of law that no part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is also trite that the statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved.

x x x x x

34. A conjoint reading of two sections as a whole leaves no manner of doubt that one provision is to be construed with reference to the other provision and vice versa so as to make the provision consistent with the object sought to be achieved. The scheme and object of the Act being the admissibility of the confession recorded under Section 15 of the Act in the trial of a person or co-accused, abettor or conspirator charged and tried in the same case together with the accused, as provided under Section 12 of the Act."

48. In the case of ***Anwar Hasan Khan Vs. Mohd. Shafi &Ors.23*** the cardinal principle of construction of a statute by reading it as a whole and construing one provision with reference to the other provision so as to make the provision consistent with the object

sought to be achieved, was emphasized and it was held as follows:-

"8. ...It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved..."

49. To a similar effect are the observations made in the case of ***Union of India &Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama11*** wherein referring to the judgment in the case of ***Towne Vs. Eisner, Collector of United States Internal Revenue for the Third District of the State of New York24 and Lenigh Valley Coal Co. Vs. Yensavage25,*** it was held as follows:-

"16. The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose. A statute is neither a literary text nor a divine revelation. "Words are certainly not crystals, transparent and unchanged" as Mr Justice Holmes has wisely and properly warned. (Towne v. Eisner26) Learned Hand, J., was equally emphatic when he said: "Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." (Lenigh Valley Coal Co. v. Yensavage27)"

50. The principle of reading a statute as a whole has been emphasized in***Maxwell on the Interpretation of Statutes28***wherein it has been stated as follows:-

"It was resolved in the Case of Lincoln College [(1595) 3 Co.Rep. 58B, at p. 59b] that the good expositor of an Act of Parliament should "make construction on all the parts together, and not of one part only by itself." Every clause of a statute is to "be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute. (Canada Sugar Refining Co., Ltd. v. R. [1898] A.C. 735, per Lord Davey at p. 741.)"

51. Reference may also be had to the judgment in ***R (on the application of Quintavalle) Vs. Secretary of State for Health29*** for the proposition that in construing an enactment effort should be made to give effect to the legislative purpose. The observations made in the judgment are as follows:-

"8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. ... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

52. Similar observations were made in ***Stock Vs. Frank Jones (Tipton) Ltd.30*** wherein it was held as follows:-

"Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way says Lord Blackburn, of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction . . . which goes by the name of "the rule in Heydon's Case" (1584) 3 Co. Rep. 7b. (Nowadays we speak of the "purposive" or "functional" construction of a statute.)"

53. The Court's function, in view of the foregoing discussion, would thus be to construe the words used in an enactment, so far as possible, in a way which best gives effect to the purpose of the enactment.

54. In the present case the legislative intent in granting a special privilege or a lien to the evicted tenant by way of a right to re-entry under Section 24(2) is clear from a plain reading of the provision which indicates that the right under Section 24(2) flows from the proceedings initiated under Section 21(1)(b) in terms of which the tenant had been evicted from the building on the ground of the same was in a dilapidated condition and was required for the purpose of demolition and new construction.

55. The provisions of Section 24(2) and 21(1)(b) are thus required to be read conjointly and have to be construed with reference to one another so as to make the same consistent with the object sought to be achieved i.e. providing a protection to the original tenant who had been evicted solely for the reason that the building was in a dilapidated condition and was required to be demolished and reconstructed without either the bona fide need of the landlord being considered or the comparative hardship of the landlord vis-a-vis the tenant being tested.

56. A combined reading of the provisions under Section 24(2) with Section 21(1)(b) would clearly show that the proceedings under Section 24(2) are a continuation of the proceedings for eviction under Section 21(1)(b) and provide a logical culmination to the said proceedings.

57. As a logical corollary the provisions contained under Section 34(4) which provide for substitution of the heirs or legal representatives of the deceased-tenant in proceedings for eviction would be applicable to proceedings under Section 24(2).58. While using the expression "original tenant" under Section 24(2), the term "tenant" is qualified by the word "original". Looking to the context the expression "original tenant" would be referable to the "evicted tenant" who has been evicted in proceedings initiated under Section 21(1)(b) for release of the building on the ground that the same is in a dilapidated condition and is required to be demolished and reconstructed.

59. The scheme of the Act clearly indicates that under Section 24(2) a right is conferred on the evicted tenant to be placed in occupation of the building from which he was evicted in proceedings under Section 21(1)(b), and it is not merely the discretion of the Collector to order the landlord to place him in

occupation of the building. The right of re-entry under Section 24(2) is to be seen as a statutory right flowing from the legislative mandate. Any other construction would, in my view, defeat the purpose of the statutory provision itself.

60. In view of the foregoing discussion, the order dated 13.12.2018 passed by the District Magistrate/Collector, Budaun rejecting the objections raised by the petitioner-landlord on the ground that the provisions contained under Section 34(4) did not contain any bar with regard to substitution of the legal heirs and representatives of the deceased-tenant, cannot be faulted with. The District Magistrate while passing the order has clearly held that the landlord could not substantiate their arguments with regard to the substitution application being barred by the provisions contained under Section 34(4) of the Act, 1972 and Rule 25 of the Rules, 1972 by placing any authority so as to demonstrate that the substitution of the legal heirs of the deceased-tenant was barred under the provisions of the Act, 1972.

61. Counsel for the petitioners has not been able to point out any material error or irregularity in the orders passed by respondent no.1/District Magistrate, Budaun rejecting their objections/application for recall in respect of the substitution of the legal heirs of the deceased-tenant, so as to warrant interference in exercise of powers in writ jurisdiction under Article 226 of the Constitution of India.

62. The petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.05.2019

BEFORE
THE HON'BLE IRSHAD ALI, J.

Rent Control No. 89 of 1999

Dilip Singh Chawla ...Petitioner
Versus
Krishna Kurari Gupta &Ors. ...Respondents

Counsel for the Petitioner:
S. Mirza

Counsel for the Respondents:
Chief Standing Counsel, Dheeraj Srivastava, R.K. Dewedi

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Rules 16(1)(d), 16(2). Even if no plea under Rule 16(1)(d) has been raised below—it is the duty of the Court to consider this aspect.

Ground based on subsequent event is liable to be considered by the Court.

Release application was allowed. Appeal was dismissed. Petitioner has challenged both the orders. Setting aside both the orders and remanding the matter, the High Court. Even if the plea under Rule 16(1)(d) has not been raised below, it is the duty of the Court to take into account that aspect. (Para 17, 23)

B. Subsequent event – ground based on - which was not available before both the Courts below, is liable to be considered by the Court while dealing with the matter of bonafide requirement. (Para 20, 27)

C. No distinction is made between residential and non-residential premises in Section 21(1). Therefore, it cannot be held that the power vested in the authority to order partial eviction is confined to the residential premises only. (Para 19, 24)

Precedent followed:-

1.Smt. Raj Rani Mehrotra Vs. IInd Addl. District Judge and others, Allahabad Rent Cases, 1980
(Para 17, 32)

2. Saroj Mishra and others Vs. Chandrakanti Sinha and others, 2009 (27) LCD 874 (Para 18)

3. Swaraj Kumar (Sri) Vs. Arvind Kumar, 2005 (2) ARC 243 (Para 19)

4. Jai Narain Khanna Vs. IInd A.D.J., Moradabad and others, 2007 (1) ARC 254
(Para 20, 27)

Precedent distinguished: -

1. Mohd. Zafar Khan and others Vs. District Judge, Hardoi and others, 2011 (2) ARC 629
(Para 11, 21)

2. Ramji Lal Vs. 1st Addl. District Judge, Muzaffarnagar and others, 1992 (1) ARC 473,
(Para 12)

3. Suresh Chand Sharma Vs. Nand Kumar Kamal, 2013 (2) ARC 174 (Para 13) (E-4)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Shafiq Mirza, learned Senior Advocate assisted by Sri Himayu Mirza, learned counsel for the petitioner and Sri Dheeraj Srivastava, learned counsel for the respondent no.1.

2. Factual matrix of the case is that an application under Section 21(1)(a) of the U.P. Act No.13 of 1972 was filed by opposite party no.1 on 10.1.1997. The petitioner filed written statement on 21.8.1997. The release application was allowed vide order dated 11.9.1998.

The petitioner, feeling aggrieved by the order passed by the Prescribed Authority, filed an appeal which has also been dismissed vide order dated 24.7.1999 and on the request made by the learned counsel for the appellant, operation of the judgment was stayed for a period of one month. Both the orders passed by the Prescribed Authority as well as by the Appellate Court are under challenge.

3. Challenging the impugned orders, submission of learned counsel for the petitioner is that the provision contained under Section 21(1) (a) is mandatory to be followed while deciding the release application on the ground of bona fide requirement. Both the courts below have committed gross illegality in not returning finding on the point by following the mandatory provisions of Section 21(1)(a) of the Act No.13 of 1972.

4. In support of his submission, he has placed reliance upon the following judgments:

(i) **Smt. Raj Rani Mehrotra v. IInd Addl. District Judge and others** reported in **Allahabad Rent Cases, 1980 paragraph 1**

(ii) **Saroj Mishra and others v. Chandrakanti Sinha and others** reported in **2009 (27) LCD 874, paragraph 8**.

(iii) **Swaraj Kumar (Sri) v. Arvind Kumar reported in 2005 (2) ARC 243, paragraphs 5,6,7,8 and 9.**

5. Next submission of learned counsel for the petitioner is that during the pendency of the proceedings, if another shop became vacant that too will be taken into consideration while deciding the issue involved at this stage also. In regard to that, he placed reliance upon the judgment rendered by this Court in the case of **Jai Narain Khanna v. IInd A.D.J., Moradabad and others** reported

in **2007 (1) ARC 254, paragraphs 9,10 and 11.**

6. Sri Safiq Mirza, learned counsel for the petitioner further submitted that under the proviso to Section 21 (1)(a), certain requirement is prescribed to be considered while dealing with the bona fide requirement of the landlord as well as of the tenant. Likewise, he placed reliance upon proviso (4) to Section 21 to the effect that the Prescribed Authority and the Appellate Court have failed to appreciate that while recording finding on bona fide requirement, the factual as well as relevant evidence is to be taken care of which has not been done in the present case.

7. Per contra, submission of learned counsel for the respondents is that the petitioner has Chawla market complex, wherein there are 25-30 shops, in which he can establish his shop to run his business, therefore, in comparison of the landlord the bona fide requirement and comparative hardship of the tenant is more than that of landlord.

8. He next submitted that both the courts below while considering the application for release of the shop have taken care of the comparative hardship of the landlord as well as bona fide requirement being three sons and five daughters in his family, therefore his submission is that both the courts below have committed no error in law in passing the impugned judgments. He next submitted that in view of the finding return by both the courts below, no interference is called for and the writ petition is liable to be dismissed.

9. He next submitted that opposite party no.1 is the owner of the shop in question and for release of the shop occupied by the petitioner, he moved an application under Section 21 (1)(a) of the Act No.13 of 1972 on 10.9.1997 on the ground that son of the plaintiff is unemployed, so that he may be settled in business in the shop in dispute.

10. Next submission of learned counsel for the respondents is that the Prescribed Authority on the basis of evidence, has recorded finding on the bonafide requirement which does not suffer from infirmity or illegality. He next submitted that the Appellate Authority, after perusal of the material on record, has affirmed the finding return by the Prescribed Authority in regard to release of the shop.

11. In support of his submissions, he placed reliance upon the judgment rendered by this Court in the case of **Mohd. Zafar Khan and others v. District Judge, Hardoi and others** reported in **2011 (2) ARC 629 paragraphs 85,86 and 91.**

12. He further placed reliance upon the judgment rendered by this Court in the case of **Ramji Lal v. 1st Addl. District Judge, Muzaffarnagar and others** reported in **1992(1) ARC 473** so as to distinguish the applicability of the judgments cited in favour of the petitioner.

13. He also placed reliance upon the judgment rendered in the case of **Suresh Chand Sharma v. Nand Kumar Kamal** reported in **2013 (2) ARC 174.**

14. I have heard rival submissions of learned counsel for the parties and perused the material on record as well as law reports relied upon by the learned

Senior Advocate appearing for the petitioner as well as learned counsel for the respondents.

15. To resolve the controversy of the present writ petition, Section 21(1)(a) is quoted below:

"21. Proceedings for release of building under occupation of tenant.

(1) The Prescribed Authority may, on an application of the landlord in that behalf order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exits, namely-

(a) that the building in bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust; ....."

16. On perusal of the provisions referred hereinabove and the order passed by the Prescribed Authority, it is reflected that while dealing with the matter of bonafide requirement, there is only recital that the bonafide requirement of the landlord is more than that of the tenant/petitioner. While reaching at the conclusion of the bonafide requirement, the Prescribed Authority would have considered the comparative hardship, irreparable loss and injury and to arrive at conclusion of bonafide requirement, he has to record cogent reason which is missing in the impugned orders. Thus, non-recording of cogent reason to arrive at conclusion of bonafide requirement, the order vitiates in law.

17. In regard to the consideration of the provisions contained under Section 21(1)(a), learned counsel for the petitioner placed reliance upon the judgment rendered in the case of **Smt. Raj Rani Mehrotra (supra)**, wherein the Hon'ble Supreme Court has held in paragraph 1 as under:

"1. We have heard counsel for the parties. On going through the judgments of the lower authorities also of the High Court we are satisfied that the issue arising under Rule 16(1)(d) of the rules framed under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction), Rules, 1972, as to whether the landlord's need could have been satisfied by releasing only a part of the premises has not been gone into or considered by any of them. When the plea under the said rule was pressed on behalf of the tenant in the High Court. The High Court rejected it on the sole ground that no such plea has been raised by the tenant in his written statement and as such it could not be considered. It is clear that under the relevant rule it is a duty of the court to take into account that aspect while considering the requirements of personal occupation of the landlord and therefore, this issue will have to be remanded to the High Court."

18. Learned counsel for the petitioner placed reliance upon the judgment rendered in case of Saroj Mishra (supra), wherein following has been held in paragraphs 8 and 9:

"8. After hearing learned counsel for petitioner and learned counsel or

respondents, as it is not disputed that the issue regarding part of release of the accommodation to satisfy the need of the landlord-respondent has not been considered, therefore, this Court is of the view that matter needs re-consideration in view of Rule 16(1)(d) of Rules 1972 which is mandatory in nature. This Court as well as the Apex Court has also taken the same view.

9. In view of the aforesaid fact, the writ petition is allowed in part and the order dated 30.9.2008 passed by learned Additional District Judge, Court No.1, Allahabad is hereby quashed and the matter is remanded back to Appellate Authority for decision in view of the observation made above taking into consideration the provision of Rule 16(1)(d) of the Rules framed under the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 as well as the Apex Court judgment considering the question of part release of accommodation in dispute. As the matter is very old, therefore, the same may be decided by Appellate Authority within a period of six months without granting any unnecessary adjournments to the parties."

19. Another judgment rendered in the case of **Swaraj Kumar (Sri) (Supra)** relied upon by learned counsel for the petitioner, wherein the following has been held in paragraphs 5, 6,7,8 and 9:

5. Learned counsel for the petitioner has argued firstly that in view of the provisions of Section 21(1)(a) of the Act it was incumbent on the part of the prescribed authority as well as the appellate authority before directing release of the accommadation in dispute under Section 21(1)(a) of the Act, to consider as to whether the release of the part of accommodation will serve the purpose of the landlord and tenant both and if it would have come to the conclusion that the release of the part of the accommodation will serve the purpose, it should direct for release of part of the accommodation not of entire. Learned Counsel for the petitioner further argued many other points but since the writ petition succeeds on this point of part release of the accommodation, the other points are not discussed. For ready reference Section 21(1)(a) is quoted below :

"21. Proceedings for release of building under occupation of tenant.-(1) The prescribed authority may, on an application of the landlord in that behalf order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists, namely :

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust...."

6. As against the point of part release, learned Counsel for the respondent raised objections to the effect that since this point was not raised either before the prescribed authority, or before the appellate authority, therefore, petitioner cannot be permitted to raise it before this Court for the first time. Learned Counsel for the petitioner relied upon the decision of the Apex Court in Smt. Raj Rani Mehrotra v. IInd Additional District Judge and Ors., 1980 ARC 311, wherein the Apex Court has ruled as under :

"We have heard counsel for the parties. On going through the judgments of the lower authorities also of the High Court we are satisfied that the issue arising under Rule 16(1)(d) of the Rules framed under the U.P. Urban Buildings (Regulations of Letting, Rent and Eviction), Rules 1972, as to whether the landlord's need could have been satisfied by releasing only a part of the premises has not been gone into or considered by any of them. When the plea under the said rule was pressed on behalf of the tenant in the High Court, the High Court rejected it on the sole ground that no such plea has been raised by the tenant in his written statement and as such it could not be considered. It is clear that under the relevant rule it is duty of the Court to take into account that aspect while considering the requirements of personal occupation of the landlord and therefore, this issue will have to be remanded to the High Court.

We accordingly set aside the order of the High Court dismissing the writ petition and remand the matter back to it for determination of aforesaid issue. If necessary, theparties may have to be allowed to lead fresh evidence, if the High Court is unable to decide it on the materials on the record. If evidence becomes necessary, the High Court may in its turn remand the matter back to the trial court, which will give an opportunity to both the parties to lead fresh evidence."

7. It is then submitted by learned Counsel for the petitioner that in view of the law laid down by the Apex Court, the objection raised by respondent deserves to be rejected. It is then submitted by learned Counsel for the respondents that since the accommodation in dispute is a non-residential accommodation which is governed by the provisions of Rule 16(2) of the Rules framed under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 and not by the provisions of Rule 16(1) of the aforesaid Rules, therefore, the question of considering the part release by the authorities does not arise. In reply to the aforesaid objection learned Counsel for the petitioner further relies upon other decision of the Apex Court in Ramesh Chandra Kesharwani v. Dwarika Prasad and Anr., 2002 (4) AWC 2737 (SC) : 2002 (2) ARC 298, wherein taking notice of the Sub-rules (1) and (2) of Rule 16 of the aforesaid Rules, 1972 the Apex Court has ruled as under :

"5. The first contention raised by Shri R.B. Mehrotra looked attractive prima face, but on a closer reading of Section 21(1) it leaves little scope for doubt that the Prescribed Authority is vested with the power to order eviction of a tenant from the building under tenancy, or any specified part thereof if it is satisfied about exercise of the ground specified in the section. No distinction is made between residential and non-residential premises in the section. Therefore, by interpretation, it cannot be held that the power vested in the authority to order partial eviction is confined to the residential premises only.

Regarding Rule 16, it is to be rioted that Sub-rules (1) and (2) lay down certain factors for consideration by the Prescribed Authority which is considering the question of eviction from the premises. Rule 16(1) deals with premises in occupation for the purpose of residence and Rule 16(2) deals with premises in occupation of a tenant for the purpose of any business. Clause(d) of Rule 16 (1) provides that where the tenant's needs would be adequately met by leaving with him a part of the building under tenancy and the landlord's needs would be served by releasing the other part, the Prescribed

Authority shall release only the latter part of the building. This provision, in our view, merely reiterates the power vested in the authority to order eviction of the tenant from the premises in entirety or portion of it. No doubt a similar provision is not found in Sub-rule (2) of Rule 16, but that does not affect the power of the authority vested under Section 21 of the Act to order eviction of tenant from a portion of the premises in an appropriate case if the authority is satisfied that on the facts and circumstances of the case interest of justice will be served by passing such an order. Therefore, the first contention raised by Shri Mehrotra cannot be accepted."

8. Learned Counsel for the petitioner has also relied upon another judgment of this Court in Pratap Narain Tandon v. Abdul Makatadir, 2005 (1) AWC 921 : 2005 (1) ARC 555, wherein in the similar circumstances this Court quashed the order of the prescribed authority as well as the appellate authority and remanded the matter to the authority to decide in accordance with law in the light of observations made in the judgment.

9. Considering the aforesaid facts and arguments and the law laid down by the Apex Court and this Court, this writ petition deserves to be allowed and is hereby allowed. The order dated 31.3.2005 (Annexure-15 to the writ petition) passed by the appellate authority is quashed and the matter is remanded to the appellate authority to consider the question of part release and decide the same in the light of the observations made in this judgment and in accordance with law. Since the matter is old, the appellate authority is directed to decide the question involved within three months from the date of presentation of certified copy of this judgment before him.

20. He further placed reliance upon the judgment rendered in the case of **Jai Narain Khanna (supra),** wherein this Court in paragraphs 9, 10 and 11 has held as under:-

"9. According, the subsequent event of availability of the shop, in which original landlord was doing business, to Shyam Sunder during pendency of the writ petition after the death of the original landlord in the year 1998 has changed the entire scenario. It is such an important subsequent development, which will have to be taken into consideration. It has totally satisfied the need of Shyam Sunder as set up in the original release application.

10. I have considered the legal position in respect of subsequent events in he matter of bona fide need of the landlord in detail in the authority reported in Diptee Singh v. A.D.J., 2006 ARC 157. In the said authority, I have placed reliance upon several Supreme Court authorities including K.N. Agarwal v. D. Devi, 2004 (2) A.R.C. 764

11. Accordingly both the impugned orders are set aside and writ petition is allowed only on the ground of subsequent event of death of original landlord and availability of the shop, in which original landlord was carrying on the business, to Shy*am Sunder for whose need release application was filed.*

Para 13 of Diptee Singh authority is quoted below:-

"I have held in Khursheeda v. A.D.J., 2004 (2) ARC 64 that while granting relief to the tenant against eviction in respect of building covered by Rent Control Act, writ Court is empowered to enhance the rent to a reasonable extent. Under somewhat similar circumstances the Supreme Court in the authority reported in A.K. Bhatt v. R.M. Shah

AIR 1997 SC 2510: 1997 SCFBRC 322, enhanced the rent from Rs.101/- per month to Rs.3500/- per month with effect from the date of the judgment of the Supreme Court. For the period during which appeal remained pending before the Supreme Court rent was enhanced to Rs.2000 per month for some of the period and Rs.2500/- per month for rest of the period. In the said authority release application of the landlord had been allowed by the Court below. The Supreme Court held that the landlord who had sought release of the building when he was about 54 years of age had become 87 years of age when the matter was decided by the Supreme Court hence he was not in a position to do any business. This fact of old age of the landlord was taken into consideration as relevant subsequent event by the Supreme Court.

21. Learned counsel for the respondents placed reliance upon the judgment rendered in the case of Mohd. Zafar Khan (supra), wherein the following has been held in paragraphs 85, 86 and 91:

"85. And in the case of Ramji Lal Vs. 1st Addl. District Judge, Muzaffarnagar and others, 1992 (1) ARC 473, in paragraph No.19 has held as under:

"Para No.19- There is no dispute that if the provision of Rule 16(1)(d) have not been considered by the Appellate Authority the same can be considered by the High Court. Reference may be made to the case reported in Smt. Raj Rani Vs. IInd Additional District Judge, 1980 ARC 311(SC). But since this Rule is not attracted in the present case, there was no question of it being considered."

86. In the light of abovesaid facts, the provision which emerge out is to the effect that the only interpretation of Rule 16(1)(d) of Rules framed under U.P. Act 13 of 1972 is that the same has no application to a non-residential building as the said sub-rule does not deal with an accommodation let out for commercial/ business purpose but deals with an accommodation let out for residential purpose, thus the Prescribed Authority or Appellate Authority in the aid of Rule 16(1)(d) cannot consider theory of partial release of a commercial/ business space in respect to which release application moved by the landlord under Section 21(1)(a) of U.P.Act 13 of 1972 and the same is to be decided as per provisions as provided under Rule 16(2) of the Rules.

91. As per admitted facts of the present case, petitioners/ tenants are enjoying comforts of a rented shop while the landlord/ respondent is doing his business from another rented shop and in this regard, appellate court after appreciacing facts of the present case stated to the effect that after filing of release application tenant had not made any sincere effort to find out alternate accommodation. So as per settled provision of law that when a release application is filed before the prescribed authority, tenant must find out suitable accommodation, he cannot force landlord to allow him to run his business from a shop rented to him."

22. Learned counsel for the petitioner by placing reliance upon certain judgments wherein Rule 16(1)(d) was considered by holding

that to arrive at conclusion of bonafide requirement, reason should be recorded. Mere recital that there is bonafide requirement, is not sufficient. Learned counsel for the respondents tried to distinguish the judgments relied upon by learned counsel for the petitioner on the pretext that most of the judgments have dealt the provisions contained under Rule 16(1)(d). Thus, the ratio of judgments is not applicable to the present facts and circumstances of the case.

23. The dispute in hand pertains in regard to Section 21(1)(a) of the Act No.13 of 1972, therefore, the finding is to be recorded in regard to bonafide requirement taking into consideration of aforesaid provisions.

24. Hon'ble Supreme Court while considering bonafide requirement as required under Section 16(1)(d) has proceeded to hold that no reason has been recorded to arrive at the conclusion of bonafide requirement, although the judgment is in consideration of provisions under Rule 16(1)(d), but the ratio of judgments shall be made applicable in a case dealing with the matter under Section 21(1)(a) wherein while deciding the issue, finding with reason is to be return on the baonfide requirement. Therefore, the submission advnaced that the judgment relied upon by the learned counsel for the petitioner is not applicable to the present facts and circumstances of the case, is misplaced.

25. On perusal of the impugned orders, it is apparent on the face of it that both the courts below while passing the impugned orders have failed to discharge their legal duties to arrive at the conclusion of bonafide requirement. Both the orders do not contain the cogent reason and mere rectial of bonafide requirement is not the purpose to decide the requirement of the landlord. The courts below would have considered that there is bonafide need and if it is not considered, there shall be hardship to the landlord. In the present case, both the courts below have failed to record the reason in this regard.

26. In the above-referred judgments whether dealing with the provisions of Rule 16(1)(d) or the provisions contained under Section 21(1)(a), it has been recorded that the Prescribed Authority as well as the Appellate Authority has to take care to arrive at the conclusion of bonafide requirement by recording finding on the basis of material evidence produced before them. Due to non-consideration of the aforesaid aspect of the matter, both the orders impugned in the writ petition suffer from gross illegality and cannot be sustained.

27. In regard to the shop which became vacant during the pendency of the writ petition, the submission advanced by the learned counsel for the petitioner is that even though the ground was not available before both the courts below, the same is liable to be considered by this Court while dealing with the matter of bonafide requirement. He submits that due to subsequent vacant shop which is available to the landlord will serve the purpose and meet the end of requirement to run the business of his son. In this regard, he placed reliance upon the judgment rendered in the case of Jai Narain Khanna (supra), wherein this Court while dealing with the matter has held

that the issue cannot be denied by the High Court on the issue of subsquent event of availability of the shop by the High Court and remanded the matter for reconsideration of the relevant subsequent events by the Hon'ble Supreme Court.

28. This Court, on over-all consideration of material on record, has recorded that both the courts below have failed to record cogent reason to arrive at the conclusion of the bonafide requirement and is of the opinion that by setting aside the orders, the matter is to be remanded back to the Prescribed Authority for fresh consideration with the further direction to take into consideration the subsequent events of availability of the shop to fulfill the bonafide needs of the landlord.

29. In view of the above, this Court has arrived at the conclusion that both the courts below have ignored the consideration of bonafide requirement by not recording cogent reason to arrive at the conclusion of bonafide requirement. Thus, the orders dated 24.7.1999 and 11.9.1998 cannot be sustained and are hereby set aside.

30. Accordingly, this writ petition succeeds and is hereby allowed.

31. In the interest of justice, the matter is remanded back to the Prescribed Authority to reconsider and pass fresh order permitting the parties to lead evidence and provide opportunity of hearing while considering the issue involved as observed by this Court.

32. It is, however, provided that question of existence of subsequent shop shall also be taken into consideration in the light of the judgment referred hereinabove in the case of Smt. Raj Rani Mehrotra (supra).

33. It is however directed that since the matter is old, therefore, the exercise in this regard shall be concluded and final order shall be passed within a period of four months from the date of production of a certified copy of this order.

34. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.05.2019

BEFORE
THE HON'BLE IRSHAD ALI, J.

Rent Control No. 11763 of 2019

Smt. Munni Devi &Ors. ...Petitioners
Versus
Addl. Dist. & Session Judge IVth Bahraich &Ors. ...Respondents

Counsel for the Petitioners:
Sri Anurag Narain

Counsel for the Respondents:
M.A. Khan

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Sections 12, 16, 21(1)(a). Landlord's a remedy under S.16 does not affect the maintainability of application U/s 21.

Release application was allowed. Appeal was dismissed. Petitioner has challenged both the orders. Dismissing the Petition, the High Court.
Premises had not been let out to a sub-tenant is a finding of fact, therefore provisions of Sections 12 and 16 are not attracted. (Para 28)

Precedent followed: -

1.Smt. Padma Devi and others Vs. Prescribed Authority, Kanpur and others(Para 22)

2. Kumari Sarveshwari and others Vs. IIIrd Addl. DistrictJudge,Lucknow and others, (Para 23, 24)

Precedent distinguished: -

1.Revti Raman and others Vs. (Para 15, 16)

2. Suman Wahal Vs.(Para 17, 18, 19)

3.Ram Kishan Das Vs.(Para 20, 21) (E-4)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Anurag Narain, learned counsel for the petitioners and Sri M.A. Khan, learned Senior Advocate, assisted by Mohd. Aslam Khan, learned counsel for the respondent nos.3 to 13.

2. Factual matrix of the case is that the petitioners are tenant of the disputed shop. Landlord filed an application under Section 21(1)(a) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 [hereinafter referred to as the "Act of 1972"] before the Prescribed Authority for release of the shop which was allowed vide order dated 24.12.2005. Feeling aggrieved, the petitioners filed Rent Appeal No.1 of 2006 which has been dismissed vide judgment and order dated 7.3.2019. Against the said order, the petitioners have approached this Court by challenging the order passed by the Prescribed Authority on 24.12.2015 and the order of the Appellate Authority dated 7.3.2019.

3. Assailing the aforesaid two orders, submission of learned counsel for the petitioners is that the application filed under Section 21(1)(a) of the Act of 1972 was not maintainable in view of the fact that in paragraph 5 of the release application, the statement of fact was made that the shop has been let out to some other person. Therefore, in view of the provisions contained under Section 12 of the Act of 1972, the application would have been filed under Rule 16 of the Act of 1972. He next submitted that since this aspect of the matter was not considered by the Prescribed Authority as well as by the Appellate Authority, therefore, both the courts below have committed illegality in passing the impugned orders.

4. His next submission is that while recording the finding on the bona fide requirement, the comparative hardship and bona fide requirement were not properly considered. The petitioners in the light of the provisions contained under Rule 16 of the Rules framed under the Act of 1972, are running a business and both the sons are involved in the business, therefore, there was no bona fide requirement of the shop. Thus, the finding recorded on the point is misconceived and contrary to Rule 16. In support of his submission, he placed reliance upon the following judgments rendered by this Court:

(i) **Revti Raman and others v. The District Judge, Mathura and ors** reported in **1990 ARC Page 731**.

(ii) **Suman Wahal v. Smt. Mukti Sen and others** reported in **2000(1) ARC 493**.

(iii)**Ram Kishan Das v. Vth Additional District Judge, Bijnore and others** reported in A**llahabad Rent Cases 1994 (2)**

5. He further submitted that both the courts below have failed to record finding

on the capital and business of the landlord while dealing with the bona fide requirement and comparative hardship.

6. On other hand, Sri M.A. Khan, learned Senior Advocate, submitted that in paragraphs 1 and 2 of the release application, it has been stated that the opposite parties are landlord and the petitioners are the tenant of the shop in question, which has not been denied in the written statement filed by the petitioners.

7. He next submitted that the averment made in paragraph 5 of the release application was denied with the specific stipulation that he has not let out the shop to the sub-tenant and this question was dealt with by the Prescribed Authority and finding has return that the opposite parties in the present writ petition are landlord and the petitioners are tenant of the shop in question. Therefore, the application under Section 21(1)(a) is maintainable and the submission advanced by the learned counsel for the petitioners in this regard is devoid of merits.

8. He next submitted that both the courts below, upon consideration of bona fide requirement and comparative hardship have recorded cogent reason and the question involved and raised by the petitioners have duly been considered and upon recording the findings of facts arrived at the conclusion that the application under Section 21(1)(a) is maintainable. His next submission is that both the courts below have committed no error in law in deciding the issues in regard to release of the shop.

9. In support of his submission, reliance has been placed upon the judgment rendered by this Court in the case of **Smt. Padma Devi and others v. Prescribed Authority, Kanpur and others** reported in **ARC 1981 Short Notes of Cases 7.** He further placed reliance upon the judgment rendered by this Court in the case of **Kumari Sarveshwari and others v. IIIrd Addl. District Judge, Lucknow and others** reported in **ARC 1984 Vol.1 Page 479.**

10. After having heard the rival submissions of learned counsel for the parties, I perused the material on record and the judgment relied upon by learned counsel for the parties.

11. To resolve the controversy in the present writ petition, Section 21(1)(a) of the Act of 1972 is quoted below:

"21. Proceeding for release of building under occupation of tenant. - (1) The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely-

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust :"

12. On its perusal, it is evident that on the ground of bona fide requirement, application would be moved by the landlord under the aforesaid provisions.

13. Learned counsel for the petitioner placed reliance upon the Section 12 which is being quoted below:

"12. Deemed vacancy of building in Certain cases. - (1) A, landlord or tenant of a building shall be deemed to have ceased to occupy the building or part thereof if-

(a) he has substantially removed his effects therefrom, or

(b) he has allowed it to be occupied by any person who is not a member of his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

(2) In the case of a non-residential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy :

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

(4) Any building or part which a landlord or tenant has ceased to occupy within the meaning of sub-section (1), or sub-section (2) , or sub-section (3), shall, for the purposes of this Chapter, be deemed to be vacant."

14. On its perusal, it is evident that it is in regard to deemed vacancy in case of sub-letting of building to some other person, remedy is to initiate proceeding in view of the provisions contained under Section 16, therefore, submission advanced by learned counsel for the petitioner is that Section 16 was violated and both the courts below have not taken care of, due to which the orders suffer from apparent illegality.

15. In the case of **Revti Raman (supra)** relied upon by learned counsel for the petitioner, the following has been held by this Court in paragraph 8 of the judgment:

"8. It was the submission of the learned counsel for the petitioner that Section 12(2) could not have retrospective effect and if anybody was inducted as a partner in a business upon a premises held by a tenant prior to 1972 there having been the bar under the extant law as to his being a partner, may not to a reason, after the introduction of Act No.13 of 1972 for applying the deeming clause of Section 12. It was stated that any provision of a legislation must be taken to be prospective unless a retrospective effect was given specifically or by necessary implication. He laid stress on the clause in Section 12 (2) "as a partner or a new partner" to say that a person introduced as a partner before 1972 may not be deemed to be a new partner after 1972. The learned counsel for the other side submitted that all these argument are not at all necessary as by their own act the defendants had cancelled the partnership deed executed prior to 1972 and had chosen to constitute a new partnership on two occasions after the introduction of the Act and even accepting that the law is only

prospective the tenants must be deemed to have ceased to occupy the building. In view of the facts pleaded, I feel that this court may not Government Order into the question if the provisions of Section 12(2) are prospective or retrospective. Admittedly, in 1968 only D-1 and D-3 were the partners in the business. The defence story as narrated in the judgment indicates that it was a joint family business and D-1 was the Karta of the family. Evidently, introduction of D-3 in the partnership had taken away the status of joint family business. In 1973, D-4 was also introduced as a partner together with D-1 and D-3. It was argued that as it was a joint family business. D-4 had every right to be introduced in the family business and his introduction did not violate the conditions of Section 12(1)(b) read with Section 12(2) of the Act No.13 of 1972. This argument is difficult to accept as the business ceased to be a joint family business, there being a outsider already introduced as a partner. However, in 1981, the partnership suffers a complete change, one could say in lock, stock and barrel as D-1, the Karta of the joint Hindu family, dissociates himself from the business and D-2 as introduced as a partner. From the trend of events, it cannot be presumed that with the exit of D-1 and with the introduction of D-2, it still remained the same partnership business, and more so, when the shares were also redistributed once the Court comes to the conclusion that the 1981 partnership was not a continuation of the same old partnership when D-4 becomes a partner in the business run in the tenanted premises being an outsider to the family of the tenant immediately the situation attracts Section 12(1)(b)and Section 12(2) of Act 13 of 1972. It may be looked from another angle. The tenancy was under the name of D-1 alone. By the partnership deed of 1981 he removes himself from the name of D-1 alone. By the partnership deed of 1981 he removes himself from the partnership leaving the business in the premises in the hands of two persons of his family and another from outside the family. If a tenant totally removes himself from the business,there could not be a better case for application of Section 12(1)(b) and Section 12(2) of the Act."

16. In the case of **Revti Raman (supra)**, the question is in regard to applicability of Section 12 (2) that whether it is an application with retrospective effect and if anybody was inducted as a partner in a business upon a premises held by a tenant prior to 1972 there having been the bar under the extant law as to his being a partner, may not to a reason, after the introduction of Act No.13 of 1972 for applying the deeming clause of Section 12. It was stated that any provision of a legislation must be taken to be prospective unless a retrospective effect was given specifically or by necessary implication. He laid stress on the clause in Section 12(2) "as a partner or a new partner" to say that a person introduced as a partner before 1972 may not be deemed to be a new partner after 1972. Here in the present case, the matter of consideration is entirely different. In the present case the shop in dispute was not let out to any other person, therefore, his submission is that the provisions of Section 12 (b) and Section 12(2) of the Act No.13 of 1972 was applicable. Accordingly the submission would have been misplaced.

17. In the case of **Suman Wahal (surpa)** relied upon by learned counsel for the

petitioner, this Court has held in paragraph 9 of the judgment as under:

"9. The vacancy can be declared either under Section 15 of the Act when the tenant vacates or is likely to vacate it and it can also be declared vacant under Section 12 of the Act when the conditions mentioned therein exist. If the tenant has substantially removed his effects from the disputed accommodation or has allowed it to be occupied by any person who is not member of his family or in case of non-residential building where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building."

18. In the aforesaid case, in regard to applicability of Section 12, it was considered and held that if the tenant has substantially removed his effects from the disputed accommodation or has allowed it to be occupied by any person who is not member of his family or in case of non-residential building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

19. Here, in the present case, facts and circumstances are totally different. The landlord moved an application under Section 21(1)(a) setting out a case of bona fide requirement of the shop, thus the judgment is not attracted to the present case.

20. In the case of **Ram Kishan Das (supra)** relied upon by learned counsel for the petitioner, this Court has held in paragraph 7 of the judgment as under:

"So far as the ground floor is concerned, I am of the opinion that the Appellate Court has not properly considered this matter. Admittedly, the landlord is now about 66 or 67 years of age and the Appellate Court should have carefully examined whether he really intends to do business at this old age or it is a mere pretext to get the shop released. I do not mean to say that an old cannot start business. But then the Appellate Court should have carefully examined the matter and asked the landlord to furnish full details as to what is the exact nature of the business he intends to do in the ground floor, what steps he has taken in this connection, what contacts he has made, what capital he proposes to invest etc. A mere averment by the landlord that he intends to do business is surely not enough. The landlord had merely contended that he intends to do business of Agro-Engineering on the ground floor for which he is qualified. In my opinion, this bald averment is not sufficient to hold that the landlord has bona fide need for business purpose. If an old man alleges that he has bona fide need of the accommodation as he intends to start business, the Court must carefully examine whether this allegation is true or a mere pretext to get the shop released. Surely there is a difference between a youngman and old man. A youngman can more readily be believed fit is contended that it is intended to start business. In the present case, it is not clarified what exactly the landlord means by saying that he wants to do Agro-Engineering business. Does he mean that he intends to sell agricultural machinery in the said shop? If so, what particular machinery does he intends to sell, which manufacturing company has been contacted and what steps has he taken in

this connection? Has he got any agency for doing such business? All these and other relevant questions should have been enquired into by the Appellate Court before holding that the need of the landlord for doing business is genuine. Unfortunately, the Appellate Court has believed the bald averment of the landlord that landlord that he wants to do Agro-Engineering business without probing deeper into the matter. Hence, I set aside the impugned judgment dated 17.7.1993 so far it has been held in the said judgment that the need of the landlord for the ground floor for doing business is genuine and I remand the case to the Lower Appellate Court so far as this question of alleged need of the landlord for doing business in the ground floor is concerned. It is no doubt true that a finding of bona fide need is a finding of fact and ordinarily this Court does not interfere with findings of fact, but if the said finding is arbitrary or without considering the relevant material then this Court can certainly set aside the same and remand the matter to the Lower Appellate Court for a fresh finding in accordance with law. Hence the matter, so far as it relates to the ground floor of the deputed accommodation, is remanded to the Lower Appellate Court for considering the matter afresh in the light of the observations made above and for giving afresh decision as to whether the need of the landlord for the ground floor for doing business is genuine or not."

21. The ratio of judgment relied upon in the case of **Ram Kishan Das (supra)** is also not attracted to the present case.

22. Reverting the submissions advanced by learned counsel for the petitioner, learned Senior Advocate- Sri M.A. Khan has placed reliance upon the judgment rendered in the case of **Smt. Padma Devi (Supra).** Relevant portion of the judgment is quoted below:

"The landlord's application was filed against Brij Raj Singh (Original tenant) as well as Gopal Ram on grounds which are relevant for allowing an application under Section 21 of the Act. Brij Raj Singh's tenancy admittedly continued even through it is asserted that he had vacated the accommodation and allowed it to be occupied by Gopal Ram. The application of the landlord being directed against a tenant was clearlymaintainable under Section 21. Under Section 23 of the Act not only the tenant but all those who might be occupying the building on his behalf are liable to be evicted. On the facts found by the courts below, the application of the landlord was clearly maintainable. The landlord might have had an alternative remedy under Section 16 of the Act, but that fact by its cannot effect the maintainability of the application under Section 21 of the Act."

23. In the case of Kumari Sarveshwari relied upon by learned Senior Advocate, Sri M.A. Khan this Court has held in paragraphs 3,4 and 5 of the judgment as under:

"3. The learned appellate court has held that Section 16 was attracted because of the petitioner's pleading that the opposite parties were not living in the house for the last several years. One of them was in Zambia and the other was living at Dehradun. Only some strangers were living in the premises. The implied that a deemed vacancy has occurred within the meaning of Section 12 of the Act.

Accordingly the remedy to the petitioners was only under Section 16.

4. It is noteworthy that the case was contested by the tenants before the Prescribed Authority. It was the tenants who had filed an appeal. It was thus not a case in which the tenants had admittedly ceased to have any concern with the house. It was, therefore, surprising that an argument passed on behalf of the tenants that the house was vacant in the eye of law should have been accepted by the appellate Court for throwing out the landlord's petition under Section 21. If the tenants had really ceased to occupy the accommodation and the house was to be deemed to be vacant then they have no locus standi to maintain the appeal and the appeal should have been dismissed on that ground instead of being allowed. Indeed in para 7 of the counter affidavit filed in this court also, the tenants have stated that their case was that the deponent, namely, opposite party no.2 had temporarily gone to Zambia on deputation by the Government of India for a fixed term and that his luggage was kept therein and his daughters stayed in the house along with his real elder sister and her sons. In view of this assertion of the opposite parties the tenants' plea which has found favour with the appellate court was clearly untenable. The tenants could not be permitted to blow hot and cold in the same breath.

5. Moreover, even if a tenant may induct some outsiders in a building and as such, proceedings may possibly be initiated under Section 16 on the ground of deemed vacancy having occurred under Section 12 it does not follow that a suit on the ground of sub-letting canot lie under Section 20 or that an application under Section 21 on the ground of balance of hardships cannot lie at the instance of the landlord. It is open to the landlord to pursue either of the remedies and one cannot be defeated merely on the ground that another remedy was also available to him."

24. In the judgment rendered in the case of **Kumari Sarveshwari (supra)** relied by the learned counsel for the respondents, it has been held that in case tenancy is allowed to continue, the same is liable to be evicted by initiating proceeding under Section 21(1)(a) and in case the ground was taken that the opposite parties were not living in the house for the last several years, one of them was in Zambia and other were living at Dehradun and only some other were living in premises then it implied that there is a deemed vacancy occurred within the meaning of Section 12 of the Act. Accordingly, the remedy was only under Section 16.

25. In the present case, there is no such circumstance. The petitioners were tenant of the shop and after recording finding of bona fide requirement, the court has proceeded to decide the application filed under Section 21(1)(a).

26. I have carefully examined the material available on record and the law-reports relied upon by learned counsel for the parties.

27. On thoughtful consideration of the order impugned, it is evident that the prescribed authority, on the basis of averments made in the application filed under Section 21(1)(a) as well as written statement and material evidence led by the parties, came to the conclusion that there is relationship of landlord and tenant and by holding the application to be maintainable, recorded cogent reason and finding to arrive at conclusion to evict the shop.

28. In regard to applicability of the Section 12 and Section 16, I have perused

the material on record and found that the provisions contained under Section 12 and Section 16 are not attracted to the present facts and circumstances of the case and the pleadings placed before the Prescribed Authority as well as before the Appellate Court. I am of the considered opinion that the judgments relied upon by learned counsel for the petitioners are distinguishable and do not have applicability to the present case.

29. The Prescribed Authority, while dealing with the issues framed and material placed on record, recorded cogent reason and after considering the bona fide requirement and comparative hardship as well as other ingredients required for consideration of claim for release of the shop, proceeded to pass the order dated 24/12/2005. He also considered the statements of facts made in paragraphs 1 and 2 of the release application filed under Section 21 (1)(a) and written statement filed by the opposite parties.

30. On perusal of the statements of facts made in paragraphs 1 and 2 of the application moved under Section 21(1)(a) by the landlord, the Prescribed Authority, considering the statement of fact made in written statement, has return finding of fact that there is relationship of landlord and tenant between the parties and on the basis of bona fide requirement and comparative hardship has decided the issue in favour of the landlord which was affirmed by the Appellate Court dismissing the appeal filed by the petitioners.

31. This Court, upon consideration, came to the conclusion that there are concurrent findings and cogent reasons recorded in passing the orders and there is no ground made out by the petitioners for interference in the orders impugned. Both the courts below have duly considered the judgments relied upon by learned counsel for the parties and thereafter, allowed the application filed under Section 21 (1)(a) and dismissed the appeal vide the orders impugned.

32. In the opinion of this Court, both the courts below have committed no illegality nor the impugned orders suffer from any infirmity. Therefore, this Court declines to interfere in the impugned orders.

33. Accordingly, this writ petition lacks merits and is hereby dismissed.

34. It is, however, directed that the petitioner shall evict the shop in dispute within a period of four months from the date of production of a certified copy of this order ensuring payment as directed by the Appellate Court.

35. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.09.2019
BEFORE
THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE JASPREET SINGH, J.

Land Acquisition No. 174 of 2015
alongwith
Land Acquisition No. 175 of 2015

Rajendra Singh &Anr. ...Petitioners
Versus
District Magistrate Raebareli &Ors. ...Respondents

Counsel for the Petitioners:
Apporva Tewari

Counsel for the Respondents:

C.S.C., Anupam Mehrotra, Gopesh Tripathi

A. Land Acquisition Act, 1894: Sections 3 (b), 4, 6, 12(2), 18. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013: Sections 24(1)(a), 64. Held:- Collector does not have power to withhold the reference-delving into the merits is outside his jurisdiction.

Petitioners' application against the mutation Order was under challenge. Notification u/s 4 and declaration u/s 6 of the old Act was issued. During the pendency of the proceedings, the old Act was repealed and replaced by Act of 2013. Petitioner's application u/s 18 of the old Act was rejected by respondent No.2. Allowing the present petition, the High Court. The Collector does not have power to withhold the reference nor does he have any discretion in the matter whether the dispute raised has any merit or not and the same has to be left for the determination of the Court. Delving into the merits of the dispute is exceeding jurisdiction.
(Para 33, 39)

B. Before passing award, conflicting claims were available before Collector. Therefore, Petitioners' application cannot be said to be time barred. (Para 40, 41, 43, 44)

C. Once it is established that petitioners were "person interested" u/s 18, non-disclosure of the entire set of litigation would not affect the right of the petitioners. (Para 50, 51, 52)

Precedent followed: -

1.Sharda Devi Vs. State of Bihar and Another, 2003 (3) SCC 128 (Para 21, 30, 33, 38)

2. Ramesh B. Desai Vs. Bipin Vadilal Mehta and Others, 2006 (5) SCC 638 (Para 21)

3. Himalayan Tiles and Marble (P) Ltd. Vs. Francis Victor Coutinho, AIR 1980 SC 1118 (Para 51)

Precedent distinguished: -

1.Ramesh Chandra and Others Vs. Tanmay Developers Pvt. Ltd., 2017 (13) SCC 715
(Para 27, 53)

2.Union of India and Others Vs. Major General Shri Kant Sharma and Another, 2015 (6) SCC 773
(Para 27, 54)

3.Mohammad Hasnuddin Vs. State of Maharashtra, 1979 (2) SCC 572 (Para 27, 55)

4.Shahid Zamal and Another Vs. State of U.P. and Others, 2018 (3) SCC 52 (Para 27, 56)

5. M/s Prestige Lights Ltd. Vs. State Bank of India and Others, 2007 (8) SCC 449 (Para 27, 49) (E-4)

(Delivered by Hon'ble Pankaj Kumar Jaiswal, J. & Hon'ble Jaspreet Singh, J.)

1. Both these writ petitions assail the order dated 28.09.2015 passed by the opposite party no. 2 and since common questions of facts and law are involved. Hence both the petitions have been heard together and are being decided by this common judgment.

2. W.P. No. 174 (LA) of 2015 has been filed by Sri Rajendra Singh and Anand Singh whereas W.P. No. 175 (LA) of 2015 has been filed by Smt. Pushpa Devi @ Pappo Devi who is the mother of Rajendra Singh and Anand Singh. Primarily, the grounds raised in both the petitions are similar, however, in so far as the claim is concerned, there is a divergence in the stand of the petitioners of W.P. No. 174 (LA) of 2015 and petitioners of W.P. No. 175 (LA) of 2015.

3. To put the controversy before this Court in a proper perspective, certain facts giving rise to the above petitions are being noticed hereinafter:-

4. That both the present writ petitions assail the order passed by the Special Land Acquisition Officer whereby he has rejected the claim of the petitioners in both the writ petitions for referring the matter for adjudication in terms of Section 18 of the Land Acquisition Act, 1894, hereinafter referred to as "Old Act of 1894" which is equivalent to Section 64 of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, hereinafter referred to as "New Act of 2013. For the sake of convenience the facts, dates and events have been noticed from the W.P. No. 174 (LA) of 2015.

5. The land in question bearing Khata No. 69 and 70 situate in Village Dalmau, District Raebareily which is the subject matter of acquisition for setting up the Battalion for Indo Tibetan Border Police, for which a notification under Section 4 of the Old Act of 1894 was issued on 12.06.2013. Subsequently, the declaration under Section 6 of the Old Act of 1894 was issued on 30.12.2013.

6. The aforesaid land admittedly belonged to Late Raja Uday Raj Singh and his name was duly recorded in the revenue records as bhumidhar with transferable rights.

7. It is the case of the petitioners that Raja Uday Raj Singh had two wives namely Smt. Laxmi Kunwar and Smt. Pushpa Devi @ Pappo Devi (petitioner of W.P. No. 175 (LA) of 2015). Sri Uday Raj Singh had one son from his first wife Smt. Laxmi Kunwar namely Rakesh Pratap Singh who is the respondent no. 3 in the above writ petitions and he had two sons from the second wife Smt. Pushpa Devi @ Pappo Devi namely Rajendra Singh and Anand Singh (who are the petitioners in W.P. No. 174 (LA) of 2015).

8. Sri Uday Raj Singh expired on 13.05.1976. It is the case of the petitioners that at that point of time the petitioners of W.P. No. 174 (LA) of 2015 were only 14 and 12 years of age respectively and though they along with Smt. Pushpa Devi @ Pappo Devi were the successor, however, the respondent no. 3 by misleading the revenue authorities only got his name mutated as the sole bhumidhar with transferrable rights in respect of Khata No. 69 and 70 which admeasures 317 Bighas 18 Biswas and 3 Biswansi. This mutation order dated 27.07.1978 was not known to the petitioners and it is only on 27.04.2010, from a newspaper report published in Dainik Jagran, Raebarely which indicated that some land of Shivgarh estate situate in Village, Pargana and Tehsil Dalmau, District Raebarely was made the subject matter of some dispute then the petitioners inspected the revenue records and upon obtaining the certified copies of the Khatauni as well as the Khewat, for the first time they became aware that by means of the ex-parte order dated 27.07.1978, respondent no. 3 had got his name mutated in place of late Raja Uday Raj Singh.

9. The petitioners thereafter assailed the order dated 27.07.1978 by moving an application for recall specifically stating therein that they were the co-tenure holders along with the respondent no. 3 and had equal rights over the aforesaid

property and that the name of the petitioners be also mutated in the revenue records. The aforesaid application was moved on 12.07.2010. At this juncture, it would be pertinent to notice that as far as Smt. Pushpa @ Pappo Devi is concerned while she also assailed the mutation order dated 27.07.1978, however, her ground of challenge was that Late Raja Uday Raj Singh had executed his last registered Will dated 15.04.1969 and in furtherance of the aforesaid Will, upon the death of Late Raja Uday Raj Singh on 13.05.1976, the petitioner of W.P. No. 175 (LA) of 2015 became the exclusive owner of the said estate left behind by Late Raja Uday Raj Singh.

10. It has also been pleaded on record that late Raja Uday Raj Singh had instituted a suit against his first wife namely Smt. Laxmi Kunwar and his son Rakesh Pratap Singh (respondent no. 3) which was registered as R.S. No. 15 of 1968. The said suit was filed in the Court of Civil Judge, Raebareily. During the pendency of the aforesaid suit, since the Late Raja Uday Raj Singh had expired, hence, in the aforesaid suit Smt. Pushpa Devi @ Pappo Devi was permitted to be substituted in his place after due consideration of his last Will dated 15.04.1969. It has been stated that since upon substitution in the Civil Suit, the respondent no. 3 herein was aware of the fact that Late Raja Uday Raj Singh had executed a registered Will in favour of Smt. Pushpa Devi, however, the same was concealed by the respondent no. 3 and had got his name mutated in the revenue records. Thus, it would be seen that as far as the two petitions are concerned, the writ petitioners of W.P. No. 174 (LA) of 2015 are claiming co-tenure ownership along with the respondent no. 3 and Smt. Pushpa Devi, whereas the writ petitioner of W.P. No. 175 (LA) of 2015 is maintaining her case as being the sole and absolute owner of the estate left behind by Late Raja Uday Raj Singh on the basis of his last registered Will dated 15.04.1969.

11. It will also be relevant to point out that a number of civil disputes and cases are pending between the petitioners and the respondent no. 3 in various Courts. It is in this backdrop of disputes and time that the notification under Section 4 and declaration under Section 6 of the old Act of 1894 was issued. The writ petitioners of both the writ petitions before the Special Land Acquisition Officer submitted their objections stating that they also had a stake in the compensation amount and it was specifically stated that in view of ongoing litigations, the respondent no. 3 alone was not the sole tenure holder whereas the writ petitioners of both the writ petition also had a right in the property and now since the said property had been acquired, accordingly they had a right in the compensation and it was further prayed that the said compensation amount may not be released in favour of the respondent no. 3.

12. During the pendency of the proceedings before the Special Land Acquisition Officer, the Old Act of 1894 was repealed and was replaced by the Act of 2013. Taking the benefit of Section 24 (1) (a) of the Act of 2013 it was prayed that since no award had been made under the Act of 2013, accordingly, the compensation is to be adjudged in accordance with the provision of the Act of 2013. The writ petitioners of both the writ petitions again made applications before the respondent no. 2 on 13.06.2014 stating that in view of the disputes between

the parties the amount may not be released in favour of respondent no. 3 alone and that the petitioners also had a right and the matter be referred to the competent Court in terms of reference under Section 18 of the Old Act of 1894 (which is equivalent to Section 64 of the new Act of 2013). Similar application was made by the petitioners on 21.07.2014 and thereafter the respondent no. 2 issued notices dated 05.08.2014 requiring the petitioners to furnish evidence/documents in support of their claims. The petitioners filed their affidavits bringing on record all the facts along with their documents in support of their claim which was submitted with the respondent no. 2 along with their covering application dated 19.08.2014.

13. Since this matter was already seized with the respondent no. 2, however, before adjudicating upon the same, it passed its award dated 25.07.2015 wherein it did not indicate as to who was entitled to the compensation and to what extent.

14. That even after passing of the award, the respondent no. 2 yet again issued notice dated 17.08.2015 calling upon the petitioners to produce their evidence in support of their claim. The petitioners once again by means of their letter/application dated 26.08.2015 submitted evidence/documents in respect of their claim and sought the apportionment of the compensation and the disputed questions referred to to the Court. The respondent no. 3 also submitted his objections and disputed the claim of the writ petitioners of both the writ petitions and sought the release of compensation in his favour alone.

15. The petitioners had thereafter filed another application dated 21.09.2015 reiterating the request to refer the disputes to the Court, however, the respondent no. 2 by means of order dated 28.09.2015 rejected the application of the petitioners and adjudicating the matter itself found that there was no merit in the objections raised by the writ petitioners and held the respondent no. 3 to be entitled to the compensation and further provided that the order passed shall be subject to any order passed in any title suit by a competent Court against the respondent no. 3.

16. It is this order dated 28.09.2015 which is the subject matter of challenge in the above two writ petitions. Significantly, the writ petitioners of both the writ petitions had initially preferred one composite writ petition No. 146 (LA) of 2015, however, the same was withdrawn, with liberty granted by a co-ordinate Bench of this Court by means of order dated 16.10.2015 to file a fresh writ petition and subsequently these two separate writ petitions came to be filed.

17. The Court has heard at length Sri Anil Tiwari, learned Senior Advocate assisted by Sri Apoorva Tiwari for the petitioners of W.P. No. 174 (LA) of 2015 and Sri Arvind Jauhari, learned counsel for the writ petitioner of W.P. No. 175 (LA) of 2015 and Sri Anupam Mehrotra learned counsel who has appeared on behalf of respondent no. 3 in both the writ petitions.

18. The contention of learned Senior Counsel for the petitioners Sri Anil Tiwari is that the respondent no. 2 has committed a grave illegality, inasmuch as, once the matter was pending before the respondent no. 2 wherein application had been moved bringing on record the dispute in between the parties regarding the compensation and these applications were in the knowledge of the

respondent no. 2 even prior to the date of passing of the award and so thereafter, however, in terms of Section 18 of the Old Act of 1894 which is equivalent to Section 64 of the New Act of 2013 it was incumbent upon the respondent no. 2 to have referred the matter to the appropriate Court / Authority for adjudication. It has been submitted that it was not at all within the domain of the respondent no. 2 to have adjudicated the rights of the parties and the respondent no. 2 has exceeded its jurisdiction vested in it in law by holding that the objections raised by the writ petitioners did not have any merit and it upheld the right of the respondent no. 3 to receive the compensation.

19. It has been elaborated by Sri Tiwari that in the proceedings under the Land Acquisition Act, the legislature has used to word "interested person' and any person who has a right over the compensation is an interested person and has a right to approach the Special Land Acquisition Officer. Once the issue had been raised by such interested person in terms of Section 18 of the Old Act of 1894 (equivalent to Section 64 of the new Act of 2013) then it was incumbent upon the Special Land Acquisition Officer to refer the dispute for reference and it is not within his jurisdiction to adjudicate the conflicting claims of the respective parties.

20. It has been further submitted that since the respondent no. 2 has taken upon himself to adjudicate the rights which is in gross violation of the powers conferred upon the Special Land Acquisition Officer, consequently, the order being wholly without jurisdiction and nonest deserves to be set aside and a direction be issued that the Special Land Acquisition Officer may refer the matter before the appropriate authority for apportionment of the compensation in terms of the new Act of 2013.

21. The Learned Senior Counsel for the petitioners has relied upon the decisions of the Apex Court in the Case of **Sharda Devi Vs. State of Bihar and Another** reported in **2003 (3) SCC 128** and **Ramesh B. Desai Vs. Bipin Vadilal Mehta and Others** reported in **2006 (5) SCC 638** in support of his submissions.

22. The aforesaid submissions have also been adopted by Sri A.K. Jauhari, learned counsel for the petitioner in W.P. No. 175 (LA) of 2015.

23. Per contra, the learned counsel for the respondent no. 3 Sri Anupam Mehrotra has vehemently opposed the submissions of the learned counsel for the petitioner. The primary ground of challenge raised by Sri Mehrotra is that the petitioners are not entitled to maintain the above writ petitions as they have not approached the Court with clean hands and have resorted to suppression and concealment of facts. It has been submitted that large number of proceedings were pending between the parties which have been concealed by the petitioners. It has also been vehemently urged that the sole ground raised by the petitioners in their application before the Special Land Acquisition Officer was that the mutation order of 1978 was under challenge, inasmuch as, the writ petitioner had made an application for recall of order 21.07.1978 vide application dated 12.07.2010. However, it is submitted that the said application was dismissed in default by means of the order dated 25.10.2012. Subsequently, an application for recall of the said order dated

25.10.2012 was moved which was also rejected by means of the order dated 30.03.2015 and yet again the application for restoration/recall was moved. It is only by means of the order dated 21.07.2016 that the application for restoration/recall was allowed and order was set aside but it was only the subsequent order by which the restoration application was rejected was set aside and it did not restore the original applications for recall which were moved in the year 2010.

24. Thus, the submissions of Sri Mehrotra is that an incorrect impression was given by the writ petitioners and even similar facts were brought on record in the above writ petition to indicate that their application challenging the mutation was pending whereas the same already stood dismissed in default on 25.10.2012 and the said order had yet not been recalled. What was recalled was the order of dismissal of the restoration application and thus on the date when the Special Land Acquisition Officer has passed the impugned order admittedly the recall applications against the mutation order was not in existence and thus no benefit could be granted to the writ petitioners on the assumption of the pendency of the recall application dated 12.07.2010.

25. It has also been submitted by Sri Mehrotra that since the application for reference did not adhere to the ingredients as set out in Section 64 of the Act of 2013, hence it was not incumbent upon the respondent no. 2 to have made the reference. It has also been submitted that the respondent no. 2 is not a mere authority who just receives the application and without application of its mind, is required to make the reference, rather it has to apply its mind and only when it finds that the application is in accordance with the parameters set out in Section 64 and Section 65 of the new Act of 2013 only then a reference can be made. Since the applications moved by the writ petitioners did not comply with the requisite conditions, accordingly it was absolutely appropriate for the respondent no. 2 to have refused to make the reference.

26. It has also been pointed out that the writ petitioners of W.P. No. 174 (LA) of 2015 had already instituted a Regular Suit bearing No. 566 of 1999 wherein they were claiming declaration to the effect that the respondent no. 3 be declared as not being the son of Late Raja Uday Raj Singh wherein an injunction has also been prayed that the respondent no. 3 is not entitled to the property inherited by the respondent no. 3, thus, the aforesaid suit also encompasses within its fold, the land in question which is the subject matter of acquisition and hence once the issue was already seized by the Civil Court in Regular Suit No. 566 of 2019, thus the same could not be made the subject matter of reference.

27. Sri Mehrotra has also vehemently urged that the application filed by the writ petitioners seeking reference under Section 18 of the old Act was barred by the limitation as provided in sub Section (2) of Section 18 of the Act of 1894. Sri Mehrotra has relied upon the decision of the Apex Court in the case of **Ramesh Chandra and Others Vs. Tanmay Developers Pvt. Ltd.** reported in **2017 (13) SCC 715, Union of India and Others Vs. Major General Shri Kant Sharma and Another** reported in **2015 (6) SCC 773, Mohammad Hasnuddin Vs. State of Maharashtra** reported in **1979 (2) SCC 572,**

Shahid Zamal and Another Vs. State of U.P. and Others reported in **2018 (3) SCC 52 and M/s Prestige Lights Ltd. Vs. State Bank of India and Others** reported in **2007 (8) SCC 449** in support of his submissions.

28. The Court upon hearing the learned counsel for the respective parties and on perusal of the record and their respective case laws, discerns the following questions for consideration.

(i) Whether the respondent no. 2 was obliged to refer the matter under Section 18 of the old Act or the respondent no. 2 could have decided the applications seeking reference and adjudicate the dispute by himself ?.

(ii) Whether the application seeking reference made by the writ petitioners was barred by limitation as provided in Section 18 of the old Act equivalent to Section 64 of the new Act ?.

(iii) Whether the writ petitions filed by the writ petitioners should be dismissed on the ground of non-disclosure of full and complete details regarding the pending litigations between the parties ?.

29. In order to answer the aforesaid questions which have been set out for determination, it would be relevant to notice the scheme of the land acquisition especially in light of the provisions contained under Section 18 and Section 30 of the old Act equivalent to Section 64 and Section 76 of the new Act.

30. This aspect of the matter has been extensively dealt with by the Apex Court in the Case of **Sharda Devi Vs. State of Bihar and Another (Supra)**. The Apex Court while summarizing the difference in the reference made under Section 18 and under Section 30 of the old Act in context with locus, types of disputes which are referrable, nature of power exercised by the authority and the ground of limitation and has held as under :-

"*By reference to locus*

Under Section 18(1) a reference can be made by the Collector only upon an application in writing having been made by (i) any person interested, (ii) who has not accepted the award, (iii) making application in writing, to the Collector, requiring a reference by the Collector to the court, (iv) for determination of any one of the four disputes (specified in the provision), and (v) stating the grounds on which objection to the award is taken. For reference under Section 30 no application in writing is required. The prayer may be made orally or in writing or the reference may be made suo motu by the Collector without anyone having invited the attention of the Collector for making the reference.

By reference to the disputes referable

Under Section 18(1) there are four types of disputes which can be referred to the civil court for determination. They are disputes: (i) as to the measurement of the land, (ii) as to the amount of the compensation, (iii) as to the persons to whom the compensation is payable, or (iv) as to the apportionment of the compensation among the persons interested. Under Section 30 the only disputes which are referable are: (i) any dispute as to the apportionment of the amount of compensation or any part thereof, or (ii) a dispute as to the persons to whom the amount of compensation or any part thereof is payable. A dispute as to the measurement of the land or as to the quantum of compensation or a dispute of a nature not falling within Section 30,

can neither be referred by the Collector under Section 30 of the Act nor would the civil court acquire jurisdiction to enter into and determine the same.

By reference to the nature of power

Under Section 18 of the Act the Collector does not have power to withhold the reference. Once a written application has been made satisfying the requirements of Section 18, the Collector shall make a reference. The Collector has no discretion in the matter, whether the dispute has any merit or not is to be left for the determination of the court. Under Section 30 the Collector may refer such dispute to the decision of the court. The Collector has discretion in the matter. Looking to the nature of the dispute raised, the person who is raising the dispute, the delay in inviting the attention of the court, and so on - are such illustrative factors which may enter into the consideration of the Collector while exercising the discretion. If the Collector makes the reference it may be decided by the court subject to its forming an opinion that the dispute was capable of reference and determination under Section 30 of the Act. In case the Collector refuses to make a reference under Section 30 of the Act, the person adversely affected by withholding of the reference or refusal to make the reference shall be at liberty to pursue such other remedy as may be available to him under the law such as filing a writ petition or a civil suit.

By reference to limitation

Under Section 18 the written application requiring the matter to be referred by the Collector for the determination of the court shall be filed within six weeks from the date of the Collector's award if the person making it was present or represented before the Collector at the time when he made his award or within six weeks of the notice from the Collector under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire. There is no such limitation prescribed under Section 30 of the Act. The Collector may at any time, not bound by the period of limitation, exercise his power to make the reference. The expression "the person present or represented" before the Collector at the time when he made his award would include within its meaning a person who shall be deemed to be present or represented before the Collector at the time when the award is made. No one can extend the period of limitation by taking advantage of his own wrong. Though no limitation is provided for making a reference under Section 30 of the Act, needless to say, where no period of limitation for exercise of any statutory power is prescribed, the power can nevertheless be exercised only within a reasonable period; what is a reasonable period in a given case shall depend on the facts and circumstances of each case.

26. The scheme of the Act reveals that the remedy of reference under Section 18 is intended to be available only to a "person interested". A person present either personally or through a representative or on whom a notice is served under Section 12(2) is obliged, subject to his specifying the test as to locus, to apply to the Collector within the time prescribed under Section 18(2) to make a reference to the court. The basis of title on which the reference would be sought for under Section 18 would obviously be a pre-existing title by reference to the date of the award. So is Section 29, which speaks of "persons interested". Finality to the award spoken of by Section 12(1) of the Act is between the Collector on one hand and the "persons interested" on the other hand and attaches to the issues relating to (i)

the true area i.e. measurement of the land, (ii) the value of the land i.e. the quantum of compensation, and (iii) apportionment of the compensation among the "persons interested". The "persons interested" would be bound by the award without regard to the fact whether they have respectively appeared before the Collector or not. The finality to the award spoken of by Section 29 is as between the "persons interested" inter se and is confined to the issue as to the correctness of the apportionment. Section 30 is not confined in its operation only to "persons interested". It would, therefore, be available for being invoked by the "persons interested" if they were neither present nor represented in the proceedings before the Collector, nor were served with notice under Section 12(2) of the Act or when they claim on the basis of a title coming into existence post-award. The definition of "persons interested" speaks of "an interest in compensation to be made". An interest coming into existence post-award gives rise to a claim in compensation which has already been determined. Such a person can also have recourse to Section 30. In any case, the dispute for which Section 30 can be invoked shall remain confined only (i) as to the apportionment of the amount of compensation or any part thereof, or (ii) as to the persons to whom the amount of compensation (already determined) or any part thereof is payable. The State claiming on the basis of a pre-existing right would not be a "person interested", as already pointed out hereinabove and on account of its right being pre-existing, the State, in such a case, would not be entitled to invoke either Section 18 or Section 30 seeking determination of its alleged pre-existing right. A right accrued or devolved post-award may be determined in a reference under Section 30 depending on the Collector's discretion to show indulgence, without any bar as to limitation. Alternatively, such a right may be left open by the Collector to be adjudicated upon in any independent legal proceedings. This view is just, sound and logical as a title post-award could not have been canvassed up to the date of the award and should also not be left without remedy by denying access to Section 30. Viewed from this angle, Sections 18 and 30 would not overlap and would have fields to operate independent of each other."

31. From the perusal of the principles extracted above, it is clearly brought out that a reference under Section 18 of the old Act is only available to a person interested. A person who is either personally present before the Special Land Acquisition Officer or through a representative or to whom a notice is served subject to meeting the test of locus-standi, such a person can apply to the Collector within the time so prescribed in the aforesaid sections to make a reference.

32. Obviously the basis of title on which a reference can be sought under Section 18 , as explained by the Apex Court, would apparently be on the basis of a pre-existing title. It has also been clearly stated that the disputes which can be referred for reference under Section 18 are such disputes relating to (i) measurement of the land (ii) as to the amount of compensation (iii) as to the persons to whom the compensation is payable (iv) as to the apportionment of the compensation amongst the persons interested. Once an application is submitted to the Collector which complies

with the requirements as set out in Section 18 then it is imperative for the Collector to make such a reference.

33. The Apex Court in the Case of Sharda Devi (Supra) has clearly held that the Collector does not have the power to withhold the reference nor does he has any discretion in the matter whether the dispute raised has any merit or not and the same has to be left for the determination of the Court.

34. Applying the principles as laid down by the Apex Court and considering the fact that as far as the present writ petitioners are concerned, they have been claiming title in respect of the property in question on the basis of inheritance, having succeeded to the estate of Late Raja Uday Raj Singh. Though, the acquisition notice under Section 4 was dated 12.06.2013 whereas the rights claimed by the writ petitioners accrued to them upon the death of Late Raja Uday Raj Singh who expired on 13.05.1976. Thus, in so far as the dispute of succession and inheritance is concerned, the same accrued to the parties in the year 1976 i.e. prior to the date of notification under Section 4 of the Land Acquisition Act and thus it can safely be said that as far as the rights agitated by the writ petitioners is concerned the same was a pre-existing right and is not a right which has accrued to them post the notification or making of the award.

35. From the perusal of the record, it is also clearly reflected that the dispute is in respect of who is entitled to the compensation since the respondent no. 3 claims that he is the only successor of Late Raja Uday Raj Singh, therefore, the compensation should be paid to him, alone. Whereas the writ petitioners of W.P. No. 174 (LA) of 2015 submit that they along with their mother Smt. Pushpa Devi have a right. On the other hand, Smt. Pushpa Devi who is the writ petitioner of W.P. No. 175 (LA) of 2015 claims to be the exclusive owner, having succeeded to the entire estate of Late Raja Uday Raj Singh on the basis of a registered Will dated 15.04.1969. It is also not disputed that there is a bitter litigation between the parties, inasmuch as, the respondent no. 3 has also challenged the paternity of the petitioners of W.P. No. 174 (LA) of 2015.

36. From the record it reveals that prior to the date of the passing of the award, the petitioners had already made an application before the Special Land Acquisition Officer registering their objections including the fact that they had staked their claims by means of their objections dated 13.06.2014. The record also indicates that the Special Land Acquisition Officer had even called for the documents from the writ petitioners to substantiate their case and in furtherance thereof the writ petitioners had submitted their affidavits bringing on record the documents in support of their claims. Once these claims were before the Special Land Acquisition Officer who himself had issued notices dated 05.08.2014 to the parties concerned, a copy of which has been annexed as Annexure No. 10 to the writ petition, then in the aforesaid circumstance, the Special Land Acquisition Officer ought to have considered the same while passing the award dated 25.07.2015, however, the record would indicate that while passing the award there was no discussion or even reference to the respective and conflicting claims of the parties.

37. Significantly, the respondent no. 2 again by means of his notice dated

17.08.2015 (post passing of the award) again issued notices and required the writ petitioners and the parties to submit their documents/evidence. The writ petitioners once again submitted their applications which have been brought on record, a copy of which is Annexure no. 14 and Annexure No. 15 of the writ petition. Thus, from the above, the fact which cannot be disputed is that the matter in dispute regarding the payment of compensation was alive before the respondent no. 2. It was a dispute which had been raised by the parties clearly referrable under Section 18 of the old Act equivalent to Section 64 of the new Act.

38. It is also not in dispute that the writ petitioners and the respondent no. 3, all were present before the Special Land Acquisition Officer even prior to the making of the award and had been agitating their claims. Once their claims were present with the Special Land Acquisition Officer who did not consider the same at the time of making an award and himself required the parties to appear before him in the month of August, 2015 and required the petitioners to submit their documents in respect of the respective claims which was done by the writ petitioners. Thus, under these circumstances, it was not open for the Collector to have entered into the merits of the disputes and as per the dictum of the Apex Court in the case of Sharda Devi, the Collector was obliged to refer the disputes for adjudication to the Court. It was not open for the Collector to withhold the reference nor was it open for him to entertain the same on its merit and find out whether the dispute so raised by any party had any merit or not.

39. Under these circumstances, the only inescapable conclusion that can be drawn is that the respondent no. 2 exceeded his jurisdiction by delving into the merit of the disputes while passing the impugned order dated 28.09.2015. Thus, this Court has no hesitation to hold that the respondent no. 2 did not have the jurisdiction to delve into the merits of the disputes raised by the parties and consequently the only option left with the respondent no. 2 was to have referred the dispute for adjudication to the competent Court. The first question is answered accordingly.

40. Considering the next question, whether the reference was within time, this Court without delving much into the details, notices that the objections regarding the compensation had already been made by the writ petitioners even prior to the making of the award. Admittedly, the award was made on 25.07.2015 and as far as the writ petitioners are concerned their claims for making the reference was already available on the record with the respondent no. 2. Moreover, after the passing of the award on 25.07.2015, the respondent no. 2 issued notices to the parties concerned on 17.08.2015, a copy of which has been annexed as Annexure No. 13 to the writ petition which also indicates that the matter was still live before the respondent no. 2 who was conscious of the fact that conflicting claims were available and pending before him which had to be decided.

41. It is in furtherance thereof that the petitioners made their applications on 22.08.2015, 26.08.2015 and 21.09.2015. Thus, it cannot be said that the applications before the respondent no. 2 seeking reference was beyond time nor the limitation set forth in sub Section 2 of Section 18 of the old Act equivalent to Section 64 of the new Act, was breached.

42. At this juncture, it will be relevant to mention that once the Collector was required to make a reference under Section 18 of the old Act and under the provisions of the Act, the Collector does not have any discretion in the matter rather he is obliged to refer the disputes for reference then considering the applications made which were available on the record, apparently the time or the limitations had not expired as the applications were already available on record prior to making of the award and even in pursuance of the notice issued by the respondent no. 2 himself, the applications were made on 22.08.2015 and 26.08.2015.

43. The limitation as provided under Section 18 clearly indicates that an application shall be filed within six weeks from the date of Collector's award if the person making it was present or represented before the Collector at the time when the award was made or within six weeks from the notice issued by the Collector under Section 12 (2) or within six months from the date of Collector's award whichever expires first.

44. The award was made on 25.07.2015 and the period of six weeks in any case would have expired in the first week of September, 2015, whereas the record indicates that the applications were moved on 22.08.2015 as well as 26.08.2015. The notice annexed as Annexure No. 13 to the writ petition is also dated 17.08.2015 requiring the parties to submit their evidences by 22.08.2015. Thus, this Court is satisfied that as far as the plea of limitation raised by the respondent no. 3 is concerned it does not merit any consideration and as such the same is turned down.

45. Coming to the last issue regarding the fact whether the writ petition could be dismissed for non-disclosure of complete facts is concerned, this Court finds that as far as the writ petitioners are concerned they had brought to the notice of the Collector that there were disputes pending between the parties. It had indicated that the respondent no. 3 was claiming on the basis of mutation entry which he had got in his name on 27.07.1978. It was also brought to the notice of the Collector that the writ petitioners had made an application for recall of the order dated 27.07.1978 by making an application in the year 2010.

46. Though, the aforesaid application had been dismissed in default for which the writ petitioners had made an application for restoration which also stood dismissed in default against which another application was moved which was allowed on 21.07.2016.

47. The learned counsel for the respondent no. 3 may be correct in submitting that vide order dated 21.07.2016 it was not the original recall application registered as Case No. 1 & 2 of 2010 which was restored rather it was the restoration application which had been dismissed on 30.05.2015 came to be revived. However, the fact remains that the matter remained pending before the competent authority who was seized of the matter and though the writ petitioners may not have been vigilant enough, which lead to the dismissal of their applications, it cannot be said that they were negligent to have left the matter completely. Whereas the record indicates that they had made an application regarding recall which was seized by the authority

concerned. The writ petitioners may not have made a clear and candid disclosure but there has been a mention that the litigation has been pending. As far as the litigation pending in the Civil Court is concerned, the respondents did not make any reference to it, however, the submission of the learned counsel for the writ petitioners is that the aforesaid litigations was not relevant as far as the respondent no. 2 is concerned, inasmuch as, they are related to other properties and the suit was for seeking declaration and injunction which related to other properties as well and were pending in the Court of competent jurisdiction since 1999.

48. The writ petitioners with their rejoinder affidavit have brought on record the documents including the statements recorded in the Civil Suits and from the perusal of the same it indicates that severe and bitter litigation was ensuing between the parties. A reference to the same had been made by the petitioners while making an application before the respondent no. 2 as shall be evident from the copies of the application annexed as Annexure No. 8 and Annexure No. 9 to the writ petition.

49. Learned counsel for the respondent no. 3 has also relied upon the decision of the Apex Court in the case of **Prestige Lights (Supra)**, wherein the Apex Court has held that while entertaining a petition it is necessary for the party approaching the High Court to place all facts without any hesitation and in case of suppression or facts are twisted, the Court may refuse to entertain the writ petition and dismiss it without entering into merits. There is no quarrel on the aforesaid proposition, however, as already indicated in the preceding paragraphs that there has been a mention of litigation between the parties, though, not in graphic detail. However, when the fact of incomplete disclosure is compared with the effect of non-interference with the impugned order, then this Court finds that by dismissing the writ petition only on the ground of non-disclosure shall cause greater injustice and for the said reason, this Court is not inclined to dismiss the writ petition on the aforesaid grounds.

50. In view of the above, it cannot be said that there has been a complete non-disclosure of the litigation. At best, it can be said that there was not a complete disclosure but at the same time another fact that requires consideration is that the Collector is required to consider the fact whether the person making the application seeking reference is an interested person who has some semblance of right to raise objection to get the disputes referred for adjudication to this Court. In order to come to a finding whether the petitioners were interested persons as defined under Section 3 of the old Act of 1894 is concerned, all that the petitioners had to indicate that they were persons claiming an interest in the compensation to be made on account of acquisition.

51. Since the petitioners were claiming in the compensation on the basis of their right in the land in question and the disputes were pending since 1999 and even in respect of the property the subject matter of acquisition, the mutation order was challenged in the year 2010, thus, it cannot be said that the petitioners were not persons interested. (See paragraph 8 in the case of **Himalayan Tiles and Marble (P) Ltd. v. Francis Victor Coutinho, reported in AIR 1980 SC**

1118) relevant portion of which is being reproduced hereinafter.

"8. It seems to us that the definition of "a person interested" given in Section 18 is an inclusive definition and must be liberally construed so as to embrace all persons who may be directly or indirectly interested either in the title to the land or in the quantum of compensation. In the instant case, it is not disputed that the lands were actually acquired for the purpose of the company and once the land vested, in the Government, after acquisition, it stood transferred to the company under the agreement entered into between the company and the Government. Thus, it cannot be said that the company had no claim or title to the land at all. Secondly, since under the agreement the company had to pay the compensation, it was most certainly interested in seeing that a proper quantum of compensation was fixed so that the company may not have to pay a very heavy amount of money. For this purpose, the company could undoubtedly appear and adduce evidence on the question of the quantum of compensation."

52. Thus, this Court is of the considered view that the petitioners were interested persons and the non-disclosure of the entire set of litigation would not affect the rights of the petitioners to maintain the above writ petitions though, it would have been an ideal situation where the writ petitioners would have detailed all the litigations. But since, the Collector only has to consider that the persons before him are persons interested within the meaning of the term interested person as defined in the Act and if the applications seeking reference is within time then the Collector does not have any jurisdiction to withhold but to send the matter for adjudication before the Court under these circumstances even if all the details of the litigations pending between the parties had or not been disclosed would not deprive the petitioners of maintaining the above writ petitions.

53. Now as far as the reliance placed by learned counsel for the respondents on the decision of **Ramesh Chandra Vs. Tanmany Developers (Supra)** is concerned, the same is clearly distinguishable on facts, inasmuch as, in the said case, the persons were seeking apportionment on the basis of an agreement to sale and it is well settled that the agreement to sell does not create any right. Further, in the said case a Civil Suit had already been filed for the same relief and for the said reasons the Apex Court refused to entertain. In the present case the facts are completely different and the litigations in the Civil Court is not what is the subject matter of the dispute before the Special Land Acquisition Officer.

54. The decisions of **Union of India Vs. Major General Shri Kant Sharma (Supra)** also is not applicable to the facts of the case even though the proposition therein is largely not disputed that where a statutory forum is created for redressal of grievances, a writ petition should not be entertained. Since in the present case the authority under the Act of 1894 has transgressed its jurisdiction and there is no other forum of appeal, accordingly, in such a situation, the writ petition against the order passed by the respondent no. 2 is maintainable and, therefore, the decision cited by the learned counsel for the respondent no. 3 is not applicable.

55. Similarly, the decision relied by learned counsel for respondent no. 3 in the case of **Mohammad Hasnuddin Vs. State of Maharashtra (Supra)** the same

is also on a different set of facts and in light of the later decision of the Apex Court in the case of Sharda Devi, it would be seen that the same clearly covers the field whereas the decision of Mohammad Hasnuddin (Supra) is on the different footing.

56. The reliance placed by learned counsel for the respondent no. 3 in the case of **Shahid Zamal (supra)** wherein it has been held by the Apex Court that an application which contains the grounds for reference should be taken to be the proper application. Since the provisions of the C.P.C. do not apply and from the perusal of the record it indicates that the applications made by the writ petitioners did contain the facts which gave rise to the grounds upon which they were agitating their claims, therefore, it cannot be said that the application moved by them was completely devoid of the necessary facts which gave rise to the grounds upon which they were agitating their claims, therefore, also the submissions as well as the said judgment of Shahid Zamal is not applicable in the present facts and circumstances of the case.

57. Thus, this Court finds that the matter required to be adjudicated on merits and so in view of the detailed discussions as made above, this Court is of the considered view that the respondent no. 2 while passing the impugned order has committed an error in deciding the dispute, whereas it ought to have referred the matter for adjudication before the appropriate Court. Another error committed by the respondent no. 2 was that while passing the order dated 28.09.2015 it only considered the application before it dated 13.06.2014 and did not take note of the subsequent applications and documents which were filed by the parties including upon the notice issued by the respondent no. 2 himself and as such the application under Section 18 of the old Act, though, filed after passing of the award, yet the same has not been considered and for this reason as well the impugned order is bad.

58. As a consequence of the detailed discussion, the order impugned dated 28.09.2015 is liable to be quashed. Accordingly a writ of certiorari is issued and the order dated 28.09.2015 passed by respondent no. 2 is quashed.

59. The respondent no. 2 is directed to make the reference and relegate the parties to the appropriate Court for disposal of their disputes in accordance with law.

60. With the aforesaid, the writ petition stands allowed and the order dated 28.9.2015 passed by the respondent no. 2 is quashed/set aside, however, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2019

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Consolidation No. 13301 of 2019

Vinod Bahadur ...Petitioner
Versus
D.D.C. Ayodhya & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rama Niwas Pathak

Counsel for the Respondents:

C.S.C., Azad Khan, Vonod Kumar

A. U.P. Consolidation of Holdings Act, 1953: Sections 4, 9-A, 11-A, 10, 12. If a claim is not raised at the given opportunities prescribed by the Act—the claim stands barred by Section 11—A.

Revision petition (of Respondent No.2) against the appellate order was allowed. Consequently, the matter has been remitted to the Consolidation Officer to decide the issues afresh under Section 9-A (2). No action was taken for mutation of name prior to commencement of consolidation proceedings. No objection filed prior to publication of form CH-11 under Section 10 of the Act. Claim barred by provisions of Section 11 – A of the Act. (Para 17)

Precedent followed: -

Gafoora & anr Vs. DDC, & ors [(1975) 2 SCC 568] (Para 17)

Precedent distinguished: -

Sudhir Kumar Goswami Vs. District Director of Consolidation/ Deputy Director of Consolidation and others, Civil Misc. Writ Petition No. 31552 of 2011 (Para 19) (E-4)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Shri Rama Niwas Pathak, learned counsel for the petitioner, learned State Counsel and Shri Vinod Kumar Pandey, learned counsel representing the respondent no.2.

2. In these proceedings instituted under Article 226 of the Constitution of India, the petitioner assails the validity of an order dated 27.04.2019 passed by the Deputy Director of Consolidation, Ayodhya whereby he has allowed the revision petition filed against the appellate order dated 23.07.2007 passed by the Settlement Officer, Consolidation. By the impugned order, the orders under appeal before the Settlement Officer, Consolidation, namely, the orders dated 17.04.2006 and 05.02.2002 passed by the Consolidation Officer have also been set aside and the matter has been remitted to the Consolidation Officer to decide the issues afresh under section 9-A(2) of U.P. Consolidation of Holdings Act (hereinafter referred to as ' the Act').

3. Ordinarily in the order of remand, this Court would not have interfered, however, the facts of this case are such that this matter calls for interference by the Court in this petition for the reason (which follows in the judgment at appropriate place) that the case set up by respondent no.2 on the basis of some will deed said to have been executed by the original recorded tenure holder, namely, Ram Karan is barred by statutory prescription available under section 11-A of the Act.

4. This Court vide its order dated 22.07.2019 had required the Deputy Director of Consolidation to file his counter affidavit on the basis of instructions which were already provided by him to the learned State Counsel. It was further observed in the said order dated 22.07.2019 that respondent no.2 who has had ample opportunity to file counter affidavit had not done so, however, it was also provided that if, he so chooses he may file counter affidavit and no further opportunity shall be given to him to file the counter affidavit.

5. In compliance of the said order dated 22.07.2019, a counter affidavit has been filed by the Deputy Director of Consolidation. Vide order dated

06.08.2019, on the prayer made by the learned counsel representing the respondent no.2, two weeks further time was granted to file counter affidavit, however, it was observed in the said order that in case the counter affidavit is not filed by the respondent no.2, the matter may proceed ex-parte.

6. Shri Vinod Kumar Pandey, learned counsel representing the respondent no.2 states that in view of the counter affidavit filed by the Deputy Director of Consolidation in the matter giving details of the different dates of publications under the relevant provisions of the Act, the matter may be decided on the said basis.

7. Undisputedly, the original recorded tenure holder of the land in question was one Ram Karan. On his death, name of his brother Ram Yagya came to be recorded in the revenue record on the basis of PA-11 entry. A notification under section 4 of the Act declaring the intention of the State Government to bring the village in question, where the land in dispute is situated under consideration operation, was published on 19.05.1990. The publication under section 4-A(2) of the Act in the village was made on 22.08.1991. As per the counter affidavit filed by the Deputy Director of Consolidation, publication of record and statements under section 9 of the Act was made on 28.02.1992. As per the said affidavit, the revised annual registers in form CH-11 prepared on the basis of orders passed under section 9-A(1) and 9-A(2) of the Act was published on 23.09.1998 in terms of the requirement of section 10 of the Act. These different dates of publication under the Act have been extracted from the counter affidavit filed by the Deputy Director of Consolidation which is supported by the relevant documents and are thus not in dispute.

8. At the time of notification under section 4 of the Act, the name of Ram Yagya was found recorded in the basic year khatauni. Ram Yagya is said to have executed a sale deed on 11.04.2001 in favour of the petitioner-Vinod Bahadur, who on the basis of said sale deed moved an application under section 12 of the Act seeking mutation of his name, which application was allowed on 05.02.2002 whereby the name of the petitioner was ordered to be mutated. The respondent no.2 moved an application seeking recall of the order dated 05.02.2002 passed by the Consolidation Officer and restoration of the case, however, the said restoration application was rejected by the Consolidation Officer vide his order dated 17.04.2006. Against the said orders dated 05.02.2002 and 17.04.2006 passed by the Consolidation Officer, the respondent no.2 filed an appeal which was dismissed by the Settlement Officer, Consolidation vide his order dated 23.07.2007. However, the revision petition filed by the respondent no.2 challenging the orders 23.07.2007 passed by the Settlement Officer, Consolidation and the orders dated 17.04.2006 and 05.02.2002 passed by the Consolidation Officer has been allowed. It is this order dated 27.04.2019 passed by the Deputy Director of Consolidation which is under challenge herein. By the said order, the Deputy Director of Consolidation has set aside the orders dated 23.07.2007, 17.04.2006 and 05.02.2002 and has remitted the matter to the Consolidation Officer for disposal of the issues between the parties under section 9-A(2) of the Act afresh.

9. There are two issues which need consideration in this case. The first issue as raised by the learned counsel for the respondent no.2 is that the order dated 05.02.2002 passed by the Consolidation Officer was an ex parte order and as a matter of fact his claim based on the will said to have been executed by Ram Karan in favour of the respondent no.2 has nowhere been considered and therefore the order passed by the Deputy Director of Consolidation, dated 27.04.2019 does not suffer from any illegality and irregularity for the reason that by the said order he has only remitted the matter to the Consolidation Officer where the case set up by the petitioner on the basis of sale deed dated 11.04.2001 and case set up by the respondent no.2 on the basis of will deed said to have been executed by Ram Karan in his favour shall be considered afresh and parties will have ample opportunity to lead evidence to establish their cases. His submission, thus, in this regard is that by the order passed by the Deputy Director of Consolidation dated 27.04.2019 no prejudice will be caused to the parties and accordingly this Court need not interfere in the same.

10. The second issue which needs consideration is as to whether the claim of the respondent no.2 is barred by the statutory prescription available in under section 11-A of the Act and in case it is thus found that his claim is so barred by statutory prescription, the respondent no.2 would be entitled to lay his claim either in the proceedings initiated by the petitioner under section 12 or his objection said to have been filed by him under section 9-A(2) of the Act.

11. The answer to the first issue as observed above will depend on the findings which may be recorded in this order on the second issue which relates to claim of the respondent no.2 being barred by statutory prescription available under section 11-A of the Act.

12. There is no dispute to the fact that Ram Karan had died prior to publication of notification under section 4 of the Act in the village by which the village where the land in question is situated was brought under consideration operations.It is also not in dispute that prior to initiation of the consolidation proceedings in the village, name of Ram Yagya was recorded in the relevant revenue records by way of PA-11 entry and further that there is no dispute that basic year entry in the khatauni existed in the name of Ram Yagya.

13. If the respondent no.2 had any claim based on the alleged will deed executed by Ram Karan in in his favour, he ought to have firstly moved mutation application seeking mutation of his name in place of the deceased tenure holder Ram Karan prior to commencement of the consolidation proceedings under the relevant provisions oflLaw. It is not in dispute that he did not take any steps seeking mutation of his name on the basis of alleged will deed said to have been executed in his favour by Ram Karan. If it was found by the respondent no.2 that name of Ram Yagya was wrongly recorded as the land in question would devolve on the respondent no.2 on the basis of will deed said to have been executed by Ram Karan in his favour, on publication under section 9 of the Act he ought to have filed objections under section 9-A(2) of the Act. It is not in dispute that the respondent no.2 laid his claim on the basis of will deed allegedly executed by Ram Karan in his favour only on 05.05.2001 i.e. the date on which he filed objections under section 9-A(2) of the Act before the

Consolidation Officer. As noticed above publication under section 4-A(2) of the Act in the village was made on 22.08.1991, publication under section 9 of the Act was made on 28.02.1992 and thereafter the extracts of annual register in form CH-11 was published under section 10 of the Act on 23.09.1998.

14. It is relevant to point out that section 10 of the Act mandates the consolidation authorities to publish the annual register after revising the same on the basis of the orders passed under sub sections 1 & 2 of section 9-A of the Act. Thus on preparation and maintenance of revised annual register under section 10 of the Act, the disputes by and large under section 9-A(2) if raised get settled. It is in this view that the scheme under section 11-A of the Act provides that any claim to land or partition of joint holdings or valuation of plots, trees, wells and other improvements relating to consolidation area cannot be raised at a subsequent stage of consolidation proceedings which ought to have been raised under section 9 of the Act or which might have been raised under the said section.

15. A bare reading of section 11-A of the Act makes it clear that there exists a statutory bar on any claim after publication of annual register under section 10 of the Act. In respect of any claim or partition or valuation of plots, trees, wells and other improvements. As observed above there is a purpose for creating such a bar under section 11-A of the Act by the legislature and the purpose is to ensure that further proceedings relating to carvation of chaks etc. be initiated once the disputes relating to rights and title and claims in respect of the holdings are decided under section 9-A(2) of the Act if raised. In case such a bar as available under section 11-A is not created, determination of rights and claims in the holding shall be an unending process which will make almost impossible for consolidation authorities to undertake further proceedings of consolidation such as carvation of chaks etc.

16. So far as the facts of the instant case as already noted above are concerned, the publication under section 9 of the Act was made on 28.02.1992 and publication of form CH-11 was made under section 10 of the said Act on 23.09.1998, thus, there was ample time of more than 6 and 1/2 years available to the respondent no.2 between the date of publication under section 9 and date of publication under section 10, however, the petitioner kept silent and did not raise any claim based on the alleged will said to have been executed in his favour by the original tenure holder-Ram Karan. As a matter of fact, he woke up to file objection under section 9-A(2) of the Act only on 05.05.2001, that is to say, after the date when Ram Yagya whose name was found entered in the basic year khatauni executed a sale deed in favour of the petitioner on 11.04.2001.

17. On the basis of the aforementioned undisputed facts, in my considered opinion, bar of section 11-A of the Act in this case will act in its full force as far as the claim of respondent no.2 in the land in question is concerned for the reason that neither he took any action for getting his name mutated prior to commencement of the consolidation proceedings nor did he file any objection as contemplated under section 9-A(2) of the Act prior to publication of form CH-

11 under section 10 of the Act. The aforesaid view is supported by a judgment of Hon'ble Supreme Court in the case of **Gafoora and another vs. Deputy Director of Consolidation, Meerut and others, reported in [(1975) 2 SCC 568].**

18. At this juncture, learned counsel appearing for the respondent no.2 has relied upon a judgment rendered by this Court on 23.08.2011 in **Civil Misc. Writ Petition No.31552 of 2011, Sudhir Kumar Goswami vs. District Director of Consolidation/Deputy Director of Consolidation and others** to emphasize that the proceedings under section 12 of the Act cannot be said to be summary proceedings for the reason that the provisions of section 7 to 11 of the Act apply mutatis mutandis in so far as the proceedings under section 12 are concerned.

19. As far the proposition of law laid down in the said judgment in the case of **Sudhir Kumar Goswami (supra),** there cannot be any quarrel, however, what is noticeable is the fact that the statutory bar created by section 11-A specifically comes in the way of the claim put forth by the respondent no.2 in the land in question on the basis of the alleged will deed said to have been executed in his favour by Ram Karan-original recorded tenure holder.

20. In view of the discussions made above, this Court does not have any doubt to observe that any claim of respondent no.2 would thus be barred by operation of the provisions of section 11-A of the Act. Accordingly, even if it is presumed, though it is being disputed by the petitioner, that the order dated 05.02.2002 passed by the Consolidation Officer was an ex-parte order, remitting the matter back to the Consolidation Officer will not serve any purpose for the reason that claim of the respondent no.2 is barred by statutory prescription under section 11-A of the Act.

21. In view of the discussions made and reasons given above, the writ petition deserves to be allowed. Accordingly, the writ petition is allowed. The order dated 27.04.2019 passed by the Deputy Director of Consolidation, Ayodhya as is contained in annexure no.1 to the writ petition is hereby quashed.

22. Consequences to follow.

23. There will be no order as to cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

Writ – B No. 14209 of 2012 connected with
Writ C No. 20580, 20578, 20579 of 2012

Smt. Kusum ...Petitioner
Versus
State of U.P. And Others ...Respondents

Counsel for the Petitioner:
Sri Deepak Kaushik

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar, Sri A.K. Umrao, Sri M.N. Singh.

A. U.P Zamindari Abolition and Land Reforms Act, 1951 – Sections 157 AA and 131 B- Transfer under section 157 AA - the permission of Assistant Collector is required when transfer is made by a person belonging to Scheduled Caste who has become bhumidhar with

transferable right under section 131 B in favour of a person belonging to Scheduled Caste – "except with the previous approval" indicates that approval of the Assistant Collector is a condition precedent for such transfer

(Para 20)

Writ petition dismissed. (E-6)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. In these four writ petitions the facts as well as the point arising for determination, being identical, they all are being decided by this common judgment. Smt. Kusum is the petitioner in all these petitions while respondent No. 5 is different one.

2. Heard Sri Deepak Kaushik, learned counsel for the petitioner, Sri A. K. Umrao, Advocate holding brief of Sri M.N. Singh, learned counsel for the respondent and Sri Anuj Kumar, learned counsel for respondent No. 4.

3. The question that poses for consideration in these petitions is as to whether, the permission of the Assistant Collector is necessary under Section 157-AA of the U.P. Act No. 1 of 1951, if the transfer is made to a person belonging to Scheduled Castes?

4. Briefly stated, the relevant facts of the case are that one Buddhu son of Newla was allotted land of Khata No. 1240 measuring area 0-10-0, Khata No.1264 measuring area 1-4-0 and Khata No. 1270 measuring area 0-5-0 on 02.11.1975 for agricultural purposes. Budhu had five sons namely Satish, Dharm Raj, Dharm Pal, Soraj and Pappu. After the death of Buddhu, name of his son Satish -Respondent No.5 in this writ petition was recorded in the revenue record who executed a registered sale deed in favour of his wife Smt. Kusum (petitioner in all the writ petition) on 12.11.2010. Similarly, Respondent No. 5 in other writ petitions namely Dharm Raj, Dharm Pal and Soraj, all sons of Buddhu, have executed registered sale deeds in favour of petitioner on the same date.

5. The proceeding was initiated against the petitioner by issuing a notice under Section 157-AA of the U.P. Act No. 1 of 1951 (hereinafter referred as "Act, 1951) on the ground that the sale deed was executed by respondent No. 5 in favour of petitioner who is the wife of respondent No. 5 and sister-in-law of respondent no. 5 in connected petitions, without obtaining any permission from the concerned collector as they become bhumidhar under Section 131- B (1) of the Act, 1951.

6. The petitioner in all the writ petitions having received the above notice on 23.04.2011, filed an objection before the concerned authorities. Ultimately, an order was passed by Assistant Collector (Administration) Meerut on 04.07.2011, by which the objection of the petitioner was rejected and the sale deed in favour of the petitioner was declared to be void having been executed without obtaining permission from the Collector and the land was directed to be vested in the State as per Section 166/ 167 of the Act. Against that order, a revision was preferred by the petitioner which too was dismissed by the Additional Commissioner (Administration) Meerut Division, Meerut vide order dated 20.10.2011.

7. Both these orders dated 4.7.2011 and 20.10.2011 are impugned in the present writ petitions.

8. Contention of learned counsel for the petitioner is that respondent No. 5 became bhumidhar with transferable rights since ten years period has expired from the date of grant of lease and further that no permission was required since the transfer had been made on 12.11.2010 in favour of the petitioner, who is also a member of Scheduled Caste. Learned Counsel for the petitioner next contends that under Section 157-AA, the permission is required only when the transfer is made in favour of a person other than Scheduled Castes and, therefore, no permission is required if the transfer is made by the person belonging to the same casts. According to the learned counsel, the writ petitions deserve to be allowed by quashing the impugned orders.

9. On the other hand, learned counsel for Goan Sabha submits that the permission under Section 157-AA is necessary as the respondents were lease holders in view of provision of section 131-B of the Act and, therefore, they have to obtain the permission and the impugned orders have rightly been passed by the authorities concerned.

10. I have considered the rival submissions so raised by the counsel for the parties and perused the record.

11. The issue which arises for determination in these petitions is as to whether for the transfer made under Section 157-AA of the Act by a lease holder belonging to Scheduled Castes in favour of the person who also belongs to the Scheduled Castes, the permission of the Assistant Collector is required or not ?"

12. According to the counsel for petitioner, the permission is required only when the transfer is made to a person belonging to other castes. Learned counsel for petitioner has referred to Clause (1) of Section 157-AA of the Act.

13. In support of his submission, learned counsel for the petitioner has also relied upon a judgment in the case of ***Ramey Vs. State of UP & Others reported in 2015 (2) ADJ 392*** in which it is held that in view of the provisions of Section 157-AA of the Act, in cases where vendor and vendee both belong to Scheduled Caste, permission of the Collector/ Assistant Collector would not be necessary prior to execution of the sale-deed. The relevant paragraphs No. 10 and 11 of the aforesaid judgment are quoted hereinunder:-

"10. The undisputed facts are that both the parties to the sale belong to the Scheduled Castes. Section 157-AA provides that no person belonging to the Scheduled Caste and having become a Bhumidhar with transferable rights under Section 131-B shall have the right to transfer land by way of sale, gift, mortgage or lease to a person other than the persons belonging to the Scheduled Castes. Sub Section 4 of Section 157-AA provides that no such transfer shall be made except with the previous approval of the concerned Assistant Collector.

11. In my opinion since both the parties belong to the Scheduled Caste the rigour of Section 157-AA would have no application in the present case and permission of the Collector/Assistant Collector would not be necessary prior to executing the sale deed dated 12.12.2003. In this view of the matter, in my opinion the impugned orders dated 16.01.2006 and 19.01.2007 are both illegal and are therefore quashed."

14. For appreciating the submission of learned Counsel for the petitioner, it is necessary to look into the scheme of the

Act with regard to transfer under the U.P. Zamindari Abolition and Land Reforms Act, 1950. Section 131-B provides that bhumidhar with non-transferable rights will become a bhumidhar with transferable rights after ten years. The restriction for transfer of land is contained under Section 157-A and 157-AA, which are being quoted herein below:

"157-A. Restrictions on transfer of land by members of Scheduled Castes.- (1) Without prejudice to the restrictions contained in Section 153 to 157, no bhumidhar, or asami belonging to a Scheduled Caste shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous approval of the Collector:

Provided that no such approval shall be given by the Collector in case where the land held in Uttar Pradesh by the transferor on the date of application under this section is less than 1.26 hectares or where the area of land so held in Uttar Pradesh by the transferor on the said date is after such transfer, likely to be reduced to less than 1.26 hectares.

(2) The Collector shall, on an application made in that behalf in the prescribed manner, make such inquiry as may be prescribed.

157-AA. Restrictions on transfer by member of Scheduled Castes becoming bhumidhar under Section 131-B. (1) Notwithstanding anything contained in Section 157-A, and without prejudice to the restrictions contained in Section 153 to 157, no person belonging to a Scheduled Caste having become a Bhumidhar with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a Scheduled Caste and such transfer, if any, shall be in the following order of preference:

(a) landless agricultural labourer,

(b) marginal farmer,

(c) small farmer; and

(d) a person other than a person referred to in Clauses (a), (b) and (c).

(2) A transfer in favour of a person belonging to Clause (a) of Sub-section (1) shall be made in order of preference given below. If a person referred to in Clause (a) is not available then transfer may be made to a person referred to in Clause (b) of the said sub-section and if a person referred to in Clause (b) is also not available then to a person referred to in Clause (c) of the said sub-section if a person referred to in Clause (c) is also not available then to a person referred to in Clause (d) of the said sub-section in the same order of preference:

(a) first, to the resident of the village where the land is situate;

(b) secondly, if no person referred to in Clause (a) is available, to the resident of any other village within the Panchayat area comprising the village where the land is situate;

(c) thirdly, if no person referred to in Clause (a) and (b) is available, to the resident of a village adjoining the Panchayat area comprising the village where the land is situate.

(3) If no person referred to in Sub-section (1) belonging to a Scheduled Tribe is available, the land may be transferred to a person belonging to a Scheduled Caste in the order of preference given in Sub-sections (i) and (2).

(4) No transfer under this section shall be made except with the

previous approval of the Assistant Collector concerned."

15. The provisions of Section 157-A contains a restriction that no bhumidhar or asami belonging to a Scheduled Caste shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous permission of the Collector.

16. Section 157-AA provides that no person belonging to a Scheduled Castes having become a bhumidhar with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a Scheduled Caste and such transfer shall be in the order of preference as contained in Sub-section (1) of Section 157-AA.

17. There is a clear distinction between the restrictions contained under Section 157-A and Section 157-AA. Section 157-A provides that no bhumidhar or asami belonging to a Scheduled Caste can transfer the land to a person not belonging to the Scheduled Caste except with the previous approval of the Collector whereas Section 157-AA contains a clear restriction that a person belonging to Scheduled Caste who have become bhumidhar with transferable rights under Section 131 -B shall have no right to transfer to any person other than person belonging to Scheduled Caste. The transfer under Section 157-AA is permissible only to a person belonging to Scheduled Castes in the order of preference as prescribed in Sub-section (1). Thus, Scheduled Caste cannot transfer the land in favour of a person not belonging to Scheduled Caste in any contingency. Further, this restriction is on reasonable basis since land which has been contemplated under Section 157-AA is a land which is allotted to a person belonging to Scheduled Caste.

18. Sub-section (4) of Section 157-AA contains an injunction to the effect that no transfer under this section shall be made except with the previous approval of the Assistant Collector concerned. Sub-section (4) is in a very wide terms when it refers to "transfer under this section". This clearly means that it embraces itself all the transfers which are contemplated in Section 157-AA. Thus, even if the transfer is by a Scheduled Caste in favour of a Scheduled Caste, it is fully covered by the restrictions contained under Sub-section (4) of Section 157-AA. In case, the interpretation as put by learned Counsel for the petitioner to Sub-section (4) of Section 157-AA is accepted, then the restrictions put under this Sub-section (4) will be meaningless and redundant. There is valid reason for requiring previous permission of the Assistant Collector. The reason which is deciphered from the scheme of section is, that even the transfer by a bhumidhar belonging to Scheduled Caste to a person belonging to Scheduled Caste shall be in accordance with the preference mentioned in Sub-section (1).

19. A Scheduled Caste who is bhumidhar with transferable right under Section 131-B has no free choice of transfer to any Scheduled Caste of his own choice. The order of preference given under Sub-section (1) has its own object and purpose. The object obviously is that if transfer is made, the said transfer shall first go to landless agricultural labourer and thereafter to marginal

farmer. The reason obviously is that the land being a lease land, the rights of a lessee have to be regulated in a manner which may advance the object and purpose of the Act. Thus, the prior approval of the Assistant Collector is contemplated which is obviously to consider and decide as to whether permission can be accorded and the transfer which is sought, is in accordance with the Scheme of Sub-section (1) of Section 157-AA.

20. In view of the discussion made above, this Court is of the considered view that permission is also required when a transfer is made by a person belonging to Scheduled Caste who has become bhumidhar with transferable right under Section 131-B in favour of a person belonging to Scheduled Caste. In the present case, the transfer was made without obtaining previous approval/permission of Assistant Collector concerned. The words **" except with the previous approval"** used in sub section (4) of section 157-AA, indicates that approval of the Assistant Collector concerned is a condition precedent for such transfer.

21. The judgment in the case of **Ramey** (Supra) relied on by the counsel for petitioner is on the different facts in which even the mandatory restriction contained in Sub-Section (4) of Section 157-AA, has not been considered. Therefore, any decision delivered without taking into consideration even the mandatory provision, cannot be said to be laying down a good law and hence this Court has no hesitation in holding the said judgment to be per incuriam.

22. In view of the above discussion, there appears to be no illegality or infirmity in the orders impugned dated 4.7.2011 and 20.10.2011 contained in annexure 6 & 8 to the writ petition.

23. In the result, the writ petition lacks merit and is, accordingly, **dismissed.**

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

Writ – B No. 679 of 2019

Satya Narain ...Petitioner
Versus
Deputy Director of the Consolidation and Others ...Respondents.

Counsel for the Petitioner:
Sri Kailash Nath Singh

Counsel for the Respondents:
C.S.C., Sri Dharmendra Kumar Tripathi, SriS.C. Tripathi, Sri S.N. Tripathi.

A. U.P. Consolidation of Holdings Act, 1953-Rule 111 is directory and not mandatory.

Section 48 (1) - Revision- Dismissed by DDC holding non-compliance of Rule 111 of U.P Consolidation of Holding Rules, 1954 - The question for consideration in the present case is with regard to the compliance of Rule 111-Held, sufficient explanation was given by the petitioner before DDC for not filing the certified copy of the order passed by CO - (Paras 18 to 24)

Writ petition allowed. (E-6)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Present writ petition has been filed challenging the order dated

29.3.2019 passed by Deputy Director of Consolidation, Jaunpur in Revision No. 3135 of 2017-18, whereby the revision filed by the petitioner under Section 48 (1) of U.P. Consolidation & Holdings Act, 1953 (hereinafter referred to as an Act), was dismissed.

2. Brief facts involved in the present writ petition are that in a proceeding under Section 9A (2) of the Act initiated by the petitioner, an order dated 8.3.2013 was passed by Consolidation Officer, Sadar, Jaunpur, whereby the objection filed by the petitioner was allowed. Against that order, respondent no.4-Shankar and 3 others (respondent nos. 5 to 7) filed an appeal before the Settlement Officer of Consolidation, Jaunpur under Section 11 (1) of the Act, registered as Appeal No. 2202/2016-17, which was allowed vide order dated 18.5.2017.

3. Being aggrieved against the order dated 18.5.2017 passed by Settlement Officer of Consolidation, Jaunpur, the petitioner and his brothers filed a revision on 7.6.2017 under Section 48 (1) of the Act, registered as Revision No. 3135/2017-18. Subsequently, an application was filed by respondent no.4 on 16.3.2019 on the ground that revision filed by the petitioner is incompetent as the certified copy of the order passed by Consolidation Officer has not been annexed or filed alongwith memo of revision and therefore, in view of Rule 111 of U.P.C.H. Rules, 1954 (hereinafter referred to as Rules), the memo of revision be rejected as incompetent and defective and barred by provisions of Rule 111 of the Rules.

4. After filing the said application, raising objection for non-compliance of Rule 111 of the Rules, the petitioner filed an application dated 19.3.2019 annexing the certified copy of the order passed by Consolidation Officer stating therein that the revision was filed challenging the order passed by the Settlement Officer of Consolidation and the certified copy of the said order was annexed alongwith the memo of revision. But since the order of the Consolidation Officer was not under challenge and therefore, the said order could not be annexed alongwith the memo of revision. It was further stated in the application that in order to avoid technicalities, the petitioner has filed the certified copy of the order, which may be taken on record and the revision be decided on merits.

5. The revisional court vide impugned order dated 29.3.2019 dismissed the revision at the admission stage on the ground that the petitioner has not explained the reasons for not filing the certified copy of the order passed by Consolidation Officer, which he obtained in the year 2013 and no sufficient cause for delay has been explained and therefore, the order was passed dismissing the revision.

6. The order passed by Deputy Director of Consolidation dated 29.3.2019 rejecting the revision filed by the petitioner is impugned in the present writ petition.

7. I have heard Sri Kailash Nath Singh, learned counsel for the petitioner, Sri S.C. Tripathi, learned counsel appearing on behalf of respondent no.4 and perused the record.

8. Contention of learned counsel for the petitioner is that there is

sufficient compliance of Rule 111 of the Rules as the memo of revision accompanied the order passed by Settlement Officer of Consolidation, which was impugned in the revision. According to the counsel, subsequently, the certified copy of the order passed by Consolidation Officer was also filed when the objection was raised by the respondent no.4 for non-compliance of Rule 111 of the Rules and therefore, it cannot be said that there is no compliance of Rule 111 of the Rules and the revision could not have been dismissed on that ground.

9. It was further contended by learned counsel for the petitioner that the revision cannot be decided on mere technicalities and the view taken by the revisional authority is hypertechnical, which is totally unjust and uncalled for.

10. In support of his contention, he placed reliance upon the judgment rendered in the case of ***Hari Narain and others Vs. Deputy Director of Consolidation and others 1981 (2) RD 341, Ram Naresh Vs. Deputy Director of Consolidation and others 2019 (142) RD 83***and in case of ***Ram Deo and another Vs. Deputy Director of Consolidation, Basti and others 2004 (97) RD 211.***

11. On the other hand, learned counsel appearing on behalf of respondent no.4 submitted that there is no sufficient compliance of Rule 111 of the Rules and delay in filing the order of Consolidation Officer has not been explained by the petitioner and therefore, in absence of appropriate explanation, the impugned order has rightly been passed. He relied upon the judgment of Division Bench of this Court passed in case of ***Ram Nath and others Vs. Deputy Director of Consolidation, Gyanpur, Varanasi and others 1971 RD 51.***

12. I have considered the rival submissions and perused the record.

13. The question for consideration in the present case is with regard to the compliance of Rule 111 of the Rules made under Section 54 of the Act, which reads as under:

*"**111.** Sections 48 and 54. - An application under Section 48 of the Act shall be presented by the applicant or his duly authorised agent to the Joint/Deputy/Assistant Director of Consolidation, nominated by the Director of Consolidation, Uttar Pradesh for the District or Settlement Officer (Consolidation) unit concerned or failing posting of any such Joint/Deputy/Assistant Director of Consolidation in the district, to the District Deputy Director (Consolidation) within 30 days of the order against which the application is directed. It shall be accompanied by copy of the judgment or order in respect of which the application is preferred. Copies of judgment or order, if any, of other subordinate authorities in respect of dispute shall also be filed alongwith the application."*

14. An analysis of this Rule makes it clear that a revision filed under Section 48 of the Act is to be filed within 30 days of the order passed against which the revision is directed. The Rule further requires that memorandum of revision shall be accompanied by the copy of the judgment and the order in respect of which the revision preferred. This Rule further requires that copy

of the judgment and order, if any, of the subordinate authority in respect of dispute shall also be filed alongwith the revision.

15. Therefore, the requirement of Rule insofar as the filing of the copy of judgment and order against which the revision is preferred is concerned, it is clear that such copy of the judgment and order must be accompanied with the memorandum of revision.

16. The word 'accompany' used in this part of the Rule is significant. So far as the other requirement for filing copy of the judgment and order of another subordinate authority is concerned, the Rule requires that such copy of the judgment and order has to be filed alongwith the application and the word 'accompany' is significantly absent so far as this requirement is concerned. The Rule making authority by not using the word 'accompany' in the latter part of the requirement, must be intended to mean the Rule is not requiring such copies of judgments and orders of the subordinate authorities necessarily to accompany the memorandum of revision. The Rule so read is on the fact of it salutary in nature. The intention of Rule making authority appears to be that though the judgment and order under revision alone is necessarily required to accompany the memorandum of revision, but the copies of other judgments and orders be also made available to the revisional authority at the time when the matter comes up for consideration before the authority.

17. In the present case, the order, which is under challenge in the revision is accompanied by memo of revision, but the certified copy of the order passed by Consolidation Officer, which was not challenged in the revision, was finally filed by the petitioner alongwith an application on 19.3.2019 stating therein that the same could not be filed earlier as the said order was not under challenge and in order to avoid the technicalities, certified copy of the said order of Consolidation Officer is being filed alongwith an application and the revision be decided on merits. The contents of the application dated 19.3.2019 filed by the petitioner, appended as annexure-5 to the writ petition, is quoted as under:

न्यायालय डी0डी0सी0 जौनपुर।

नि0 शीतला———बनाम———शंकर
ग्राम हमजापुर परगना हवेली जौनपुर।

श्रीमान जी,

सविनय निवेदन है कि प्रार्थी ने ब0अ0च0 द्वारा पारित आदेश के विरूद्ध निगरानी प्रस्तुत किया है तथा ब0अ0च0 के आदेश की नकल निगरानी से साथ संलग्न किया है च0अ0 द्वारा पारित आदेश हम निगरानी कर्ता के पक्ष रहा उसे चुनौती नहीं दिया गया है इस वजह से दाखिल नहीं किया गया।

यह कि दौरान सुनवाई विपक्षीगण ने कहा कि नियम 111 का पालन नहीं किया गया च0अ0 के आदेश की प्रतिलिपि दाखिल नहीं है इस बिन्दु पर निगरानी निरस्त की जावे इस बिन्दु पर माननीय हाई कोर्ट इलाहाबाद ने कई व्यवस्थाओं में आर0डी0 1968 पृष्ठ 357 बाबूराम बनाम श्रीमती आर0डी0 1981 पेज 341 हरी नरायन बनाम डी0डी0सी0 आर0डी0 2004 पेज 211 रामदेव बनाम डी0डी0सी0 व आर0डी0 2009 पेज 402 वक्फ ताकियान बनाम दिलीप सिंह में स्पष्ट किया।

चूँकि मुकदमें में तकनीकी बिन्दुओं से बचने हेतु तथा न्यायहित में अनावश्यक विलम्ब से बचने हेतु निगरानी कर्ता आदेश की नकल प्रस्तुत कर रहा है जिसे स्वीकार करके सुनवाई हेतु ग्रहण किया जाये।

अतः प्रार्थना है कि उपरोक्त व्यवस्थाओं के संदर्भ में निगरानी में प्रार्थी

द्वारा प्रस्तुत नकल आदेश च0अ0 को शामिल करते हुये निगरानी सुनवाई हेतु किया जाये।

प्रार्थी :–

शीतला प्रसाद

18. Reasons for non filing the certified copy of the order of Consolidation Officer have sufficiently been explained in the application. In the case of ***Jagdeo Prasad Vs. Assistant Director of Consolidation, U.P. Lucknow and others 1975 RD 277,*** the certified copy of the order of Consolidation Officer had been filed and was available before the Assistant Consolidation Officer on the date of hearing of the revision. The learned Single Judge of this Court held that the revision was not rendered incompetent merely because the copy of the order of the Consolidation Officer did not accompany the revision application when it was filed. It was held that justice required that the Assistant Director should have decided the dispute on merits.

19. In case of ***Ram Naresh (supra),*** it was held that Deputy Director of Consolidation should not dismiss the revision petitions on technicalities; rather he should tilt himself towards examining the record on merits and pass appropriate orders to secure the ends of justice. Relevant portion of the said judgment is quoted as under:

"As has been laid down by this Court on several occasions, the Deputy Director of Consolidation should not dismiss the revision petitions on technicalities; rather he should tilt himself towards examining the record on merit and pass appropriate orders to secure the ends of justice. In fact the provisions of Section 48 (1) of the Act are couched in such a language which confers a power or jurisdiction on the Deputy Director of Consolidation and for exercise of such power an application need not necessarily be made. The jurisdiction vested in the Deputy Director of Consolidation is akin to revisional jurisdiction."

20. Paragraph 5 of the judgment rendered in the case of **Ram Deo** (supra), which was relied by learned counsel for the petitioner, is quoted as under:

"It is well settled that if entire record was before Deputy Director of Consolidation, a revision could not be dismissed as incompetent on the ground of non-filing of certified copy of the order of Consolidation Officer, being violative of Rule 111 of U.P. Consolidation of Holdings Rules as laid down by Full Bench in Ramakant Singh v. Deputy Director of Consolidation."

21. In case of **Ram Nath (supra)**, it was held that non-filing of certified copy of the order of Consolidation Officer does not rather violate the Rule 111 of the Rules. On the other hand, learned counsel for the respondent relied upon the relevant portion judgment in the case of Ram Nath, which is quoted hereunder:

"We find no manifest error of law in this order. Even if R. 111 is held directory, that will only mean that a person who wants to file a revision may comply with it substantially. The last part of this Rule requires that copies of judgments and order, if any, shall also be filed with the memorandum of Revision. If the Rule is directory, an applicant may file the copies subsequently, and the Director can, in a fit case, accept the

same even if they had been filed at the proper time. But the fact that the Rule is directory does not confer an absolute right on a litigant to violate the Rule and file the copies whenever he wants. The directory nature of the Rule will only enable the Director to entertain a copy even if filed beyond time if he is satisfied that the case is a fit one for doing so. In that even, the Director wil have to go into the merits of the explanation offered by the litigant for the delay in filing the copy; and if on facts, the Director is satisfied that the cause shown is not sufficient, he would be within his powers in refusing to entertain such a defective revision. In the present case, the Deputy Director of Consolidation applied his mind to the explanation offered by the petitioners and was not satisfied that the delay has been satisfactorily explained."

22. From perusal of the aforesaid judgment passed by Division Bench of this Court, it is apparent that Rule 111 of the Rules is held to be directory and not mandatory. If the Rule is directory, application may be filed alongwith certified copies of the judgments subsequently and it will only enable the Director of Consolidation to entertain the copy even if the application is beyond time, if he is satisfied that the case is fit one for doing so.

23. In the present case, sufficient explanation had been given by the petitioner vide his application dated 19.3.2019, which is quoted above and in the said application, the reason for not filing the said copy earlier alongwith memo of revision has been explained satisfactorily. The word 'accompany' as mentioned in the first part of Rule 111 of the Rules has been explained, meaning thereby the copy of order which is not challenged in revision can be filed subsequently alongwith the application.

24. The Deputy Director of Consolidation has committed illegality while holding that the certified copy of the order of Consolidation Officer was issued in 2013 and there is no justification for not filing the same alongwith memo of revision. The Deputy Director of Consolidation is not at all justified while holding so when there is no requirement under Rule 111 of the Rules to accompany the order, which was not challenged in revision. The certified copy of the order of the Consolidation Officer having been filed subsequently alongwith an application furnishing explanation, I hold that sufficient explanation has been given by the petitioner for non filing that certified copy of the order earlier. Even otherwise, it is also well settled that the revision cannot be dismissed on the technicalities, rather the order should be passed on merits in order to deliver justice to the parties.

25. For the aforesaid reasons, present writ petition succeeds and is allowed. The impugned order dated 29.3.2019 passed by Deputy Director of Consolidation, Jaunpur in Revision No. 3135 of 2017-18 is hereby quashed. The Deputy Director of Consolidation, Jaunpur is directed to decide the revision afresh on merits in accordance with law expeditiously within maximum period of six months from the date of presentation of certified copy of this order, after affording opportunity of hearing to the parties.

26. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J

Writ – B No. 9003 of 1997

Kalu Ram ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri R.K. Asthana, Sri Amit Malik, Sri Ashish Gopal, Sri B. Malik, Sri P.K. Asthana, Sri P.K. Srivastava, Sri Pawan Kumar Srivastava, Sri S.C. Pandey, Sri S.K. Dubey, Sri Sanjay Mishra, Sri Satyam Shah, Sri Siddharth Pandey.

Counsel for the Respondents:
C.S.C., Deepika Sharma, Sri Hriday Raj Tripathi, Sri Manoj Kumar Rajvanshi, Sri Sankatha Rai, Sri Sudhir Malhotra, Sri V.K. Rai, Sri Vikrant Rana, Sri Y.D. Sharma, N.C. Rajvanshi, Sri P.K. Shukla, Sri Sudhir Mehrotra

A. Fraud would vitiate a solemn transaction recorded in howsoever solemn proceedings.
Issue required to be decided by the D.D.C while deciding revision- whether the compromise which the D.D.C verified on 24.10.1985 was indeed a fraudulent compromise or a genuine compact between parties – instead he recorded findings, that are irrelevant and non-germane to this principle issue alone(Paras 11 to 16). Fraud would vitiate a solemn transaction recorded in howsoever solemn proceedings (Paras 18 to 19). Impugned order passed by DDC is manifestly illegal, and cannot be sustained

Writ Petition allowed (E-6)

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Sri B. Malik, learned counsel appearing for the petitioners, Sri N.C. Rajvanshi, learned Senior Advocate assisted by Sri P.C. Shukla, learned counsel appearing on behalf of respondent no.3. Sri Y.D. Sharma, learned counsel appearing on behalf of respondent no.5, Sri Vikrant Rana, learned counsel appearing on behalf of respondent no.4, and Sri Sudhir Mehrotra, learned counsel representing the Administrator General.

2. This writ petition has been filed by the original petitioner, one Kalu Ram son of Sri Bhajjan, now represented by his heirs and legal representatives, petitioner nos.1/2/1, 1/2/2 and 1/2/3, challenging an order of the Deputy Director of Consolidation, Ghaziabad dated 27.02.1997, whereby he has allowed Revision no.507 filed by original respondent no.2, Smt. Risalo, and set aside an order dated 10.09.1990 passed by the Consolidation Officer. By the order last mentioned the Consolidation Officer acting on a compromise dated 24.07.1987, and verified by the Deputy Director of Consolidation, had recorded shares of parties in the Consolidation Records. Also set aside by the impugned order is an order, dated 03.09.1993 passed by the Consolidation Officer, Ghaziabad, rejecting an application on behalf of Smt. Risalo to set aside the order dated 10.07.1990, by which the compromise was implemented. The Deputy Director in the same stroke also set at naught an order dated 26.08.1996 passed by the Settlement Officer of Consolidation dismissing an appeal under Section 11(1) of the U.P. Consolidation of Holdings Act carried by respondent no.2 from the order of the Consolidation Officer, refusing to

set aside his order dated 10.07.1990. The result of the Deputy Director of Consolidation's order dated 27.02.1997, that is impugned here is that the parties are put back to the position as it existed prior to 10.07.1990 regarding their respective shares recorded in the land in dispute, which is detailed hereinafter.

3. The background of the dispute leading to this writ petition according to the petitioners is that one, Vishram was the original recorded tenure holder of the property in dispute. He was survived by two sons, Bhajjan and Chhotia. Risalo was Chotia's wife and the couple were issueless. Half share in the land in dispute upon Vishram decease went to Chhotia, and upon his death to Risalo as his widow. Bhajjan had two sons, Kalu and Jagmal. Kalu is the original writ petitioner here. He survived by his heirs, Satish, Santram, Jeetram and Baleshwar, all of whom are Kalu's grandsons, and arrayed here as petitioners. The widow of Chhotia, Risalo remarried, post inheritance, one Bahodu. In course of time, Bahodu also died and Risalo survived him. However, Risalo's name continued to be recorded in the land in dispute, that she had inherited from her first husband, the late Chhotia.

4. According to the petitioners' case, Kalu, who represents the branch of Bhajjan, upon Risalo's remarriage, put forward a case based on reversionary rights under Section 172 of the U.P. Z.A. & L.R. Act claiming that all that she had inherited from Chhotia, her first husband, upon remarriage would revert back to the branch of Bhajjan. This is what has given rise to the dispute leading to the present writ petition.

5. It appears that upon notification of consolidation proceedings, this claim based on reversion was put forward by Kalu, but before the Assistant Consolidation Officer, a compromise was claimed to have been recorded on 20.10.1983 between Kalu and Risalo. This compromise was challenged by means of five appeals to the Settlement Officer of Consolidation being Appeal nos.449, 447, 442, 450 and 448, all of which came to be decided by the Settlement Officer of Consolidation vide judgment and order dated 02.06.1984. These appeals came to be dismissed as time barred, though with some remarks on merits also.

6. Aggrieved by this order dated 02.06.1984, Kalu went up in Revision to the Deputy Director of Consolidation, Ghaziabad vide Revision no.880 of 1984, arraying as parties, Smt. Risalo and Jagmal son of Bhajjan (Kalu Ram's brother). In the said revision, again a compromise was recorded on 24.10.1985, where parties including Kalu and Smt. Risalo (the latter thumb marked) were identified by their respective counsel. This compromise after verification by the Deputy Director of Consolidation was sent by a detailed order to the Consolidation Officer, after setting aside the orders under challenge in Revision no.880 of 1984 with a direction that the Consolidation Officer may carry out the order. This order was passed on 24.10.1985, and reads thus (in Hindi vernacular):

"उपरोक्त विवेचना के अनुसार निगरानी स्वीकार की जाती है। अधीनस्थ न्यायालयों द्वारा पारित आदेश निरस्त किये जाते हैं।

पत्रावली विद्वान चकबंदी अधिकारी के न्यायालय में नियमानुसार निस्तारण हेतु प्रत्यावर्तित की जाती हैं।"

7. The Consolidation Officer before whom the compromise went in

compliance with the order dated 24.10.1985 passed by the Deputy Director of Consolidation, carried out the terms of the compromise in the Consolidation Records, as already said hereinbefore vide order dated 10.07.1990. The parties were recorded in the Consolidation Records in terms of the aforesaid compromise.

8. Once again hostilities erupted between parties, with Risalo filing an application to the Consolidation Officer claiming that the compromise that has been recorded before the Deputy Director of Consolidation, was fraudulent and does not bear her signatures. The said application for restoration made by Risalo, was rejected by the Consolidation Officer vide order dated 03.09.1993.

9. Aggrieved by the order dated 03.09.1993, an appeal was carried to the Settlement Officer of Consolidation, who dismissed the appeal and affirmed the order last mentioned, passed by the Consolidation Officer.

10. Aggrieved by both these orders, Revision no.507 was filed by Risalo, which has come to be allowed by the impugned order.

11. Before proceeding to consider the merits of the petitioners' challenge to the impugned order dated 27.02.1997 passed by the Deputy Director of Consolidation, it would be necessary to place developments during the course of pendency of this writ petition where a number of parties have been substituted, and/ or impleaded.

12. Omdev Singh, Bhajjan and Ramdev son of Raj Kumar, have been impleaded as respondent nos.5, 6 & 8 to the petition on the basis of a registered will dated 05.12.1990 executed by Smt. Risalo, respondent no.2, bequeathing her entire estate in favour of aforesaid three. They have been impleaded vide order dated 16.05.2018. Likewise, Vinod Kumar has been impleaded as respondent no.3 on the basis of a will dated 18.05.1999, executed in his favour, also by Risalo, bequeathing her entire estate to him. Then respondent no.4 has also been impleaded under orders of this Court, dated 16.05.2018, claiming a right also from Risalo based on an agreement to sell, dated 31.12.1986. The Court has proceeded to implead all these parties who claim to represent the estate of deceased Risalo, not in the sense that their claims to title have been accepted, but only for the purpose of prosecuting this litigation. The Court also considering the fact that there is no heir or legal representative left by Smt. Risalo as per report of the Consolidation Officer, has proceeded in accordance with the provisions of Order XXII Rule 4A CPC to appoint the Administrator General, U.P. to represent the estate of the deceased, Risalo.

13. This Court must place on record the fact that the Court is assured, in the midst of much unsurety about what claim is made by which party and to what extent it is right, that the estate of Risalo is more than well represented here.

14. A perusal of the impugned order passed by the Deputy Director of Consolidation shows that after remand post verification of the compromise, the papers were laid for orders before the Consolidation Officer, who issued notice to Smt. Risalo on 09.01.1990, returnable on 23.01.1990. He has further perused the

record and held that it reveals that no process, in fact, was issued to Smt. Risalo, and nobody appeared on her behalf before the Consolidation Officer. It has been held that on 10.07.1990, the order passed against Smt. Risalo was *ex parte*, and that by the said order the compromise dated 24.10.1987 (sic 24.10.1985) was accepted; and on its basis the settlement of rights of parties was made. He has further recorded a finding that the Consolidation Officer without bestowing any consideration to the application made by Risalo to set aside the order dated 10.07.1990, has rejected the same. The Deputy Director of Consolidation has recorded a further finding that he is in agreement with the submission of the learned counsel appearing for Risalo that it was necessary to get the compromise dated 24.10.1987 set aside. He has also said that he has while setting out the controversy in the body of his order noticed that the claim of Kalu Ram as regards *Khata* nos.13 and 14 is barred by *res judicata*, and so far *Khata* no.252 is concerned, Kalu Ram has not put forward any convincing evidence to establish his claim. He has then proceeded to set aside the various orders passed by the authorities below refusing to disturb the compromise recorded between parties and given effect to vide order dated 10.07.1990. It must be remarked at once that the Deputy Director of Consolidation was required to see in the Revision pending before him whether the compromise which the Deputy Director of Consolidation verified on 24.10.1985 was, indeed, a fraudulent compromise or a genuine compact between parties. This the Deputy Director of Consolidation has not done at all. Instead, he has recorded findings, that are all irrelevant and non-germane to this principal issue alone, which the Deputy Director of Consolidation was required to determine. The Deputy Director of Consolidation has commented much on the fact that notice to Risalo was not issued by the Consolidation Officer before he passed the order dated 10.07.1990 implementing the compromise arrived at between parties, that was verified by the Deputy Director of Consolidation.

15. This Court thinks that before the Consolidation Officer, there was hardly any necessity of notice to any of the parties inasmuch as the matter had been sent to Consolidation Officer for giving effect to the compromise, that had been verified by the Deputy Director of Consolidation in Revision no.880 of 1984 vide order dated 24.10.1985. The Consolidation Officer was only an executing agency and while he may have had some adjustment to make in the rights of parties in calculating their precise entitlement and delivering on spot possession, he had nothing more to do. If grievances had arisen to parties relating to execution of the compromise, absence of notice to Risalo would have mattered; but that is not the issue. The issue is about genuineness of the compromise, which was recorded and verified by the Deputy Director of Consolidation, and this was sent down to the Consolidation Officer for giving effect to it.

16. In this context, the findings of the Deputy Director of Consolidation as regards the absence of notice to Risalo are completely out of place and irrelevant. Likewise, the findings in the impugned order regarding Kalu Ram's claim to *Khata* nos.13 & 14 being barred by *res judicata*, or the failure of Kalu Ram to produce any convincing evidence as to his claim regarding *Khata* no.252, are equally irrelevant. What is relevant, to emphasize

time over again is to judge the genuineness of compromise that the Deputy Director of Consolidation recorded on 24.10.1987. This exercise the Deputy Director of Consolidation has not at all undertaken. The order, which he had made could only be made in the event the Deputy Director of Consolidation had come to a conclusion that the compromise that was recorded before him was based on a fraud practiced upon Risalo, and the resultant compromise was the result of this fraud. No other finding, given the background in which the parties have already compromised and adjusted their rights can justify the order made by the Deputy Director of Consolidation under challenge here. The fact that fraud does vitiate all solemn transactions is eloquently dealt with by their Lordships of the Supreme Court in the context of a compromise in **Banwari Lal vs. Smt. Chando Devi (through L.R.) and another, (1993) SCC 581,** where in paragraph 14 of the report, it has been held:

"14. The application for exercise of power under proviso to Rule 3 of Order 23 can be labelled under Section 151 of the Code but when by the amending Act specifically such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to Rule 3. It has been held by different High Courts that even after a compromise has been recorded, the court concerned can entertain an application under Section 151 of the Code, questioning the legality or validity of the compromise. Reference in this connection may be made to the cases *Tara Bai (Smt) v. V.S. Krishnaswamy Rao* [AIR 1985 Kant 270 : ILR 1985 Kant 2930]*; S.G. Thimmappa v. T. Anantha* [AIR 1986 Kant 1 : ILR 1985 Kant 1933]; *Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh* [AIR 1958 Pat 618 : 1958 BLJR 651]; *Mangal Mahton v. Behari Mahton* [AIR 1964 Pat 483 : 1964 BLJR 727] *and Sri Sri Iswar Gopal Jew v. Bhagwandas Shaw* [AIR 1982 Cal 12] where it has been held that application under Section 151 of the Code is maintainable. The court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Indian Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the explanation to the proviso to Rule 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the court could have recorded such agreement or compromise on February 27, 1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of Rule 3, there was no option left except to recall that order."
(Emphasis supplied)

17. To the same end is another decision of the Supreme Court in **Delhi Development Authority vs. Bankmens Co-Operative Group Housing Society Ltd. & others, (2017) 7 SCC 636,** where it has been held in paragraphs 16, 17, 18 & 21 of the Report thus:

"16. It is further urged by Shri Ranjit Kumar that the revival of the Societies was a fraudulent act and he submits that fraud vitiates all decisions and in this regard, he made reference to the judgment of this Court in *Bhaurao Dagdu Paralkar v. State of Maharashtra [Bhaurao Dagdu Paralkar v. State of*

Maharashtra, (2005) 7 SCC 605] , relevant portions of which read as follows: (SCC pp. 611-12, paras 9-11)

"9. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. ...

10. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. ...

11. "Fraud", as is well known, vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letters or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former, either by words or letters. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

17. We have heard the learned counsel for the respondents and they have also filed their written submissions. It would be pertinent to mention that the counsel for the respondents have not countered the submission of the learned Solicitor General that the revival of the Societies was illegal and fraudulent. The main submission is that the new members were validly granted membership in Bankmens CGHS. They are not at fault and hence, they should not be made to suffer. It is also urged that the allegation that Rs 67,38,800 was paid out of the funds of builders is incorrect and, in fact, this amount was paid out of the funds of the Society.

18. In Safdarjung CGHS, additional grounds have been taken that DDA had not, in fact, challenged the orders dated 27-2-2012 [*Safdarjung Coop. Group Housing Society Ltd. v. Registrar of Coop. Societies*, 2012 SCC OnLine Del 6454] and 22-8-2012 *[Safdarjung Coop. Group Housing Society Ltd. v. Registrar of Coop. Societies*, 2012 SCC OnLine Del 6456] but only after the land which was the subject-matter of dispute in *Bankmens CGHS case [Indian Statistical*

Institute Coop. Group Housing Society Ltd. v. Union of India, 2004 SCC OnLine Del 1244] was illegally given to some third party, it was felt by officials of DDA that contempt proceedings may be initiated against them and, therefore, the appeal was filed in Safdarjung CGHS case also. Again on merits, all that has been stated is that after revival in the year 1999, the membership is genuine and bona fide and that the genuine members cannot be denied what is rightfully due to them.

21. As repeatedly held by this Court, when an action is based on fraud, the same cannot withstand the scrutiny of law. The revival of these Societies is mired in controversy. When we talk of revival, it would normally mean that the Society is being revived by its original members. As far as these two cases are concerned, the move for revival was started by persons who were not even members or promoters of the original Society. The revival of Societies was funded by the builders. The original members have all vanished into thin air. There is no explanation as to how they resigned and who accepted their resignations. There is nothing on record to show how Rajan Chopra, in case of Bankmens CGHS and Mahanand Sharma, in case of Safdarjung CGHS, were entitled to file the application for revival. We also cannot lose sight of the fact that both the Societies were put under liquidation because they could not furnish some information to the Office of RCS. There is not even a plea that when the revival was done, RCS was satisfied that the reasons for which the Societies were liquidated no longer existed. It is also obvious that memberships kept changing and almost all the members of these two Societies are persons who were granted membership after the year 2003 i.e. after the cut-off date referred to in Yogi Raj Krishna CGHS case [Yogi Raj Krishna Coop. Group Housing Society Ltd. v. DDA, 2008 SCC OnLine Del 1602] . We are, therefore, clearly of the view that the very revival of the Societies is illegal and that when the foundation falls, the edifice which has been developed on the foundation, must go."
(Emphasis by Court)

18. The principles adumbrated in the aforesaid decisions of their Lordships, which learned counsel for all parties appearing in this case acknowledge to be the correct position of the law, would lead to the conclusion that fraud would vitiate a solemn transaction recorded in howsoever solemn proceedings. It would also not the matter how old that fraud is with the only practical limitation that the fraud should not be so ancient that there is no evidence forthcoming by which a party can establish the fraud.

19. In the present case, a perusal of the impugned order shows that the Deputy Director of Consolidation has gone completely astray, and decided the revision on absolutely irrelevant considerations. It must also be noticed that the parties also knocked at the wrong door. Aggrieved by the compromise as they were, they ought to have applied to the Deputy Director of Consolidation, before whom the compromise was verified on 24.10.1987, and who accepted it. The Consolidation Officer had the role of an Executing Court, at best. As such, the resort the parties took to the Consolidation Officer to set aside the compromise was by no means well advised. But, that does not absolve the Deputy Director of Consolidation of his duty to determine the real and substantial

issue between parties, which is about the genuineness of the compromise, by which all those who stand against Risalo, affirm whereas all those who stand by Risalo, dispute. The Deputy Director of Consolidation, therefore, is required to determine going by relevant evidence as to whether the compromise recorded before him on 24.10.1987 and verified by him on the said date was genuine or not. He was not required to go into any other issue. As such, the impugned order passed by the Deputy Director of Consolidation is manifestly illegal, and cannot be sustained.

20. In the result, this petition succeeds and is **allowed**. The impugned order dated 27.02.1997 by the Deputy Director of Consolidation in Revision no.507 is hereby **quashed** with a remit of the matter to the Deputy Director of Consolidation, who will decide the said revision afresh in accordance with the guidance in this judgment, within a period of six months from the date of receipt of a certified copy of this judgment, after hearing all parties concerned, including those who were parties here, in particular, the Administrator General, U.P., who represents the estate of Smt. Risalo. Costs easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – B No. 14352 of 1984

Baladin And Another ...Petitioners
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioners:
Sri Santosh Kumar, Sri Akhilesh Patel, Sri Hausila Prasad, Sri Kanhaiya Lal, Sri Satish Chandra Dwivedi, Sri Satya Prakash Mishra

Counsel for the Respondents:
S.C., Sri Dhruva Narayan Mishra, Sri Kamal Srivastava, Sri Shyamji Gaur

A. Article 226 Constitution of India-Amendment - Writ Petition pending since 1984-Amendment application filed in 2019 at the stage of Final Hearing-Rejected. Application to postpone final hearing till disposal of application under order IX rule 13 in O.S No. 355 of 1970. Held:- dilatory device and is made malafidely – Rejected.

(E-6)

(Delivered by Hon'ble J.J. Munir, J.)

Order on Civil Misc. Amendment Application no.26 of 2019

This amendment application has been made belatedly at a stage when this writ petition has come up for final hearing. This writ petition is one of the year 1984 and this amendment application has been made in the year 2019.

There is no good ground to grant this amendment.

This amendment application is hereby **rejected.**

It is directed that in cases listed for final hearing, it shall be the responsibility of the Section Officer concerned that there is no application pending for orders. If there is an application brought subsequently, in a final hearing matter, that matter will not be listed for final hearing, but for orders first. Any violation from this direction, will be viewed seriously.

Order on Civil Misc. Application (to postpone final hearing) no.13 of 2019

This is an application made with a prayer to postpone hearing of the writ petition till disposal of the application filed by the petitioners under Order IX, Rule 13 CPC in Original Suit no.355 of 1970. This application is *prima facie* not only a dilatory device in this petition, which relates to the year 1984, but is one made *mala fide*, a fact about which this Court is convinced.

Learned counsel for the petitioners has not been able to show anything, on the basis of which this very old petition may be adjourned pending decision of a restoration application in a still older civil suit, somehow connected to the questions involved in the present petition; certainly not connected to the cause of action involved.

This application is **rejected.**

Order on Writ Petition

1. Heard Sri Kanhaiya Lal, learned Advocate holding brief of Sri Satish Chandra Dwivedi, learned counsel for the petitioners, learned Standing Counsel for the State and Sri Dhruva Narayan Mishra for respondent no.4.

2. This writ petition has been filed challenging an order dated 30.05.1984 passed by the Deputy Director of Consolidation, Prayagraj (then Allahabad) in Revision no.44 of 1981, allowing that Revision, filed by respondents nos.4, 5 &6. The interest of respondent no.6 is now represented by respondent no.5. The Revisional Court while doing so, set aside an appellate order of the Settlement Officer of Consolidation dated 01.08.1981 passed in Appeal no.88/165/62 and Appeal no.95/168/177 of 1981, that had, in turn, affirmed an order of the Consolidation Officer dated 05.03.1980, granting mutation in favour of petitioners. The petitioners' application, thus, stands rejected by the impugned order dated 30.05.1984 made by the Deputy Director of Consolidation in Revision.

3. The proceedings giving rise to the impugned order commenced before the Consolidation Officer on an application for mutation made by the original writ petitioners, Baladin son of Shiv Badal and Vijai Bahadur son of Sitaram, seeking mutation of their rights over agricultural land, comprising *Khasra* nos.379 and 405, situate in Village Pasiapur, Pargana & Tehsil Soraon, District Prayagraj. The aforesaid mutation application was made under Section 12 of the U.P. Consolidation of Holdings Act, and hereinafter referred to as the Act.

4. The background in which the aforesaid proceedings for mutation commenced before the Consolidation Officer are these: *Khasra* plot no.379 admeasuring 5 Bigha, 19 Biswa and *Khasra* plot no.405 admeasuring 2 Bigha 5 Biswa, totaling an area of 8 Bigha 4 Biswa, said to be a grove situate in Village Pasiapur, Tehsil Soraon, District Prayagraj (then Allahabad) were in the ownership and possession of respondent nos.7 to 16. On 31st May, 1965, Beni Prasad Tandon, whose interest is represented by respondent nos.7 to 16, agreed to sell the khasra plots above detailed (for short the property in dispute) to the petitioners for a valuable sale consideration of Rs.3000/-. The owners are said to have actually sold the property in dispute for a sum of Rs.3000/- by means of a registered sale deed, dated 02.10.1965, executed in favour of respondent nos.4 to 6. The petitioners filed Original Suit no.384 of 1965 against the vendors last mentioned, represented by respondent nos.7 to 16 here, for

specific performance of contract, and to cancel the sale deed executed in favour of respondent nos.4 to 6. The said suit was contested separately by respondent nos.4 to 6 and also by respondent nos.7 to 16. The petitioners' suit after trial was dismissed by a judgment and decree dated 22.12.1967, whereby the Court while refusing specific performance, granted a decree of compensation in the sum of Rs.2135/-, recoverable from defendants 4 to 9 to the suit by the plaintiff with *pendente lite* and future interest at the rate of Rs.4% per *annum*. The decree for compensation, thus, went against the vendors, who are represented by respondent nos.7 to 16.

5. Aggrieved by the aforesaid decree, two appeals were filed. Civil Appeal no.251 of 1968 was filed by vendors, that is to say, predecessors-in-interest, respondent nos.7 to 16, whereas Civil Appeal no.70 of 1968 was filed by the petitioners. The petitioners filed the Appeal against that part of the decree of the Trial Court, by which the specific performance of contract was refused, whereas respondent nos.7 to 16 appealed from that part of the decree by which they were ordered to pay Rs.2135/-, in compensation to the petitioners. The aforesaid appeals came up for determination before the Civil Judge, Allahabad [now Civil Judge (Sr. Div.)] on 28th October, 1968. The Appellate Court allowed both appeals, setting aside the decree, ordering the vendors to pay compensation to the petitioners, and at the same time, the part of the decree by which specific performance was refused to the petitioners was reversed, and the vendors were ordered to execute a sale deed relating to the property in dispute in favour of the petitioners, super-added with a direction that the decree holder would have to pay Rs.1000/- to the vendor, over and above the contracted price. Respondents nos.4, 5 & 6, who were defendants nos.1 to 3 to the suit were also directed to be joined in the execution of the sale deed, in order to pass an unimpeachable title.

6. Aggrieved by the appellate decree, a second appeal being Second Appeal no.3282 of 1968 was filed to this Court, which came up for hearing on 08.01.1970. The second appeal was dismissed and the decree made by the First Appellate Court was upheld. The decree for specific performance was executed by the Court of first instance, acting as the Executing Court, and a sale deed relating to the property in dispute was executed in favour of the petitioners on behalf of the vendors, that is to say, respondent nos.7 to 16, that was duly admitted to registration after execution by the learned Civil Judge on 22.07.1970. Respondents nos.4 to 6 thereupon filed Original Suit no.355 of 1970, that is to say, soon after execution of the decree of specific performance, in the Court of *Munsif,* East, Allahabad, seeking declaration to the effect that the decree passed in Original Suit no.384 of 1965 is illegal and void, and all proceedings in execution of the said decree be also declared void, together with their consequences.

7. It appears that the said suit was initially contested, at least upto time when the interim injunction application was heard and rejectedvide order dated 13.10.1970, passed by the First Additional *Munisif,* Allahabad, vacating the earlier *ex parte* interim injunction order dated 22.08.1970. It also figures in the sequence

of events in the history of litigation between parties that post execution of the sale deed, an application for execution, may be a further application, was made to the Court of first instance, seeking delivery of possession of the property in dispute. In the said execution case, that was numbered on the file of the Executing Court as Execution Case no.55 of 1970, Respondent no.4 filed objections under Order XXI Rule 29 CPC on ground that the petitioners had no knowledge of Suit no.384 of 1965, or had any notice served upon them. It was further pleaded that no proper guardian was appointed for respondent nos.4 to 6, all of whom were minors at that time, and, as such, the petitioners could not be given possession over the property in dispute, in execution of the decree passed in Original Suit no.384 of 1965. The said objections filed by respondent no.4 were contested by the petitioners and the learned Ist Additional *Munsif*, before whom these objections came up, dismissed the objections filed by respondent no.4 vide order dated 19.08.1971. It is pointed out that respondent no.4 had also filed objections under Section 47 of the CPC, may be raising pleas more or less to the same effect. The said objections were also dismissed by the Executing Court.

8. It is the case of the petitioners that the petitioners made an application in the execution case for the appointment of a Commissioner, to effect delivery of possession of the property in dispute to the decree holder, petitioners. Respondent no.4 also filed an application in the execution case to set aside the execution. Both the applications were heard together and disposed of by the learned *Munsif* by his order dated 12.04.1973. The learned *Munsif*, by the aforesaid order, rejected applications made by both the respondents, and allowed the petitioners' application, appointing one Sri R.D. Srivastava as Commissioner to deliver possession of the property in dispute, in execution of the decree passed in Original Suit no.384 of 1965. It is the petitioners' case that pursuant to the order dated 12.04.1973 passed by the learned *Munsif*, the Advocate Commissioner delivered possession over the property in dispute to the petitioners on 14.04.1973, and submitted his report to that effect. It is also alleged that on receipt of the report, the learned *Munsif* passed orders on 28.04.1973, striking off the execution case in full satisfaction. The aforesaid fact has been emphatically disputed by the fourth respondent in paragraph 16 of his counter affidavit dated 08.04.1985. The fourth respondent has emphatically denied the fact that possession of the property in dispute was ever delivered by the Commissioner to the petitioners. It is submitted that the entire proceedings of the Commissioner, on the basis of which the learned *Munsif* struck off the execution case in full satisfaction, was a got up report, that was drawn up sitting back in the office. There appears to be some further proceedings before the *Munsif* as there was some inaccuracy alleged in plot numbers, regarding which some further report was submitted by the Advocate Commissioner on 22.05.1973. The suit that was instituted by respondent no.4 in the year 1970, had for its basis the essential fact, that the transaction leading to the contract that culminated in the decree for specific performance of contract passed in Original Suit no.384 of 1965, was entered on behalf of respondent nos.4 to 6 by an uncle of respondent no.4, Ram Pati and father of respondent nos.5 & 6, as the fourth respondent was a minor, and so were respondent nos.5 & 6.

9. It is pointed out by the petitioners that Ram Pati was appointed next friend of respondent no.4 as he was present in Court, whereas respondent no.4 says that these proceedings were fraudulently taken, deriving unfair advantage of his minority. This is particularly so, as urged on behalf of the fourth respondent that his mother was alive at that time and she was his natural guardian, who was not served with any notice to serve as his next friend in the suit, and not Ram Pati, his uncle. He, therefore, assailed the entire contract and the transfer of his right in the property in dispute, as one beset by the fraud, as the man acting as his next friend during minority, did not defend his interest and colluded with the plaintiffs of that suit. The fourth respondent has stoutly condemned the entire proceedings of Original Suit no.384 of 1965 as one vitiated by fraud, including those that were taken in execution.

10. This Court does not intend to say one way or the other, that indeed, the proceedings of the suit that culminated in the second appeal, and the orders of the Executing Court were fraudulent. What this Court finds is that the learned *Munsif*, before whom, the fourth respondent filed a suit for a declaration that the entire proceedings of suit no.384 of 1965 were illegal and void, and further that all proceedings taken in execution of the said decree, were void, was decreed ex parte vide judgment and decree dated 16.03.1981 passed by the VIIIth Additional *Munsif*, Allahabad in Original Suit no.355 of 1970. The said *ex parte* decree has never been set aside, and is still in force. No doubt, the petitioners have made efforts to get the said decree set aside and an Application under Order IX Rule 13 CPC, has been filed on 19.03.1981. The said application was registered as Misc. Case no.10/1981, which came to be rejected by the Trial Court vide order dated 10.02.1984.

11. Aggrieved, Misc. Appeal no.43 of 1984 was filed under Order 43 Rule 1(r) CPC before the District Judge. The learned District Judge dismissed the appeal on 18.12.1985. The petitioners, thereafter, filed a review application to the District Judge in Misc. Civil Appeal no.43 of 1984. The review application was dismissed on 09.04.1986 by the learned District Judge, Allahabad. Challenging these orders, the petitioners filed Writ - C No.8571 of 1986 questioning the orders of the Trial Court, dated 10.02.1984, rejecting his restoration application and those of the District Judge in Appeal affirming it. The aforesaid writ petition was allowed on 29.11.2012 and all the three orders were quashed, with a remit of the matter to the Trial Court to decide the suit afresh, within a period of six months. It appears that what this Court actually meant was a decision of the Application under Order IX, Rule 13 CPC, but the order passed by this Court led to a situation where the Civil Judge (Jr. Div.), Sharki, Allahabad, without disposing of the Application under Order IX Rule 13 CPC proceeded with the trial of Suit no.355 of 1970. Finding these not to be intendment of this Court, the fourth respondent made an application before the learned Civil Judge (Jr. Div.) aforesaid, requesting the Court to seek a clarification of the judgment and order dated 29.11.2012 passed by this Court in Writ - C No.8571 of 1986. The Civil Judge rejected the said application, which led the fourth respondent to file a petition

under Article 227 of the Constitution to this Court challenging the order of the learned Civil Judge, rejecting his application to seek a clarification, and the course of action adopted in proceedings with the suit, instead of deciding the Application under Order IX Rule 13 CPC, in the first instance.

12. This Court thereupon proceeded to dispose of the petition aforesaid, by an order on agreement of counsel appearing for both sides, the relevant part of which is extracted from the said order dated 2nd January, 2019, passed in Matter under Article 227 no.1640 of 2015, which reads as under:

"Both the counsels are agreeable to the position which is reflected from the order dated 29.11.2012 as corrected on 19.12.2012, that this Court has set aside the orders of rejection of the application under Order IX, Rule 13 C.P.C. and the orders passed in appeal filed against the rejection order as also the order passed on the review application, but the exparte decree dated 16.3.1981 has not been set aside as on date and is intact. The result is that the application under Order IX, Rule 13 C.P.C. filed by the defendant/respondents no. 1 and 2 stood revived and is pending disposal before the court below.

For the said fact, this Court does not find any reason to direct the parties to seek further clarification of the order dated 29.11.2012 as corrected on 19.12.2012.

The present petition is, accordingly, being disposed of with the direction to the court below i.e. the Civil Judge (Junior Division) Sharki, Allahabad to proceed for disposal of the application under Order IX, Rule 13 C.P.C. namely 'Paper No. 3-Ga' pending in Original Suit No. 355 of 1970, expeditiously preferably, within a period of three months from the date of submission of certified copy of this order.

It is made clear that the court below shall not proceed with the Original Suit No. 355 of 1970 on merits until disposal of the application under Order IX, Rule 13 C.P.C. as directed herein above, inasmuch as, further continuation of Original Suit No. 355 of 1970 would depend upon the order passed on the application under Order IX, Rule 13 C.P.C.

The court below shall further not grant any unnecessary adjournment to any of the parties in disposal of application 3-Ga under Order IX, Rule 13 C.P.C. within the time given above."

13. The aforesaid order of this Court has placed matters beyond cavil that the petitioners' application under Order IX Rule 13 CPC is still pending, and it is not the petitioners' case, that it has been disposed of till date.

14. Sri Kanhaiya Lal, learned Advocate holding brief of Sri Satish Chandra Dwivedi, learned counsel for the petitioners does not dispute this fact that till date the Application under Order IX Rule 13 CPC is pending in Original Suit no.355 of 1970, and the ex parte decree passed way back on 16.03.1981, is still operating. It is quite another matter that this application may be allowed, at some point of time, may be in the near future, which may alter the rights of the parties, but as the parties' rights stand, the entire decree passed in Original Suit no.384 of 1965, that has been upheld in Second

Appeal by this Court, has been held to be inoperative and illegal. The ex parte decree dated 16.03.1981, passed in Original Suit no.355 of 1970 reads as under:

"वादी का वाद प्रतिवादीगण के विरुद्ध एकपक्षीय रूप से एकपक्षीयcost सहित डिक्री किया जाता है। वाद सं०384 सन्1965 में वादी के विरुद्ध पारित की गयी डिक्रीयाँ अवैधानिक और प्रभावहीन घोषित की जाती है।"

15. Now, the application for mutation out of which these proceedings arise has been moved on the foot of the decree passed in Original Suit no.384 of 1965, and all subsequent proceedings arising out of the said decree, including execution. Once the decree passed in the said suit, and resultantly all consequential proceedings are rendered void by dint of *ex parte* decree dated 16.03.1981 passed in suit no.355 of 1970, no rights based on the decree passed in Original Suit no.384 of 1965, or any consequential proceedings can be claimed by the petitioners, including the right to mutation of their names in the revenue records. The Deputy Director of Consolidation, Parayagraj (then Allahabad), therefore, rightly construed the rights of the parties to mutation of their names by proceeding on the basis of the *ex parte* decree dated 16.03.1981 passed in Original Suit no.355 of 1970, and rightly reversed the orders granting mutation in favour of the petitioners under Section 12, based on a decree that has now been held inoperative and illegal, by means of the *ex parte* decree dated 16.03.1981 passed in Original Suit no.355 of 1970.

16. The position of law about an ex parte decree is clear that so long as an ex parte decree remains intact, it is as much a decree as one on merits. It carries the same force. In this connection, it may be gainful to refer to the decision of the Supreme Court in ***Vijay Singh v. Shanti Devi, (2017) 8 SCC 837,*** where their Lordships have held:

"12. ..... There is no manner of doubt that an ex parte decree is also a valid decree. It has the same force as a decree which is passed on contest. As long as the ex parte decree is not recalled or set aside, it is legal and binding upon the parties."

17. It goes without saying that if the decree dated 16.03.1981 is set aside in any competent proceedings, including the pending Application under Order IX Rule 13 CPC, the petitioners' right to seek mutation or to the restoration of their mutation, if already made would revive. But as of date, till the decree passed in Original Suit no.355 of 1970, remains operative, no fault can be found with the impugned order passed by the Deputy Director of Consolidation, declining to grant mutation in favour of the petitioners, reversing the two authorities below, who granted mutation in favour of the petitioners.

18. In the result, there is no force in this petition. It stands **dismissed**. Costs easy.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – B No. 502 of 1994

Munni Lal And Others ...Petitioners
Versus
Board of Revenue and Others
...Respondents

Counsel for the Petitioners:
Sri Triveni Shankar, Sri Awadesh Kumar

Counsel for the Respondents:

A. U.P. Zamindari Abolition and Land Reforms Act, 1950- Sections 229B and 209 – Code of Civil Procedure, 1908-Order-XXII Rule 5 and Order-XLI Rule 25. The court should retain the session of this appeal to itself and remand the case to the trial court as provided under order XLI rule 25 for holding an inquiry and on receipt of the finding, finally decide the appeal.
Whether it is open to a court where more claims than one are setup for substitution in case of a deceased party, to permit multiple parties with rival claims or interest to be substituted in place of the original plaintiff/respondent/appellant, or the Court is obliged to adjudicate the issue under order XXII Rule 5 and decide in favour of one of them?- (Paras 10 to 17)

Allowed. (E-6)

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Awadhesh Kumar, learned Advocate holding brief of Sri Triveni Shankar, learned counsel for the petitioners, Sri Rajesh Kumar, learned Standing Counsel appearing on behalf of respondent nos.1 & 2. No one appears for respondent no.3, Gaon Sabha or respondent nos.4, 5 & 6.

2. This writ petition has been filed challenging an order dated 14.12.1993 passed by the Board of Revenue, U.P. at Allahabad in Second Appeal no.44/1976-77, whereby the Board have ordered that upon death of Raja Ram (respondent no.1 to the appeal), his daughters, Smt. Parbatia and Smt. Phulbatia, be substituted in his place, and by the same order one Kariman (respondent no.6 to this petition) has also been permitted to be substituted in place of deceased Raja Ram, in the second appeal aforesaid. Kariman has been permitted to be substituted on the basis of the last will and testament said to have been executed by Raja Ram in favour of Kariman.

3. The question that arises for consideration in this petition is: Whether it is open to a Court where more claims than one are set up for substitution in place of a deceased party, to permit multiple parties with rival claims or interest to be substituted in place of the original plaintiff/ respondent/ appellant, or the Court is obliged to adjudicate the issue under Order XXII Rule 5 CPC, and decide in favour of one of them?

4. The second appeal before the Board arises from a suit under Section 229B and Section 209 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act (for short "the Act') relating to certain lands situated in Village Nigai, Pargana Agori, Tehsil Robertsganj, District Mirzapur (now district Sonebhadra). The property subject matter of the suit comprises plot nos.1642/0-15-0, 1647/2-4-0, 1648/1-13-0, 1649/5-14-0, 1657/2-0-0, 1658/0-5-0, 1641/2040/3-19-0, totalling seven gata numbers, area 16-10-0. The said property is hereinafter referred to as the "suit property'. The petitioners are the plaintiffs in the suit, that was instituted by their father against defendants, Raja Ram, the State of U.P. and the *Gaon Sabha*, seeking a declaration that the suit property wherein

name of defendant no.1 to the suit, Raja Ram has been recorded by mistake, be expunged and the first defendant be dispossessed from the suit property by a decree of ejectment.

5. It is the plaint case that the original plaintiff, Ramkesh, father of the petitioners, was *sirdar* in possession of the suit property. Ramkesh had two brothers, Ram Lakhan and Ram Bilas, both of whom died issueless. As such, Ramkesh was the sole heir, entitled to succeed to the estate of his deceased brothers, Ram Lakhan and Ram Bilas. It is further averred in the plaint that the name of defendant no.1 to the suit, Raja Ram, was wrongly recorded over the suit property. It was also averred in the plaint that at a time when the plaintiff was minor, he gave the suit property to defendant no.1 on a crop sharing basis to cultivate. Thereafter, defendant no.1 withdrew his possession, which was handed over to the plaintiff. The first defendant had no concern with the suit property. Somehow, the *Lekhpal* illegally got his name recorded in the remarks column, compelling the plaintiff to file the suit.

6. The suit was contested by Raja Ram, the defendant, who is the sixth respondent to this petition, by filing a written statement. He denied the plaint allegations and asserted that he is in possession over the suit property since before the date of vesting. He urged that his right matured, and he had acquired title under Section 210 of the Act. It was also argued that the plaintiff's case of settlement of the suit property on a crop sharing basis was incorrect. The suit was time barred. The plaintiff was not *sirdar* or in possession of the suit property. It was also pleaded that during record operations, it was defendant no.1, Raja Ram, who was found in possession. The Trial Court dismissed the suit by its judgment and decree of 21st December, 1974. The plaintiff appealed the Trial Court's judgment and decree.

7. The Additional Commissioner, before whom the appeal came up for determination, on 18.09.1976 affirmed the Trial Court's decree and dismissed the appeal. An appeal from the appellate decree was carried to the Board of Revenue by the original plaintiff, that is to say, Ramkesh, being Second Appeal no.44 of 1976-77, District Mirzapur (presently district Sonebhadra). The appeal was admitted to hearing. Pending this appeal, the original plaintiff, Ramkesh, passed away and so did Raja Ram, original defendant no.1. The petitioners filed a belated substitution application on 23.10.1992, along with a delay condonation application. It is common ground between parties that the substitution application made by the petitioners in the pending second appeal, seeking to be substituted in place of their father, the original plaintiff, Ramkesh was granted, and they were substituted in his stead. So far as the deceased defendant, Raja Ram is concerned, he is survived by three daughters, one of them Raimati had died long back. Raja Ram is said to have executed a will in favour of Kariman son of Nand Lal (son of deceased Raimati). It was further brought on record that in the survey record operations, name of Munni Lal, Babu Lal and Vikram (the writ petitioners), who were found in possession of the suit property were recorded as *bhumidhar* under the guardianship of their mother, Chhaiwa, and the name of Raja Ram recorded in

class-9 was struck off on the basis of an order dated 04.03.1992, passed in Misc. Case no.1038.

8. The application of Kariman sought to substitute him in place of Raja Ram to prosecute the appeal. After the aforesaid substitution application was filed on behalf of Kariman, who was residing in the village where the suit property is situate, the name of the petitioners came to be recorded during the record operations as already said. Kariman entered into a compromise with the petitioners. A compromise was filed before the Board on 02.11.1992. By an order dated 05.11.1992, the Board of Revenue sent the compromise before the Trial Court for verification. It is pleaded in the writ petition that along with the compromise, an application under Order XXIII, Rule 3B CPC, was also filed by the petitioners to compromise the matter through their next friend and mother, Chhaiwa. The compromise was duly verified on 10.03.1993. Once the compromise dated 10.02.1993 was verified, Smt. Parvatia and Phulmatia, the two daughters of the deceased of defendant, Raja Ram, filed an application for substitution, as well as an application seeking abatement of the appeal and striking off the name of Kariman from the array of parties to the second appeal before the Board. The will executed by the late Raja Ram in favour of Kariman was impugned in the application made by his daughters. Now, before the Board an objection was filed by the petitioners to the substitution sought by Smt. Parvatia and Phulmatia.

9. The application for substitution on behalf of daughters of Raja Ram was resisted by the petitioners, and also by Kariman. The petitioners filed an application on 08.11.1993 before the Board, along with the original will dated 08.09.1991, executed by Raja Ram in favour of Kariman with a prayer to direct the Trial Court to take evidence and to decide the genuineness of the will, as well as the question as to who were the actual heirs and legal representatives of Raja Ram, in accordance with the provisions of Order XXII, Rule 5 CPC. The said application was moved on 08.11.1993. The controversy that, thus, emerged in the pending appeal before the Board of Revenue is that the deceased, Raja Ram had executed a will in favour of Kariman, the son of a pre-deceased daughter, who had also been substituted. The question was about his right to represent the deceased defendant, Raja Ram in the second appeal, a right which the daughters of the deceased defendant, Smt. Parvatia and Phulmatia, claimed as his lawful heirs and legal representatives. The Board of Revenue despite an application being made requesting that the question as to who is the legal representative of deceased defendant Raja Ram, without deciding the question aforesaid at all, permitted Smt. Parvatia and Phulmatia to be substituted, also as heirs in place of the defendant along with Kariman, the grandson of defendant, Raja Ram, by means of the impugned order dated 14.12.1993.

10. It appears that the Board, though, without saying so expressly, has proceeded on foot of the reasoning that where more than one or multiple and rival claims to substitution are brought, a substitution permitted in itself not being decisive of the right of parties to a beneficial interest in the estate of the deceased, or the property, all the rival claims to substitution ought to be allowed.

11. Learned counsel for the petitioners has pointed out that this course

of action is not in accordance with law. He has invited the attention of this Court to the provisions of Order XXII Rule 5 CPC, that read thus:

"5. Determination of question as to legal representative.-Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question."

12. Sri Rajesh Kumar, learned Standing Counsel has defended the order passed by the Board of Revenue and said that since an order of mutation does not decide the entitlement of parties, the petitioners cannot urge that any prejudice is caused by the order impugned passed in the substitution matter. He points out that permitting all persons who claim to be legal representatives of the deceased defendant to be substituted, would enable the Court to ultimately consider the case of each one of them, and thus, eschew multiplicity of litigation, that may arise in consequence of refusal to a particular party.

13. In support of his contention, learned counsel for the petitioners has placed reliance upon a decision of the Supreme Court in **Jaladi Suguna (Dead) through L. Rs. v. Satya Sai Central Trust & others, (2008) 8 SCC 521,** where in paragraph 15 of the report, it has been held:

"15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-à-vis other rival claimants to the estate of the deceased."

14. Learned counsel for the petitioners, Sri Awadhesh Kumar further placed reliance in support of the aforesaid position of law upon a decision of the Supreme Court in **Mahanth Satyanand @ Ramjee Singh vs. Shyam Lal Chauhan, 2018 (141) RD 225,** where the question in the context of facts involved,

has been considered by their Lordships in paragraphs 5, 7, 8, 9, 10 & 11 of the report, which read thus:

"5. The main contention of the appellants is that the High Court has committed a grave error of law by allowing both the impleadment applications preferred by the rival contenders staking claim to be the genuine legal representatives of the deceased, without determining the question under the prescribed provisions of law as to who is the legal representative of the deceased appellant. The High Court's order is not in consonance with the provisions of Order 22 Rule 5 of CPC and it is unjust that instead of deciding the paramount question, the High Court had simply passed the order entitling both the contenders to raise their respective arguments in the subject matter of Suit. The order of the High Court is perverse, not in the interest of justice and contrary to the settled principles of law.

7. Then the issue that crops up for consideration is, what is the course to be adopted by the Court when such an applications are filed before the Court.

8. The procedural aspect to be followed when an application is filed under Order 22 Rule 5, CPC is no longer res integra as this Court in *Jaladi Suguna (deceased) through Lrs. v. Satya Sai Central Trust, (2008) 8 SCC 521*, has interpreted Order 22 Rule 5 of CPC in the following terms:

"Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. **When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased.** Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. **If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented.**

……

The provisions of Rule IV and V of Order XXII are mandatory. **When a respondent in an appeal dies, the court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits.** The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court.

.....

Though Rule V does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, **Rule 4 read with Rule 11 makes it clear that the appeal can be heard only after the legal representatives are brought on record**".

(emphasis supplied)

9. Perceiving the present case in the above framework, the High Court, after noticing that two individual applicants have claimed to be the chelas of the deceased Mahanth and were contending to be his legal representatives, has rightly by an order dated 2nd July, 2008 referred the matter to the Subordinate Judge, Bhabhua for determination under Order 22 Rule 5 of CPC. Accordingly, the trial Court decided the question and sent back the matter with its report dated 4th December, 2008. Before the High Court, the rival contender has filed an objection and in response to the same, the other applicant has filed his counter affidavit. Thereafter, the High Court, instead of deciding on merits the question of legal representative of the deceased out of the two contenders, has simply substituted both the contenders in the place of the deceased appellant before it.

10. Apparently, the issue of bringing on record the legal representative in a pending appeal has to be dealt with in a manner prescribed under the provisions of Order 22 Rule 5. From the context of the settled legal position, it is clear that when a question arises before the Court in a pending matter as to who will come on record as the legal heir of the deceased, the Court shall, before proceeding to decide with the substantive issues involved in the case, first and foremost, shall decide who is the legal representative of the deceased. It is also well settled that when a party dies at the stage of second appeal and there are rival contenders claiming to be the legal representatives of the deceased, as in the present case, there is a burden cast upon the Court to first decide as to who is the legal representative of the deceased. Without doing so, the Court cannot proceed with the disposal of the case on hand. At the same time, the Court cannot make all the contenders as parties. The aspect of deciding legal representative cannot also be postponed with a view to decide the same at the time of final disposal of the appeal on merits. It is significant that the statute has clearly mandated that if the question of deciding the legal representative of a legatee arises before an appellate Court, it may direct the subordinate Court to make enquiries by leading evidence if any through the process of trial and record its finding as to who is the legal representative. After considering the finding recorded by the trial Court, the appellate Court can decide and bring on record the legal representative of the deceased.

11. It is indisputable that the procedural laws are meant to advance justice. A procedure contemplated under the code which is mandatory in nature shall not be skipped or ignored by the Courts. Whereas, in the instant case, the High Court's approach has diluted the purport of Order 22 Rule 5 of the CPC and is contrary to the law laid down by this Court in *Jaladi Suguna* (supra). Such an approach of the High Court cannot be sustained."

15. This question had also fallen for consideration of their Lordships of the Supreme Court in **Karedla Parthasaradhi vs. Gangula Ramanamma (D) and others, (2014) 15 SCC 789,** where it has been held, directly relating to the issue under consideration here, as under:

"25. The question as to whether a particular person is a legal representative of a deceased plaintiff or defendant is required to be decided by the

court as per procedure prescribed in Order 22 Rule 5 CPC which reads as under:

"5.Determination of question as to legal representative.-Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court:

Provided that where such question arises before an appellate court, that court may, before determining the question, direct any subordinate court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the appellate court may take the same into consideration in determining the question."

31. Now in such situation arising in a case, we have two options. First, to remand the case to the High Court which in turn will remand the case to the trial court to decide the application filed by K. Sanjiva Rao under Order 22 Rule 4 as provided in proviso to Order 22 Rule 5 CPC and depending upon the inquiry report, will decide the appeal and second, this Court should retain the session of this appeal to itself and remand the case to the trial court as provided under Order 41 Rule 25 read with Order 22 Rule 5 proviso for holding an inquiry and on receipt of the finding, finally decide the appeal in the light of finding so recorded by the trial court.

32. Having given our anxious consideration to this question, we are of the considered view that second course suggested above seems to be more appropriate. It is for the reason that firstly, retaining the session of the appeal and inviting findings from the trial court would save time, avoid incurring cost and curtail stages of litigation and secondly, the litigation which is pending since 1985 would come to an end early and lastly by taking such recourse, no prejudice of any nature would cause to any parties because so far as other issues on merits are concerned, we have already decided and lastly, the expression "appellate court" occurring in Order 41 Rule 25 read with Order 22 Rule 5 proviso would not only include the first appellate court, but also include the second appellate court and this Court, once this Court has granted leave to file appeal to the appellant. In such event, this Court being the last appellate court, can always exercise the powers available under Order 41 Rule 25 read with Order 22 Rule 5 proviso CPC and especially when the High Court as the first appellate court failed to exercise such powers for proper determination of rights of the parties."

16. The issue has also been considered by this Court in **Narbdeshwar and others vs. Ram Naresh Chaudhari, 2019 (143) RD 440,** where principles with regard to a claim to substitution, particularly based on a will and the obligation to decide it under Order XXII Rule 5 CPC, has been laid down. It is held in **Narbdeshwar and others** (supra) as follows:

"22. Taking a conspectus of the provisions in the Code and the decisions noticed above, the legal principles that could be deduced therefrom, concerning substitution of legal representative(s) of a deceased party, are

(a) Where there is a dispute as to who would be legal representative of a deceased party, the Court has to first determine the issue, under Order 22 Rule 5 CPC, before proceeding further in the matter.

(b) An enquiry under Order 22 Rule 5 CPC is to determine the legal representative for the purposes of

pursuing the suit or proceeding and, ordinarily, such an enquiry is of summary nature. A finding returned therein would not amount to res judicata in between parties, who set up rival claim against legatee, in regular probate proceeding. But such finding would be final and operate as res judicata as regards that suit or proceeding and cannot be re-agitated at a subsequent stage in the same suit or proceeding.

(c) Where the continuance of the suit or proceeding would depend upon decision on the issue as to whether a person is or is not the legal representative(s) of the deceased party, and other than that person or persons there is no one else to represent the estate of the deceased for the purposes of suing or being sued, the Court must determine the issue before proceeding further in the suit or proceeding and for that purpose, if required, may take such evidence, as may be necessary.

(d) Where a person sets up a Will of a deceased party to claim substitution, and there are other natural heirs of the deceased party already on record or brought on record, to avoid unnecessary delay that might be caused on account of an inquiry as regards legality and validity of the Will, he may be impleaded along with other natural heirs of the deceased party even without a thorough enquiry as regards validity and legality of the Will, though subject to final determination of the rights of the parties in regular probate proceeding. Likewise, where a sole natural heir or one of the natural heirs of the deceased party is also a legatee of the deceased party, he may be impleaded as legal representative of the deceased party even without a thorough enquiry as regards validity or legality of the Will.

(e) Where a serious dispute is raised as to whether a person is or is not a legal representative of the deceased party, either as natural heir or as legatee of the deceased party, and the suit or proceeding would abate but for impleadment of such person, the Court must decide the issue by taking evidence. And, in such cases, where the basis of the claim for impleadment is a Will, validity or legality of the Will would have to be tested after taking evidence in proof thereof."

17. In the present case what emerges from the facts is that the two substitution applications of two sets of legal representatives, each claiming in them the right to represent the estate of the deceased defendant, Raja Ram in the pending appeal before the Board was in question. One of them was a grandson, claiming through a pre-deceased daughter, who propounded a will, whereas the other set of claim was from the daughters of deceased defendant, Raja Ram, who claimed on the basis of intestacy. The Board of Revenue by a casual order and without the least consideration or adherence to the provisions of Order XXII Rule 5 CPC, proceeded to allow both sets of applications, and substituted both sets of legal representatives without deciding the question at all as to who was entitled to represent the estate of the deceased defendant, Raja Ram in the pending second appeal, and to be substituted in his place, in accordance with law.

18. In the circumstances, the proviso to Rule 5 of Order XXII, would require the matter to be remitted to the Trial Court for undertaking an inquiry limited to the purpose of deciding the pending applications for substitution as to who

was entitled to represent the estate of the deceased, and be substituted in place of the deceased defendant, Raja Ram in the pending second appeal. That of course would be done by the Trial Court by taking necessary evidence to judge the parties' rival claims, with a finding returned to the Board. But all this has not been done, and by an order surreptitiously made the substitution applications filed by both sets of persons claiming to be legal representatives of the deceased defendant, Raja Ram have been allowed. This course of action is patently illegal and the impugned order passed by the Board of Revenue cannot, therefore, be sustained.

19. The writ petition succeeds and is **allowed.** The impugned order dated 14.12.1993 passed by the Board of Revenue, U.P. at Allahabad in Second Appeal no.44/1976-77, Ramkesh vs. Raja Ram and others, relating to District Mirzapur (now Sonebhadra) is hereby **quashed**. The Board of Revenue is directed to remit the matter to the Trial Court as regards the entitlement to represent the estate of the deceased defendant, Raja Ram in the pending appeal before it, with a direction that after taking such evidence as may be required, findings with reasons be returned to the Board. This exercise, the Board shall ensure, is completed within a period of three months from the date this order is produced before the Board. The Board, after taking into consideration the findings returned by the Trial Court under the proviso to Order XXII Rule 5 CPC, shall pass appropriate orders on the applications for substitutions made on behalf of the two sets of applicants before it, and thereafter proceed with the appeal, hearing the party brought on record in place of deceased defendant, Raja Ram. Costs easy.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – B No. 34173 of 1997

Smt. Amarwati ...Petitioner
Versus
D.D.C. Bulandshahr And Others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh, Sri Dushyant Singh, Sri Rajesh Kumar Sharma, Sri Ram Kishor Pandey, Sri S.K. Singh, Sri M.C. Singh.

Counsel for the Respondents:
C.S.C., Sri Ayub Khan, Sri H.N. Sharma, Sri Jai Singh Chandel, Sri Mahesh Chand, Sri Pankaj Mishra, Sri R.K. Rai, Sri Rahul Sahai, Sri Rajesh Kumar.

A. U.P. Consolidation of Holdings Act- Section 9A (2) - Objection filed-claiming succession on the basis of the last will and testament - validity of the will challenged on the ground of inequitable distribution and also that the will is not free from all doubts-Section 68 of Indian Evidence Act-Section 63 of Indian Succession Act (para 15). Doctrine of approbation and re-approbation. (Para 16)

B. Code of Civil Procedure, 1908-Order XLI Rule 31-the judgment pronounced would not be vitiated for the mere formality of non-framing of an issue. (Paras 17 & 18)

C. Power of DDC to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the

power to re-appreciate any oral or documentary evidence- Explanation 3 of Section 48-U.P. Consolidation of Holdings Act. (Paras 10 to 14)

Writ petition Dismissed. (E-6)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition arises out of objections filed under Section 9-A (2) of the U.P Consolidation of Holdings Act filed by the petitioner no. 1, Smt. Amarwati. The objections were filed on 02.04.1991, claiming succession on basis of the last Will and testament of one, Roshan Singh, the last undisputed recorded tenure holder and the father-in-law of the petitioner no. 1, Smt. Amarwati. The right that was claimed under the Will relates to *Khata* nos. 172, 407, amongst others, situate in village Rabada, Pargana Shikarpur, Tehsil and District Bulandshahar.

2. It would be profitable to refer to the short pedigree of parties in order to appreciate the petitioner's claim, and, that of the contesting respondent nos. 4 and 5. The pedigree aforesaid is depicted below:-

Roshan
|

|||
Kanchhi Shishpal Sahaspal
|
Amarwati(Widow)

3. The petitioner's case as put forward in the objections is that the original tenure holder, Roshan Singh had three sons, namely, Kanchhi, Shishpal and Sahaspal. Sahaspal admittedly pre-deceased, Roshan Singh. The first petitioner is the widow of Sahaspal. The petitioner acknowledges that in the basic year relative to the consolidation operations to which the objections relate, Roshan Singh was recorded as the *bhumidhar* in possession of *Khata* nos. 172, 405, 407, 82A and 82B. In the basic year aforesaid over the *Khata* no. 172, the name of Devi Singh and Roshan Singh, sons of Udal Singh were recorded as co-tenure holders whereas, over *Khata* no. 405, Roshan Singh S/o Udal Singh was exclusively recorded. Likewise, in *Khata* no. 407, Roshan Singh and Devi Singh, last mentioned along with Kanchhi Singh S/o Ram Singh, were recorded. In *Khata* No. 82A Khadak Singh, Chandrapal, Man Singh, Shankar, Mahesh, sons of Chhitar Singh, Devi Singh and Roshan Singh S/o Udal Singh, Ramji Lal, Gyan Singh, Rewati S/o Chhattar Singh were recorded. In *Khata* no. 82 B, Khadak Singh, Chandrapal, Man Singh, Shankar, Mahesh S/o Chhitar Singh, Devi Singh and Roshan sons of Udal Singh, Gyan Singh, Rewati sons of Chattar Singh, Kundi Singh S/o Ram Singh were recorded. This is how the original tenure holder, Roshan Singh's tenure was recorded over different *khata*s in the basic year last mentioned.

4. The objections that were filed under Section 9 A(2) by the petitioner no.1, Amarwati before the Consolidation Officer have been perused in original. It figures at the top of the memorandum of the objection dated 02.04.1991 that it relates to *Khata* no. 407. It is claimed in the objections that Roshan Singh had executed a Will and testament dated 05.06.1987 that is his last Will, giving rights to the petitioner, Amarwati in terms of the said Will over *khata*s mentioned there. She claimed a right to be recorded

annexing a copy of the Will aforesaid as the basis of her objections. The claim of Smt. Amarwati was contested by the two surviving sons of the testator, Roshan Singh, that is to say, Kanchhi Singh and Shishpal, respondent nos. 4 and 5 here, who did not dispute the Will but contested the Amarwati's claim with a case that she had under the Will of Roshan Singh a right to maintenance during her life time, charged upon a specified share in the *khata* in dispute. To that share too she had a right to the usufruct to satisfy her right to maintenance. Upon her death rights to the said share in land would revert to respondent nos. 4 and 5, free of the widow's charge. She entered into a matrimony of sorts described in local and customary usage as karab. It was, therefore, pleaded that by her aforesaid act of entering into matrimony, she lost her limited right of maintenance to the revisionary heirs, going by the nature and purpose of that right. On the basis of aforesaid pleadings, the Consolidation Officer framed the following four issues (rendered into english from hindi vernacular):

(I) Whether Amarwati is also one of the heirs of the deceased Roshan Singh?

(II) Whether Amarwati has re-married?

(III) What shares do the parties have in the khatas?

(IV) Whether Gata nos. 492/1, 222 part of khata no. 405 is parti and Gata No. 492/3 is a way?

4. The principal issues between parties over which they went to trial before the Consolidation Officer were issue nos. 1 and 2, which were, as above detailed, about the fact whether Smt. Amarwati was one of the heirs of the deceased, Roshan Singh and whether she had re-married. In answering the said issues, particularly, issue no. 1, the Consolidation Officer went into the question about the validity of the Will, dated 05.06.1987 propounded by Smt. Amarwati. This Will was not disputed either by Amarwati or respondents nos. 4 and 5. The Consolidation Officer, however, held the Will not proved. While deciding issue no. 2, the Consolidation Officer held that Smt. Amarwati had not remarried. He, accordingly, directed the name of Kanchhi, Shishpal sons of Roshan Singh and Amarwati widow of Sahaspal to be recorded over Roshan Singh's share in *Khata* nos. 172, 405, 407, 82A and 82B on the basis of intestate succession. There is a detailed indication of the shares of these three co-tenure holders, as determined by the Consolidation Officer by his judgment and order dated 14.08.1995, passed in Case No. 5756, in a schedule appended to the said order.

5. Aggrieved by the Judgment and order of the Consolidation Officer, dated 14.08.1995 last mentioned, Kanchhi Singh alone preferred an appeal to the Settlement Officer of Consolidation under Section 11 (1) of the Act. In appeal, the findings recorded by the Consolidation Officer were affirmed and the appeal dismissed vide judgment and order, dated 13.06.1997.

6. Aggrieved by the order of Settlement Officer of Consolidation, Shishpal Singh and the other co-tenure holders whose rights came to be decided by the Settlement Officer, approving the findings of the Consolidation Officer, filed Revision No. 163 to the Deputy

Director of Consolidation. The Deputy Director of Consolidation went into the validity of the Will propounded by the petitioner, Smt. Amarwati which had been rejected by the Consolidation Officer on basis of his view of the evidence that finds eloquent mention in the Consolidation Officer's order. The Deputy Director of Consolidation was at pains to review the reasoning of the Consolidation Officer. He also took note of argument urged before him that there was no issue framed by the Consolidation Officer about the validity of the Will, that he pronounced upon. The Deputy Director of Consolidation held that the Consolidation Officer had found the Will to be suspicious, saying that one of the attesting witness one, Khushi Ram in his deposition had said that he had signed all pages, but his signature appeared on a single paper. This finding of the Consolidation Officer, the Deputy Director of Consolidation has held to be one based on an unwholesome view of the evidence. He has opined that the Consolidation Officer should have read the deposition of the attesting witness in its entirety. It was observed in his analysis of evidence by the Deputy Director of Consolidation that discrepant statements of this kind are commonplace. Even otherwise, it was opined by the Deputy Director of Consolidation that at the time of registration of Will, the attesting witness is required to sign multiple times. It was recorded by the Revisional Court that the revisionist filed the original Will dated 05.08.1987. By the said Will, the testator, Roshan Singh had bequeathed all his movable and immovable property to his two sons, Kanchi Singh and Shish Pal, and had also made a bequest in favour of his daughter-in-law, Smt. Amarwati. Two attesting witnesses of Will were Khushi Ram and Dhani Ram. Both were examined to prove the Will. The Deputy Director of Consolidation recorded a finding that a perusal of the record shows that both parties, who put in objections, have affirmed the execution of the will. The petitioner, Smt. Amarwati was found to have said in her objections in paragraph 3(as recorded by the Deputy Director of Consolidation) to the following effect:

"प्रतिवादी नं0 -1 मृतक हो गये हैं। उन्होंने वादिनी के नाम वसीयत लिखा था। जो साथ में संलग्न है के अनुसार वादिनी का नाम कागजात में अंकित होना चाहिये।"

(emphasis by Court)

7. The Deputy Director of Consolidation has then taken note of a document, marked as paper 1, which is a xerox copy of the said Will. The Deputy Director of Consolidation has gone on to say that the revisionist on the one hand, and Kanchhi, in his objections on the other, have specifically acknowledged that succession to the property is one to be recorded on the basis of the Will. Kanchhi and Shish Pal in their reply dated 27.12.1991 vide paragraph Nos. 3 and 4 have admitted the factum of execution the Will in question. The Deputy Director of Consolidation has categorically said that the Will gives Amrawati a right to maintenance, and a sum of Rs. 2,000/- each to the two minor daughters of Sahaspal, that has been invested in National Saving Certificates with a term of six years. There is a very detailed analysis by the Deputy Director of Consolidation about the circumstances attending the execution of Will, and the depositions made by the attesting witnesses, to prove its due execution, that were considered to be dependable by the DDC. The evidence on the basis of which the Will was sought to be proved was

examined by the Deputy Director of Consolidation, and, the Will was held to be proved. The Deputy Director of Consolidation has unhesitatingly held the Will proved, on the basis of a finding that reads to the following effect (in Hindi vernacular):-

"इस प्रकार पंजीकृत विलेख, जिसका पंजीकरण उसके अनुप्रमाणन साक्षी खुशीराम द्वारा साबित किया गया और उभय पक्षो ने अपनी-अपनी आपत्तियों में इसे स्वीकारा है, की अमान्य करने का कोई औचित्य नहीं है।"

8. Thus, according to the Deputy Director of Consolidation, the Will has been accepted by both parties. Thereafter, the Deputy Director of Consolidation has taken into consideration the plaint dated 22.04.1987 giving rise to O.S. No. 194 of 1987 on the file of the learned Munsif-IVth, Bulandshahr and the order dated 18.11.1987, passed in the said suit. It has been recorded that a perusal of the plaint giving rise to the suit shows that it was filed on 22.04.1987, seeking relief of permanent injunction restraining Roshan Singh from alienating his property, the subject matter of the dispute. The Will was executed on 05.08.1987 and the suit came to be decided 08.11.1987 which, according to Sri Rahul Sahai, was withdrawn. The said fact has also been recorded by the Deputy Director of Consolidation in his order that after the execution of the Will, the suit was withdrawn. This fact has been taken into consideration by the Deputy Director of Consolidation as circumstantial evidence to point out that the Will, indeed was genuine. The Deputy Director of Consolidation has also been at pains to consider the stand taken by Smt. Amarwati in the witness box, where she has said that after the death of her husband Sahpal, she did not marry anyone. She has also said that the wife of Kanchhi, Sushila is alive. She has also said that she is not aware of any other Will that her father-in-law has executed. She has also been noted to have said that prior to the present objections she had not filed any other case; nor had she gone to any Court. She also said that prior to her deposition in Court before the Consolidation Officer, she had never appeared before any Court. She had never thumb marked any document that she remembers. The Deputy Director of Consolidation from this evidence of Amarwati, concluded that her stand is contradictory, and that she is trying to suppress facts.

9. The Deputy Director of Consolidation has also taken into account a compromise, dated 20.07.1994, where the factum of execution of the will in question has been acknowledged. The Deputy Director of Consolidation has concluded on a meticulous examination of the evidence on record that the Will is proved and the estate of Roshan Singh would devolve by testamentary succession, under Section 169 of the Act. It would be governed by the aforesaid provision: whatever rights the widow has acquired under the Will would be her's, and even if she has remarried, there would be no defeasance. On the aforesaid conclusions, the Deputy Director of Consolidation held that the orders of the Courts below are not sustainable. He allowed the revision setting aside the orders of the Consolidation Officer and the Settlement Officer of Consolidation, dated 14.08.1995 and 13.06.1997, respectively, and declared the rights, of parties including the petitioners over *Khata* No. 172, 405, 407, 82A and 82B, in accordance with the Will dated

05.06.1987, being the last Will and testament of Roshan Singh. He has indicated the shares of parties in various *khata*s in terms of the aforesaid Will in a scheduled, scripted at the foot of the impugned order, dated 06.08.1997.

9. Heard Sri M.C. Singh, learned counsel for the petitioners Nos. 2 and 3 who are purchasers from Smt. Amarwati. No one has appeared on behalf of Amarwati on any of the dates, when this matter has been heard. Sri Rahul Sahai, learned counsel appearing on behalf of respondent No. 4 has been heard on his behalf. No one has appeared on behalf of Respondent No.5.

10. The submission of Sri M.C. Singh, learned counsel for the petitioners is that the order of the Deputy Director of Consolidation is manifestly illegal and flawed. He submits that this is so because now, he does not wish to rely on the Will which brings about an inequitable distribution to the estate of Roshan Singh, between his two sons and his widowed daughter-in-law. He does not deny the fact that this Will was propounded by Smt. Amarwati in whose shoes, the petitioner Nos. 2 and 3 have stepped but says that in the peculiar facts and circumstances, the disposition made by the Will should be condemned as unfair and modified in a more equitable manner. It is also argued that the Will that he has propounded, may be one thing but it is for the Court to determine whether the Will is proved in accordance with law. It is the submission of Sri M.C. Singh, learned counsel for the petitioners that the Will has not been proved in accordance with law. In this regard, he has invited the attention of the Court to that part of the finding of the Consolidation Officer, where he finds the attesting witness Khushi Ram to be not dependable, and, therefore, the execution of the Will not proved free from all clouds of doubt. It is argued that so far as the Settlement Officer of Consolidation is concerned, he did not go into the validity of the Will and hardly pronounced upon that; he put in a judgment of passive affirmation, without going through the entire evidence. Sri M.C. Singh, learned counsel for the petitioners criticized the judgment of the Deputy Director of Consolidation on ground that being a Court of Revision, it was not his province to undertake a wholesome review of evidence and in that exercise record a pure finding of fact regarding the validity of Will, contrary to that recorded by the Consolidation Officer and affirmed by the Settlement Officer. In support of his case, Sri M.C. Singh, learned counsel for the petitioners relied upon the decision of this Court in ***Ram Karan Shukla Vs. Deputy Director of Consolidation, Fatehpur and others reported in 2001 (92) R.D. 695,*** where this Court has held that the Deputy Director of Consolidation, cannot act as a Consolidation Officer and substitute his own findings. The Deputy Director of Consolidation is a Court of Revision. In ***Ram Karan Shukla***(supra) it has been held thus in para 4:

4. *"On the other hand, learned counsel for the contesting respondents supported the validity of the orders passed by the Deputy Director of Consolidation. It was urged that the finings recorded by the Deputy Director of Consolidation were based on relevant evidence on the record. They were all findings of fact, which could not be interfered with by this Court under Article 226 of the Constitution of India.*

I have considered the submissions made by learned counsel for the parties and also perused the record.

X X X

From a reading of the aforesaid statutory provision, it is apparent that the Deputy Director of Consolidation may send for the record of any case or proceedings decided by the authorities below to satisfy himself as to the regularity of the proceedings, or as to the correctness, legality or propriety of any order other than interlocutory orders passed by the authorities below. It is, thus, apparent that if the proceedings taken or orders are found irregular or the orders passed by the authorities below are found to be illegal, incorrect or improper, the Deputy Director of Consolidation can set aside the said proceedings or order and can allow a revision. In the present case, the requisite findings have not been recorded by the Deputy Director of Consolidation. It has not been held that the proceedings held by the authorities below were in any manner, irregular or the orders passed by them were illegal, incorrect or improper. He has acted wholly illegally and arbitrarily in observing that the chaks of the parties were liable to be exchanged. The Deputy Director of Consolidation can not act as the Consolidation Officer. He cannot substitute his findings for the findings recorded by the authorities below as a matter of course."

11. In addition, reliance has been placed on another decision of this Court in **Smt. Bechna Vs. Deputy Director of Consolidation, Varanasi and others 2001 (92) R.D. 693,** where this Court to the same effect has held that the Deputy Director of Consolidation is a Court of Revision, who cannot re-appreciate and reappraise evidence on merits, taking a view contrary to what the two Authorities of fact below have held. In **Smt. Bechna***(supra)*, this Court has held in para 7 of the report, thus:

"7. Smt. Bechna, as stated above, claimed that she was in possession over the land in dispute since the sale deed was executed in her favour on 13.11.1956 by respondent no. 2. Her name was also mutated in the revenue papers after following the procedure prescribed under the law, therefore, she was entitled to retain the land in dispute. In the objection filed by the respondent no. 2, the validity of the sale deed was not challenged by the respondent no. 2. It was also not pleaded that he was minor at the time the sale deed was executed, therefore, he had no right to lead evidence contrary to his pleadings, that at the time of execution of sale deed in question he was minor inasmuch as it is well settled in law that no amount of evidence shall be admissible in the absence of pleadings. The evidence led by respondent no. 2 to the effect that he was minor at the time of execution of sale deed was, thus, inadmissible in evidence. However, in case, the Deputy Director of Consolidation felt that the findings recorded by the Settlement Officer Consolidation, for any reason, were not correct, he could upset the findings and remand the case for decision afresh to the Settlement Officer Consolidation. He had no jurisdiction to substitute his own findings for the findings recorded by the Settlement Officer Consolidation on the questions of facts after re-appreciating and re-appraising on the evidence on record, which was relied upon by the Settlement Officer Consolidation. The submission made by learned counsel for

the contesting respondent, to the contrary, therefore, cannot be accepted. In may opinion, the writ petition is liable to be allowed and the case is liable to be remanded to the Deputy Director for Consolidation for decision afresh in the light of the observations made above and in accordance with law."

12. Further reliance has also been placed by Sri M.C. Singh, learned counsel for the petitioners upon the decision of this Court in **Ram Adhar and others Vs. Assistant Director of Consolidation, Banda and others 2003 (94) RD 697,** where also it is held that the Deputy Director of Consolidation, cannot act as the Settlement Officer or the Consolidation Officer. It was held that the jurisdiction of the Deputy Director of Consolidation under Section 48 of the Act is limited and can be exercised within the four corners of the Act alone. It was held in **Ram Adhar and others** (supra) thus:

"7. From a reading of the aforesaid section, it is clear that the jurisdiction of the Deputy Director of Consolidation under the aforesaid section is limited. He can interfere in the ordeers passed by the authorities below if the findings recorded by them are found to be incorrect, illegal or improper, but he has got no jurisdiction to interfere with the orders passed by the Settlement Officer, Consolidation if the findings recorded by him are not found to be bad in law. The Deputy Director of Consolidation nowhere held that the findings recorded by the Settlement Officer Consolidation were in any manner illegal. He has actually reappraised the entire evidence and substituted his own findings for the findings recorded by the Settlement Officer Consolidation which is, as stated above, not permissible under the law. A reference in this regard may be made to the decision of the Apex Court in the case of Gaya Din vs. Hanuman Prasad, and the decision of this Court in the case of Ram Karan Shukla v. Deputy Director of Consolidation and others.

8. In the aforesaid decisions, it has been ruled by the Apex Court and this Court that the Deputy Director of Consolidation can not act as the Consolidation Officer or the Settlement Officer Consolidation and he can exercise the power within the four corners of section 48 of the Act."

13. In order to further buttress his point, the decision of this Court on which Sri M.C. Singh, learned counsel for the petitioners further placed reliance is **Jangi Lal Vs. Deputy Director of Consolidation, Allahabad and others 2002 (93) R.D. 35.** It was held there that the limitation on the powers of the Deputy Director of Consolidation as a Court of Revision did not permit him to substitute his own findings for those of the Authorities below, though he could set aside illegal findings or those manifestly erroneous. After a review of authority on the point that was then ruling, it has held in **Jangi Lal** (supra) thus:

"7. By this Court, it has been consistently held that in exercise of powers under Section 48 of the Act if the Deputy Director of Consolidation comes to the conclusion that the findings recorded by the authorities below, i.e., the Settlement Officer, Consolidation or the Consolidation Officer were illegal or Irregular or improper or incorrect, he could set aside the said findings after

reappraisal of the evidence, but he could not substitute his own findings. A reference in this regard may be made to the decisions of this Court in case of Ram Karan Shukla (supra) and another case of Smt. Bechna (supra). So far as the decision of the Supreme Court in Gayadin's case is concerned, the Apex Court in paragraph Nos. 11, 12 and 13 was pleased to observe/hold as under :

" (quoted part omitted)".

From the fact of Gayndin's case, it is evident that the Deputy Director of Consolidation allowed the revision and remanded the case to the Settlement Officer, Consolidation vide order dated 6.7.1971. The Settlement Officer, Consolidation by order dated 22.9.1973 allowed the appeal. Thereafter, the Deputy Director of Consolidation set aside the order passed by the Settlement Officer, Consolidation and allowed the revision by order dated 7.4.1975. Subsequently, the order passed by the Deputy Director of Consolidation was set aside by the High Court in exercise of the power under Article 226 of the Constitution of India and the order passed by the Settlement Officer, Consolidation was restored. Challenging the validity of the order of the High Court. Civil Appeal No. 191 of 1991 was filed in the Supreme Court which was dismissed by the Supreme Court by judgment and order dated 27.11.2000. Thus, ultimately, the order passed by the Settlement Officer, Consolidation, dated 22.9.1973, was upheld. The question as to whether the Deputy Director of Consolidation had the jurisdiction to substitute his own findings for the findings recorded by the Settlement Officer, Consolidation was neither raised before it nor was considered by the Supreme Court in the said decision. From the reading of the judgment of the Apex Court, it is apparent that the view taken by the said Court is that the Deputy Director of Consolidation could set aside the findings of fact if they were found to be perverse or against the weight of evidence on record but it has not been held that after setting aside those findings, the Deputy Director of Consolidation himself could substitute his own findings. Therefore, the submission made by the learned counsel for the contesting respondent cannot be accepted. In the cases arising out of the provisions where phraseology similar to the phraseology used in Section 48 of the U. P. Consolidation of Holdings Act came to be considered. For example. Section 25 of the Provincial Small Cause Courts Act, this Court consistently held that the revisional court has no jurisdiction to substitute its own findings for the findings recorded by the original or the appellate authority. A reference in this regard may be made to a Division Bench decision of this Court in Laxmi Kishore and others v. Har Prasad Shukla 1979 ACJ 473 wherein it was ruled as under :

15. If it finds that there is no evidence to sustain a finding on a particular issue of fact, it can Ignore that finding. Same will be the case where the finding is based only on inadmissible evidence. In such cases the Court will be Justified in deciding the question of fact Itself, because the evidence is all one way. No assessment is needed. The Court can also decide the revision if only a question of law or some preliminary point of law viz., validity of notice, is sufficient for its decision.

16. But, if it finds that a particular finding of fact is vitiated by an error of law, it has power to pass such order as the justice of the case requires ; but it has no jurisdiction to

reassess or reappraise the evidence in order to determine an issue of fact for Itself. If it cannot dispose of the case adequately without a finding on a particular issue of fact, it should send the case back after laying down proper guidelines. It cannot enter into the evidence, assess it and determine an issue of fact.

17. Our answer to the question referred to us is that in the state (sic) circumstances, the revisional court has no power to consider the evidence for itself in order to determine an issue of fact. The proper course is to remand the case to the trial court."

14. It is also argued by learned counsel for the petitioners that the findings of the Consolidation Officer which are very substantial, have not been specifically set aside by the Deputy Director of Consolidation and in the absence of that being done, the impugned judgment could not have been passed, disturbing the two Authorities below. In support of his contention on this point, he has relied upon a decision of this Court in **Nand Kishore and others Vs. Deputy Director of Consolidation, Varanasi and others 2005 (98) R.D. 675,** where it was held:

"10. A perusal of the judgment of the Deputy Director of Consolidation clearly shows that he has not set aside the findings of the Consolidation Officer and the Settlement Officer Consolidation. Without setting aside the findings recorded by the Consolidation Officer and the Settlement Officer Consolidation he has erroneously held that the land of Khata Nos. 4 and 221 were acquired before partition of the family. He has completely ignored the oral evidence which was relied upon by the Consolidation Officer and the Settlement Officer Consolidatin. The findings of the Deputy Director of Consolidation with regard to these two khatas, as a matter of facts, are based on no evidence and thus cannot be sustained."

15. In support of his contention that was raised earliest in assail of the impugned judgment passed by the Deputy Director of Consolidation that Will was not proved free from all doubts by the attesting witness, Sri M.C. Singh, learned counsel for the petitioners has relied on a decision of their Lordship of Supreme Court in **Balathandayutham and anothers Vs. Ezhilarasan reported in 2010 (110) RD 412.** In the said decision, it has been held thus:

"6. At this juncture, the case made out by the plaintiff-respondent is very relevant. Plaintiff's case is that his father, the testator, went to a temple for attending a function and from there testator was taken by the 1st appellant to Cuddalore and coming to know this fact the plaintiff-respondent went to the house of the 1st appellant and the plaintiff-respondent went there and took the testator back to his house at Villupuram where he was staying all these years and where he ultimately died. Therefore, both the subsequent Will, namely, Ex.B-19 and Ex. B-20 were allegedly executed by the testator a couple of weeks before his death and when he was made to stay in the house of the 1st appellant. It appears that the attestors of both the aforesaid two Wills were all of Cuddaiore and were strangers to the family. Those two Wills surfaced only at the time when the 1st appellant gave his written statement in 1994 in the suit filed by the plaintiff-

respondent. According to our judgment, these are suspicious circumstances surrounding Ex. B-19 and Ex. B-20.

8. This Court also thinks that in view of the discussion made hereinabove that both Ext. B-19 and Ext. B-20 are surrounded by various suspicious circumstances. When a will is surrounded by suspicious circumstances, the person propounding the will has a very heavy burden to discharge. This has been authoritatively explained by this Court inH. Venkatachala Iyengarv.B.N. Thimmajamma[AIR 1959 SC 443] . P.B. Gajendragadkar, J. (as His Lordship then was) in para 20 of the judgment, speaking for the three-Judge Bench inH. Venkatachala[AIR 1959 SC 443] held that in a case where the testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the will is not the result of the testator's free will and mind, the court may consider that the will in question is encircled by suspicious circumstances.

11. Insofar as the execution of the will is concerned, under Section 63 of the Succession Act, 1925 it has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence, and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Section 68 of the Evidence Act, 1872 further provides that if a document is required by law to be attested it shall not be used as an evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the court is capable of giving evidence. There is a proviso under Section 68 but we are not concerned with the proviso here.

12. Commenting on these provisions, this Court in H. Venkatachala [AIR 1959 SC 443] laid down that Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as an evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. It was further held that Section 63 of the Succession Act requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. [see page 451]"

16. Sri Rahul Sahai, learned counsel appearing for respondent No.4 on the other hand contended that the present case

has arisen in a scenario that has a major difference with a case where one party propounds the Will and other disputes it. Here is a case where both the parties have propounded the Will. Petitioner no. 1, whose interest is now represented by petitioner Nos. 2 and 3 has made the Will in question, the basis of her objections filed under Section 9-A (2). She has relied on the Will to claim her right in the estate of her deceased father-in-law. She has all through stood by the Will, but after the judgment of the Revisional Court, has changed stance to assail it. He submits that she has possibly found the Will to be not a profitable bargain. He submits that this kind of a shifting stand is not at all countenanced by the law, as it militates against one of the most fundamental doctrines that frowns upon approbation or re- approbation by a party. In support of the aforesaid proposition, he relies upon a decision of the Supreme Court in **Suzuki Parasrampuria Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd. (In Liquidation) and others 2019 (143) RD 307,** where their Lordships dealing with the question of a litigant taking contradictory stands, have held:

"12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v.Union of India [Amar Singhv.Union of India, (2011) 7 SCC 69 : (2011) 3 SCC (Civ) 560] , observing as follows: (SCC p. 86, para 50)

"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."

13.A similar view was taken inJoint Action Committee of Air Line Pilots' Assn. of Indiav.DGCA[Joint Action Committee of Air Line Pilots' Assn. of India v.DGCA, (2011) 5 SCC 435] , observing: (SCC p. 443, para 12)

"12. The doctrine of election is based on the rule of estoppel-the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. ... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."

17. Sri Rahul Sahai, learned counsel for the respondent No.4 further submits that one of the objections to the impugned order is that whatever has been said about the Will is without framing an issue about it. He submits that the point really does not arise as the question of issue about the validity of the Will is determined while deciding issue no. 1, framed by the Consolidation Officer. He further submits that a perusal of the judgment recorded by the Consolidation Officer would indicate that parties were well aware of what was the case of the other side that they had to suit at the trial; they were well aware of each other's case. The case was decided on merits, evidence led and the issue fully suited. In the circumstances, the judgment that was pronounced on that basis would not be vitiated for the mere formality of non framing of an issue about the Will. In

his support, he relied upon a judgment of this Court in **Suresh Giri Vs. Lal Guddan Giri 2016 (1) AWC 425.** He has drawn the attention of the Court to paragraphs 9, 10 and 11 of the report in Suresh Giri (supra) which reads thus:

"9. In G. Amalorpavam v. R.C. Diocese of Madurai, MANU/SC/8011/2006 : (2006) 3 SCC 224 : 2006 (2) AWC 1463 (SC), the Apex Court has held as under:

"The question whether in a particular case there has been substantial compliance with the provisions of Order XLI, Rule 31, C.P.C. has to be determined on the nature of the judgment delivered in each case. Noncompliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order XLI, Rule 31, C.P.C. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order XLI, Rule 31, C.P.C. and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and tunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Sectiontunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100, C.P.C." 100, C.P.C."to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100, C.P.C."

10. Thus, it is clear that in every case, non-compliance of provisions of Order XLI, Rule 31, C.P.C. may not result in vitiation of judgment. If substantial compliance of this provision of Order XLI, Rule 31 has been made and actually point of determination has been taken and decided, then mere formal non-framing of point of determination would not

adversely affect the judgment because it would not prejudice any legal right of appellant.

11. No doubt, no formal point of determination was framed, but since the parties went to trial and appeal fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of any point of determination was fatal to the case, or that there was that mistrial which vitiates proceedings. I am, therefore, of opinion that the appeal could not be allowed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Therefore, the contentions of learned counsel for the appellant on this point are also found unacceptable."

18. This Court has carefully considered the rival submissions advanced on both sides. It must be at once remarked that the Will that is subject matter of the dispute now at the instance of the petitioner was the foundation of her objection under Section 9-A (2) of the Act. This Court had some doubt about this particular facet of the matter, and, therefore, summoned records in original to look into the objections that the first petitioner filed before the Consolidation Officer, under Section 9-A(2) of the Act. A perusal of objections in original clearly shows that the first petitioner has found her claim to the property in dispute as a legatee under the Will dated 05.06.1987, a copy of which has been filed as basis to the said objections, dated 02.04.1981 before the Assistant Conslidation Officer, Shikarpur. The petitioner's case and claim are then founded on the Will and not on any kind of intestate succession. The petitioner's claim was contested by the respondent Nos. 4 and 5 on ground that since the petitioner, a widow of their late brother, had remarried, she would not get any right under the Will. The Will *per se* was not disputed. Nevertheless, the Consolidation Officer went into the validity of the Will and examined it on the basis of evidence whether the same had been proved in accordance with the requirements of Section 68 of the Indian Evidence Act, and Section 63(c) of the Indian Succession Act. He found a minor discrepancy in the testimony of attesting witness, Khushi Ram who said that he had signed all the pages, whereas the Will had been signed by him on one page alone. It is on the edifice of this inaccuracy that the Consolidation Officer detected that he condemned the execution of the Will, wholesomely. The Deputy Director of Consolidation on the other hand found that the Will had been executed in accordance with law and attested as per legal requirements. He went into the other question also, regarding the circumstances in which the Will was executed to find out, if the Will was indeed a testament genuinely left behind by the maker. For cogent reasons that have elaborately recorded by the Deputy Director of Consolidation, the Will was accepted. While doing so, the Deputy Director of Consolidation has taken into consideration that both sides do not dispute the factum of execution of the Will, but he reached his conclusions not just on that ground. He found the Will to be proved in accordance with law, on the basis of evidence *aliunde*. This Court must also remark that apart from what the Deputy Director of Consolidation has said, the Will manifests a natural disposition made by the father-in-law. One of the considerations while judging

the validity of the Will is to see if it makes disposition that is natural or on that is to its face illogical; if it makes a disposition that is unconventional, it may raise eyebrows. The Will that make an outrageous disposition may be frowned upon and scrutinized with the greatest of care and suspicion. This scale of scrutiny on one parameter would certainly vary according to the dispositions being natural to the testator. In the present case, the father-in-law by his testament provided for maintenance to his daughter-in-law during her life time, charging it to the usufruct of a certain part of the land that he left behind for her provision. He has made that provision for his daughter-in-law during her life time. This kind of disposition to make, in the opinion of this Court, is very natural. So far as objections regarding the requirements of attestation of a Will are concerned, it has been pointed out by Sri M.C. Singh, learned counsel for the petitioners that these are governed by Section 68 of the Evidence Act and, in particular, of Section 63 (c) of the Succession Act.

19. Their Lordships of Supreme Court in a very recent decision in **Ganesan (D) Through Lrs. Vs. Kalanjiam and others in Civil Appeal Nos. 5901-5902 of 2009,** decided on 11.07.2019, have held that the signature of the testator on the Will being undisputed, section 63(c) of the Indian Succession Act requires acknowledgment of execution by the testator, which the witnesses have attested in his presence. The witnesses seeing the testator sign in their presence has been liberalized to a more reasonable principle by their Lordships indicating that what is to be seen is that the testator came to the witnesses with a signed Will and read it out to them, which they have attested. The rigour of the rule about the witnesses seeing the testator sign and the testator seeing the witnesses' sign, at the same time, seems to have been relaxed in favour of a more substantial compliance of the requirement. In paragraph 5 of their Lordships decision in **Ganesan (D) Through Lrs**.(supra) it has been held:-

"5. The appeals raise a pure question of law with regard to the interpretation of Section 63(c) of the Act. The signature of the testator on the will is undisputed.Section 63(c) of the succession Act requires an acknowledgement of execution by the testator followed by the attestation of the Will in his presence. The provision gives certain alternatives and it is sufficient if conformity to one of the alternatives is proved. The acknowledgement may assume the form of express words or conduct or both, provided they unequivocally prove an acknowledgement on part of the testator. Where a testator asks a person to attest his Will, it is a reasonable inference that he was admitting that the Will had been executed by him. There is no express prescription in the statute that the testator must necessarily sign the will in presence of the attesting witnesses only or that the two attesting witnesses must put their signatures on the will simultaneously at the same time in presence of each other and the testator. Both the attesting witnesses deposed that the testator came to them individually with his own signed Will, read it out to them after which they attested the Will."

19. It must be noticed here that like the Will that was before their Lordships in **Ganesan (D) Through Lrs**.*(supra)*, the present Will is also a registered

document. It is a Will that the attesting witnesses have signed, also in presence of the Registrar, after the testator had put his signatures. In the context of the aforesaid position of law, the submission of Sri M.C. Singh, learned counsel for the petitioners that the Will has not proved beyond doubt, cannot be accepted.

20. Turning to the next submission that some reasonable disposition of the Will should be inferred by this Court, this Court must say at once that there is no principle by which a Will can be rationalized after it is proved, but the Will indeed is required to be proved beyond all suspicious circumstances and any suspicion surrounding it, must be dispelled. The Will has to be given effect to, in the manner it has been scripted by its maker. It is not for the Court or anybody else to re-write the testator's Will invoking some idea of rationality, which the testator did not intend. The aforesaid contention of Sri M.C. Singh, learned counsel for the petitioner, therefore, cannot be accepted.

21. The other question about the Will, still remains not much to be answered. It is that, that the first petitioner relied upon the Will in her objection that she filed, staking claim in her father-in-law's property. It was claimed on the basis of a copy of Will as she did not have the original, that was with the sons of the testator. In course of time, the sons filed the original as well. As such, the Will as well as the secondary evidence is not the issue here. What is important is that the first petitioner relied upon her father-in-law's Will as the basis of her claim. Now, at some point of time, she has realized that all that she has got under the Will is her right to maintenance and that is what appears to have made her change mind to say that she disputes the Will, and now claims on the basis of intestate succession. This kind of a change of stance certainly falls squarely within the principle against approbation and re-approbation. This change of stand, therefore, by the first petitioner and a *fortiori* by her assignees, petitioner nos. 2 and 3, cannot be accepted.

22. The last submission of Sri M.C. Singh, learned counsel for the petitioner is about limitation on the power of the Revisional Court to go into a question of fact and upturn findings of the Consolidation Officer and the Settlement Officer of Consolidation, recorded on the basis of evidence, taking a plausible view of it. The decisions relied upon by Sri M.C. Singh, learned counsel for the petitioner are all rendered in a different statutory context. The U.P. Consolidation of Holdings Act was amended by U.P. Act No. 3 of 2002, giving it retrospective effect, with effect from 10.11.1980, by adding Explanation (3) to Section 48 of the Act. The decision can be best appreciated by extracting the provisions of Section 48 of the Act in extenso, with the added explanation. The provision as it now exists, after U.P. Act no. 3 of 2002, reads as follows:

48.Revision and reference-

(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regulariy of the proceedings; or as to the correctness, legality or propriety of any order [other than an interlocutory order] passed by such

authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceddings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of ay case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation- [1] For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2)- For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceedings or collateral there to as does not have the effect to finally disposing of such case or proceedings.

Explanation (3)- The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to reappreciate any oral or documentary evidence.

23. A perusal of Explanation (3) added to the Section 48 of the Act would show that it has been clarified that the power under Section 48 extends to examining the correctness, legality or propriety of any order, that includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to reappreciate any oral or documentary evidence. To recapitulate the purpose of an explanation, an explanation may have multiple purposes; one of the purposes of the explanation is to convey the intention of the legislature, where during the course of application of law, some misgiving has arisen. The explanation in this kind of a situation is introduced to clarify what the legislative intent was.

24. The explanation aforesaid makes it explicit that there are no fetters on the jurisdiction of the Deputy Director of Consolidation to go into questions of fact or law, and for the purpose, to reappreciate oral and documentary evidence. When the decision of this Court in ***Ram Karan Shukla*** (supra) and ***Smt. Bechna(supra)*** were rendered, the aforesaid explanation was not there. This explanation, interestingly, has been made effective with retrospective effect, that is to say, with effect from 10.11.1980. The impugned order was passed by the Consolidation Officer on 14.08.1995, and the objections under Section 9A(2) by the petitioners were filed before the Consolidation Officer on 24.01.1991. As such, the third explanation added to Section 48 of the Act, that has been given retrospective effect from the year 1980, would squarely apply to the proceedings in hand. Therefore, this Court must hold that there was no inhibition on the power of the Deputy Director of Consolidation to go into all questions of fact and law and recording findings of his own, after

doing a wholesome review of evidence, both documentary and oral. Therefore, the contention of Sri M.C. Singh, learned counsel for the petitioner based on the limitation of the power under Section 48 of the Act, also does not stand to scrutiny.

25. On a consideration of the entire facts and circumstances on record this Court is of clear opinion that there is no such infirmity in the order impugned passed by the Deputy Director of Consolidation, dated 06.08.1997, as may call for interference under Article 226 of the Constitution.

26. In the result writ petition fails and is **dismissed** with costs.

28. Let a copy of this order be communicated to the Deputy Director of Consolidation, Bulandshahr, by the Office within a month.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 54063 of 2017

Ahsan Karim Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udit Chandra

Counsel for the Respondents:
C.S.C., Sri Dhananjay Awasthi

A. Article 226 Constitution of India, Contract Act, 1872. Section 4 - Article 226 - not a remedy for breach of contract—if there has been no violation of justice.

Petitioner's allotment for the plot for commercial purpose was cancelled. Amount deposited by him was returned. The following questions fell for consideration: -

1.Whether by issuance of allotment letter and deposit of money by the petitioner the contract was concluded?

2. Whether for the breach of the contract the petitioner can seek the relief under Article 226 of the Constitution?

There was a concluded contract between the parties. In case of breach of contract, it is open to the petitioner to work out other remedy available under the law. (Para 26, 48). The Court will not insist for compliance of the principles of natural justice. While exercising the jurisdiction under Art. 226, the High Court has the power to refuse the writs if it was satisfied that there has been no violation of justice.
(Para 36, 37). In two enquiries were made by the senior officers, serious irregularities were found. There wasn't any arbitrary action on the part of the development authority in cancelling the allotment, giving the opportunity, in the facts of the present case would be a formality. (Para 40,48)

Precedent followed: -

1.Uttar Pradesh Avas Evam Vikas Parishad and others Vs. Om Prakash Sharma, (2013) 5 SCC 182 (Para 24)

2. Kisan Sahkari Chini Mills Limited and others Vs. Vardan Linkers and others, (2008) 12 SCC 500 (Para 29)

3. Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., (1981) 3 SCC 238 (Para 31)

4. M/s Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293 (Para 32)

5. JSW Infrastructure Limited and another Vs. Kakinada Seaports Limited and others, (2017) 4 SCC 170 (Para 33)

6. Tata Cellular Vs. Union of India, (1994) 6 SCC 651 (Para 33)

7. State Bank of Patiala and others Vs. S.K. Sharma, (1996) 3 SCC 364 (Para 36)

8. Aligarh Muslim University and others Vs. Mansoor Ali Khan, (2000) 7 SCC 529 (Para 36)

9. A.M. Allison and another Vs. B.L. Sen and others, AIR 1957 SC 227 (Para 37)

10. Ravi S. Naik Vs. Union of India and others, 1994 Supp (2) SCC 641 (Para 37)

11. Kumari Shrilekha Vidyarthi and others Vs. State of U.P. and others, (1991) 1 SCC 212 (Para 38)

12. Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405; AIR 1978 SC 851 (Para 39)

Precedent distinguished:-

1. Lalbi Vs. Modinamma @ Modinbee and others, (Karnataka) (DB)(Circuit Bench at Gulbarga); Law Finder Doc Id # 771754 : 2012 ILR (Karnataka) 4403; 2012 (74) R.C.R. (Civil) 283 (Para 17)

2. Popcorn Entertainment and another Vs. City Industrial Development Corporation and another, (2007) 9 SCC 593 (Para 17, 42)

3. Sunil Pannalal Banthia and others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and another, (2007) 10 SCC 674 (Para 17, 41)

4. State Bank of India and others Vs. D.C. Aggarwal and another, AIR 1993 SC 1197 (Para 17, 43)

5. Commisioner is Income Tax, Madras Vs. K.R. Sadayappan, (1990) 4 SCC 1 (Para 17, 43) (E-4)

(Delivered by Hon. Pradeep Kumar Singh Baghel, J.)

1. The writ jurisdiction of this Court under Article 226 of the Constitution is invoked against the order dated 26/28.08.2017 passed by respondent no.4, whereby the petitioner's allotment of the plot for commercial purpose has been cancelled and the amount deposited by him has been returned.

2. A brief reference to the factual aspects would suffice.

3. The Gorakhpur Industrial Development Authority, Gorakhpur1, the respondent no.2, issued an advertisement on 22.07.2014 inviting applications for allotment of 26 vacant industrial plots of different sizes in Industrial Area, Gorakhpur. Pursuant to the said advertisement the petitioner made an application on 19.08.2014 for allotment of an industrial plot of an area of 9000 square meters in Sector-13 or in any other sector.

4. The respondent no.2 vide a communication letter dated 30.08.2014 informed the petitioner that for allotment of the said plots an Allotment Committee has been constituted and he was asked to appear before the Allotment Committee for his interview. The interview was held on 28.01.2015. The petitioner was issued an allotment letter dated 31.03.2015, whereby he was allotted Plot No. F-5 in Industrial Sector-15. The area of the plot is 6733 square meter.

5. On 01.01.2016 the petitioner was called upon to deposit a sum of Rs.19,02,570/-. The said amount was deposited by the petitioner on 15.01.2016.

By a notice dated 03.02.2016 the petitioner was asked to deposit maintenance fee as well as lease rent.

6. It is stated in the petition that in the meantime after the allotments were made, complaints were made to various authorities in respect of the irregularity in the allotment of the plots including the Commissioner of the Division, who set up an enquiry on 02.11.2015. The enquiry report was placed before the GIDA and which resolved to stay the allotment proceedings and to cancel all the allotments. It also appears from the materials on record that serious complaints regarding the irregularity committed by the Chief Executive Officer2 and the Manager (Property) of the GIDA were made. Pursuant to the said complaint a preliminary enquiry was made and it was forwarded to the State Government and on the basis of the report dated 28.12.2015 the State Government passed an order dated 19.02.2016 to initiate disciplinary proceedings against the erring officials.

7. In compliance of the order of the State Government the two delinquent officers, namely, Gyan Prakash Tripathi and Anil Kumar Singh preferred a writ petition, being Service Bench No. 5769 of 2016, Gyan Prakash Tripathi and another v. State of U.P. and others, in this Court at Lucknow Bench to challenge the disciplinary proceedings amongst other grounds that enquiry officers are junior to the petitioners therein. The order passed by the Court on 16.03.2017 reads as under:

"The petitioner has assailed the order dated 19 February 2016 passed by the State Government, whereby the State Government has taken a decision to issue a charge sheet against the petitioner on the basis of inquiry report submitted by two members of fact finding enquiry committee.

Learned Counsel for the petitioner has submitted that the said committee was constituted with the two officers who had been juniors to the petitioner that too on the basis of complaint made by the District General Secretary, Samajwadi Party, Gorakhpur. It has been submitted that the said complaint has not been made by any public representative rather it is based on the political party politics which may not be the basis for an inquiry.

The petitioner has also brought on record the said inquiry report. Since the inquiry report has reported some irregularities in allotment of plots, therefore, we, suo motu permit the respondents to inquire the matter by some senior officers independently and the report submitted by those officer would only be the basis for further action.

With the aforesaid liberty the order impugned dated 19 February 2016 is hereby quashed.

The writ petition stands disposed of."

8. Similar complaints were made to the Lokayukta, U.P., Lucknow in respect of the same allotment. The Lokayukta appointed Commissioner, Consolidation Department, U.P., Lucknow as enquiry officer on 29.04.2016, and on 27.05.2016 the General Manager (Finance), GIDA was nominated as Nodal Officer to assist the enquiry officer in the enquiry. While the said enquiry was pending, the GIDA, the respondent no.2 in its 47th Board Meeting held on 18.06.2016 considered the report dated 28.12.2015 and took a decision to cancel all the allotments made by the GIDA in pursuance of the advertisement dated 22.07.2014.

9. It is averred in the petition that on 26.09.2016 the enquiry officer appointed by the Lokayukta submitted a report to the State Government. In the said enquiry report it was recorded that the respondent no. 2 has advertised only 26 plots but it has allotted 83 plots. The report further recorded that no fresh advertisement was issued nor fresh applications were invited for the allotment of more than 26 plots. It is mentioned in the report that for the allotment of extra 57 plots advertisement should have been issued. A copy of the enquiry report is on the record.

10. The Board of the respondent no.2 in its meeting dated 18.06.2016 resolved to cancel all the 26 allotments for the reason that in the advertisement the applications were invited for allotment of only 26 plots but 83 industrial plots were allotted. Thus, the financial interest of respondent no.2 was unsecured.

11. Consequently, the petitioner's allotment was cancelled vide order dated 28.08.2017 and the amount deposited by the petitioner has been returned. It is stated that the Lokayukta has not taken any decision on the basis of the report dated 29.06.2016.

12. An amendment application has been filed whereby the petitioner has brought on record the copy of the allotment letter and the proposed lay out plan.

13. A counter affidavit has been filed on behalf of respondent nos. 2 to 4. The stand taken by the respondent no.2 is that an advertisement dated 22.07.2014 was issued for the allotment of 26 industrial plots in Sector 13 and 15. The complaints were made in respect of various illegalities in the allotment. The Commissioner, Gorakhpur Division set up an enquiry vide order dated 02.11.2015. The enquiry report pointed out several serious illegalities in the allotment process. The said report and this matter were considered by the Board of GIDA in its 46th meeting held on 11.02.2016. It was resolved, "all further activities regarding allotment of the above mentioned plot should be stopped and status quo should be maintained and the allotment of plots be cancelled.". The said report was sent to the State Government, which recommended initiation of the disciplinary proceedings against two officers, i.e., CEO and Manager (Property) of the GIDA.

14. In the meantime, the Lokayukta on the basis of some complaints asked the State to get an enquiry conducted from some State Officers. Thereafter the Commissioner, Consolidation, U.P., Lucknow has been appointed as enquiry officer. He was earlier CEO of the GIDA in the past. The report of the enquiry officer was sent to the State Government which vide order dated 25.04.2017 directed the GIDA Board to consider and take decision whether the existing allotment should be cancelled and re-allotment will be done or not. The GIDA Board in its 50th Board Meeting held on 07.06.2017 considered the letter of the State Government dated 25.04.2017 and it was decided to cancel allotment of all the 83 plots on the ground of various anomalies which were pointed out in the two separate enquiry reports. It is stated that the petitioner was allotted a plot but the allotment never progressed beyond the stage of allotment letter. The lease-deed was never executed in favour of the petitioner, hence, the petitioner cannot

claim a right on the basis of allotment of the plot. It is stated that 83 plots have been cancelled due to illegality committed in the allotment, which is in contravention of the rules, which is apparent from the minutes of the 46th Board Meeting held on 24.02.2016 and 47th meeting held on 18.06.2016 (Annexure-CA-1 to the counter affidavit). The same minutes have also been annexed by the petitioner as Annexure-11 to the writ petition.

15. A rejoinder affidavit has been filed wherein the averments made in the writ petition are reiterated.

16. Learned counsel for the petitioner submits that there is violation of principle of natural justice. The petitioner was allotted plot on 31.03.2015 and the petitioner has deposited the reservation fees but the respondent no.2 did not execute the lease deed and on the basis of exparte report and without issuing any show cause notice the allotment was cancelled. It is further submitted that the reports submitted by the enquiry officers were merely preliminary reports and the State Government and the respondent no.2 have illegally taken a cognizance of preliminary reports submitted by the enquiry officers. It is further submitted that the reports are also self- contradictory and are based on conjecture and assumption. Next it is submitted that the enquiry reports are exparte and without affording any opportunity of hearing. The learned counsel further submits that the advertisement uses the word "almost" to allot only 26 plots. It is submitted that the small mistake does not make the entire process nugatory.

17. Learned counsel for the petitioner next submitted that Section 7 of the Uttar Pradesh Industrial Area Development Act, 19763 gives the power of allotment to the CEO. It is submitted that only financial consideration is not the criteria for the development authority. The object is not to earn money but to set up the industries. Lastly, it was urged that the State largess can be granted without advertisement unless it is found that it was arbitrary, irrational and discriminatory. He has placed reliance on the judgment of the Karnataka High Court in the case of **Lalbi v. Modinamma @ Modinbee and others4, and the judgments of the Supreme Court in Popcorn Entertainment and another v. City Industrial Development Corpn. and another5; Sunil Pannalal Banthia and others v. City & Industrial Development Corporation of Maharashtra Ltd. and another6; State Bank of India and others v. D.C. Aggarwal and another7; Commissioner of Income Tax, Madras v. K.R. Sadayappan8.**

18. Sri Dhananjay Awasthi, learned counsel for the respondents, has submitted that GIDA advertised only 26 plots, in which the petitioner was given allotment letters, but subsequently due to irregularities in the allotment it was cancelled and money was refunded vide cancellation order dated 26/28.08.2017. A fresh advertisement was made which was cancelled and again it has been advertised on 02.03.2019 and the last date for the submission of application was 07.04.2019. He submitted that irregularities were pointed out in an enquiry conducted at the behest of the Lokayukta and acting on the enquiry report the State directed for cancellation of the allotment. He has drawn our attention to the enquiry report, which is

annexure-1 to the counter affidavit, wherein several irregularities have been found in the said enquiry. It was further submitted that mere issuance of allotment letter does not create any indefeasible right in such contractual matters especially when deposited money has also been returned. Lastly, it was urged that two separate enquiries were conducted: one at the instruction of the Lokayukta and the preliminary enquiry report submitted by the Chief Development Officer, and on the basis of those enquiries the GIDA Board resolved to cancel the allotment and return the deposited money.

19. Lastly, it was urged that no document has been executed in pursuance of the allotment order and possession has also not been given.

20. We have heard and considered the submissions advanced by learned counsel for the parties and perused the material on the record.

21. The questions, therefore, that fall for consideration are as to whether by issuance of allotment letter and deposit of money by the petitioner the contract was concluded; and, (ii) whether for the breach of the contract the petitioner can seek the relief under Article 226 of the Constitution of India.

22. On the first issue, learned counsel for the petitioner has submitted that if an allotment letter has been issued, it amounts acceptance of the offer of the petitioner and the contract has concluded. Per contra, the contention of learned counsel for the respondents is that pursuant to the allotment order the petitioner was not handed over the possession nor any lease-deed has been executed in his favour, hence it cannot be said that the contract has been concluded or there is a concluded contract.

23. Before proceeding further we deem it appropriate to refer some decisions of the Supreme Court on the first issue i.e. whether it was concluded contract.

24. In **Uttar Pradesh Avas Evam Vikas Parishad and others v. Om PrakashSharma**9 somewhat similar situation arose. The Uttar Pradesh Avas Evam Vikas Parishad, which is a statutory authority, auctioned some shops and a plot by a public auction. The appellant before the Supreme Court i.e. the Uttar Pradesh Avas Evam Vikas Parishad accepted the highest bid of the respondent, who deposited 20% of the bid amount plus the earnest money. The bid was rejected by the Housing Commissioner of the Board and the amount was refunded to the respondent/plaintiff. The respondent filed a suit under Section 34 of the Specific Relief Act, 1963 seeking declaratory relief that the auction in his favour was final and binding on the Avas Evam Vikas Parishad. The trial Court decreed the suit. In appeal the judgment and decree of the trial Court was set aside. The High Court in the second appeal again decreed the suit. The review was also dismissed by it. Before the Supreme Court the issues, amongst other, raised were that "(a) What are the rights of the plaintiff/bidder participating in the auction process in relation to the plot in question? (b) Whether there is any vested right upon the plaintiff/ bidder until the bid is accepted by the competent authority in relation to the property in question? Merely because the plaintiff is the highest

bidder by depositing 20% of the bid amount without there being approval of the same by the competent authority and it amounts to a concluded contract in relation to the plot in question? (c) Whether the plaintiff could have maintained the suit in absence of a concluded contract?"

25. The Supreme Court answered the points (a) and (b) in affirmative and held that "so long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquire no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled.". The Court held that in absence of acceptance of the bid offer by the plaintiff to the competent authority of the defendant there is no concluded contract. The Court further held that under Section 4 of the Contract Act the proposal can be said to be completed when the same is accepted by the competent authority. Relevant part of the judgment reads as under:

"39. Further, the communication under Section 4 of the Contract Act speaks of when the communication will complete. It says:

"4. Communication when complete.- The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete-

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer."

The proposal is said to have been completed when the same is accepted by the competent authority, which has not been done in the instant case. Neither the Housing Commissioner nor the Assistant Housing Commissioner accepted the proposal in writing; therefore, there is no communication of acceptance of the offer of the plaintiff. In this regard, this Court in Haridwar Singh v. Begum Sumbrui10 has held that the communication of acceptance of the highest bid is necessary for concluding the contract."

26. Applying the aforesaid principle in the present case, we find that there is considerable merit in the contention urged by learned counsel for the petitioner that there was a concluded contract between the parties. Indisputably, the respondent has issued an allotment letter on 31.03.2015 and the petitioner has deposited a sum of Rs.19,02,570/- on 15.01.2016 in pursuance of the demand made by the respondents. Thereafter a letter was sent to the petitioner on 03.02.2016 raising demand for the lease rent etc.. These facts have not been denied in the counter affidavit. Hence, it can be safely held that after acceptance of the bid of the petitioner and allotting him Plot No. F-5 in Sector-15, the contract was concluded irrespective of the fact that the possession was not given to the petitioner and formal lease deed has not been executed.

27. We can not persuade ourselves to subscribe the view that the petitioner has no legal right or vested right to challenge the decision of the second respondent cancelling the entire auction and to invite fresh applications in respect of all the 83 plots.

28. In respect of Question No. (II) we may in this regard gainfully refer to

the decisions of the Supreme Court which are apposite in the facts of the present case.

29. **In Kisan Sahkari Chini Mills Limited and others v. Vardan Linkers and others** the respondent therein pursuant to a tender notice issued by the Sugar Mill, which produces the molasses, offered for the purchase of molasses. In the State of Uttaranchal, there were six State controlled sugar mills. The sale of molasses is controlled by the Molasses Sale Committee, which was constituted by the State Government. The respondent therein was permitted to lift certain amount of molasses from five sugar mills. In the meantime the State Government received several complaints, hence the competent authority stayed the operation of the order passed by the Assistant Cane Commissioner for lifting molasses. The respondent therein challenged the said action by way of a writ petition for a direction for continuance of supply of the entire quantity for which the permission was granted to him. The High Court directed the State Government to consider the grievance of the respondent. The State Government rejected the representation of the respondent therein on the ground that there was no valid contract for the supply of molasses and the order/letter issued by the Assistant Cane Commissioner was without any authority and consequently, the State Government cancelled the same. Similar issues, as raised in the present writ petition, were raised before the Court which read as under:

"(i) Whether the High Court was right in concluding/ assuming that there was a valid contract?

(ii) Whether the High Court was justified in quashing the cancellation order dated 24-4-2004 passed by the Secretary, (Sugar)?"

30. While answering the issue regarding the jurisdiction of the Court under Article 226 of the Constitution of India the Court held that even in case the High Court finds that there is valid contract but if the cancellation of contract is not arbitrary or unreasonable, the Court can still refuse to interfere in the matter leaving the aggrieved party to take recourse to the remedy available under the law. The Court held thus:

"23. ...The issue whether there was a concluded contract and breach thereof becomes secondary. In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract, and relegate the petitioner to the remedy of a civil suit. Even in cases where the High Court finds that there is a valid contract, if the impugned administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a civil court. In other words, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full-fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering

the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action."

31. Reference may also be made to **Divisional Forest Officer v. Bishwanath Tea Co. Ltd.12.** In this case the Supreme Court has considered the issue with regard to maintainability of the writ petition where a complaint is made against a statutory authority after the breach of contract. The Court has held that ordinarily the suit would be congnizable by a civil court and the High Court in its extraordinary jurisdiction would not entertain a petition and a relief flowing from a contract has to be claimed in a civil suit. The Court observed thus:

"9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the civil court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed. This is so well settled that no authority is needed. However, we may refer to a recent decision bearing on the subject. In Har Shankar v. The Deputy Excise & Taxation Commissioner13, the petitioners offered their bids in the auctions held for granting licences for the sale of liquor. Subsequently, the petitioners moved to invalidate the auctions challenging the power of the Financial Commissioner to grant liquor licences. Rejecting this contention, Chandrachud J., (as he then was), speaking for the Constitution Bench at page 263 observed as under: (SCC p.746, para 16)

Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.

Again at page 265 there is a pertinent observation which may be extracted: (SCC p. 747, para 21)

Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations.

This apart, it also appears that in a later decision, the Assam High Court itself took an exactly opposite view in almost identical circumstances. In Woodcrafts Assam v. Chief Conservator of Forests14 a writ petition was filed challenging the revision of rates of royalty for two different periods. Rejecting this petition as not

maintainable, a Division Bench of the High Court held that the complaint of the petitioner is that there is violation of his rights under the contract and that such violation of contractual obligation cannot be remedied by a writ petition. That exactly is the position in the case before us. Therefore, the High Court was in error in entertaining the writ petition and it should have been dismissed at the threshold."

32. **In M/s Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay15** the Supreme Court has held that the superior courts while exercising their jurisdiction in the administrative decisions are concerned with decision making process. The writ Courts should not interfere unless the decision is totally arbitrary, malafide and perverse.

33. Recently, the Supreme Court in **JSW Infrastructure Limited and another v. Kakinada Seaports Limited and others**, in a slightly different context, has reiterated the principles laid down in Tata Cellular v. Union of India17. Paragraph-8 of the judgment reads as under:

"8. We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. A three-Judge Bench of this Court in Tata Cellular v. Union of India18 held that:

(i) there should be judicial restraint in review of administrative action;

(ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision-making process;

(iii) the court does not usually have the necessary expertise to correct such technical decisions;

(iv) the employer must have play in the joints i.e. necessary freedom to take administrative decisions within certain boundaries."

34. The principles underlying in these decisions are that if a public element is involved then even in the case of concluded contract, the High Court under Article 226 of the Constitution can entertain a writ petition if it is established that the Government or its instrumentality, which is a State within the meaning of Article 12 of the Constitution, has acted unfairly, unreasonably or arbitrarily. The Court can also in its jurisdiction under the judicial review examine whether the transparency was maintained by the authorities while disposing the public largess. If the Court finds that the action of the authorities was unreasonable and unfair then the Court can strike down such decision under Article 14 of the Constitution in spite of the fact that the action between the parties was in the realm of the contract.

35. Learned counsel for the petitioner has vehemently urged that cancellation of plot of the petitioner has been made without furnishing any opportunity to the petitioner, hence on this ground alone the decision of respondent no. 4 is arbitrary and illegal.

36. It is a trite law that principles of natural justice cannot be put in a straitjacket formula. In the recent time, the principles of natural justice have undergone a sea-change. The Court has now shifted from its earlier concept that non-observance of the principles of

natural justice itself causes prejudice, hence the order becomes arbitrary. The recent shift in the judgments of the Supreme Court in the case of **State Bank of Patiala and others v. S.K. Sharma19and Aligarh Muslim University and others v. Mansoor Ali Khan20** lays down "useless formality theory". In such cases the Supreme Court has held that the Court will not insist for compliance of the principles of natural justice.

37. In **A.M. Allison and another v. B.L. Sen and others**21 the Supreme Court has ruled that "while exercising the jurisdiction under Article 226 of the Constitution, the High Court has the power to refuse the writs if it was satisfied that there has been no violation of justice". The said judgment has been quoted with approval by the Supreme Court in the case of Ravi S. Naik v. Union of India and others22.

38. In **Kumari Shrilekha Vidyarthi and others v. State of U.P**. and others23 the Supreme Court has held as under:

"48. ... Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power."

39. In **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others**24 the Supreme Court, speaking through Hon'ble Mr. Justice Krishna Iyer, has observed as under:

"For fairness itself is a flexible: pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop nor a bee in one's bonnet. Its essence is a good conscience in a given situation: nothing more- but nothing less."

40. Applying the principle propounded in the above-mentioned cases, in the present case we find that two enquiries were made by the senior officers and in both the separate enquiries serious irregularities were found. We do not find that there was any arbitrary action on the part of the development authority in cancelling the allotment, giving the opportunity, in the facts of the present case, would be a formality.

41. Learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in **Sunil Pannalal Banthia (supra)**. We find that the said case is distinguishable on the ground that in the said case the Court has found that a discrimination has been done and the irregularity, which was found in the enquiry, on the basis of which the cancellation of the allotment was made, was not found to be applicable in the case of the petitioners therein. In that context, the Supreme Court held that in such a case the allotment could not have been cancelled merely because certain recommendations have been made by a Committee. In the said case, the allottee had commenced the construction work and proceeded upto the first floor and it also completed construction of underground water tank. In the present case, the possession has not been handed

over to the petitioner nor any lease deed has been executed. The said case has no application in the facts of the present case.

42. In **Popcorn Entertainment (supra)** the allotment order for a commercial plot was issued by the City Industrial Development Corporation (for short, the 'CIDCO'). Earlier the CIDCO had issued an advertisement for the plots but no response was received by it. Thereafter on the application of the appellant therein, Popcorn Entertainment, an allotment letter was issued asking to pay the price of the plot which was deposited by it. Later the allotment order was cancelled. When the appellant therein challenged the cancellation order, its writ petition was dismissed by the High Court on the ground of alternative remedy. The Supreme Court set aside the order of the High Court and remitted the matter back to the High Court to decide the matter on merit. This case also is not of much help in the present case.

43. We have carefully perused the judgment of **Commissioner of Income Tax, Madras (supra)** and found that this case has no application in the facts of the present case. In D.C. Aggarwal (supra) the case was in respect of observance of the natural justice in the disciplinary proceeding. We have already referred the law on the violation of the natural justice in the earlier part of the judgment. In our view, this case also does not help the petitioner.

44. As regards the maintainability of the writ petition, it is a trite law that if the action of the State is found to be arbitrary and illegal, the writ petition is maintainable and in the judicial review the Court can examine the facts whether there was any arbitrary or unreasonable stand of the respondents. It is a well settled law that the parameters of the judicial review are very limited and when the Court finds that the action is malafide or unreasonable, only in that situation the Court interferes in the matter. In the present case, no element of malafide has been made against the GIDA. We have carefully perused the enquiry report dated 28th December, 2015 submitted by the Chief Development Officer, Gorakhpur and the Additional Commissioner (Administration), Gorakhpur. They have found serious irregularities in the allotment of the plot. The relevant part of the enquiry report is extracted below:

"... जैसा कि ऊपर उल्लेख किया जा चुका है कि गीडा द्वारा 26 भूखंडों के आवंटन हेतु नोटिस/टेण्डर विज्ञापन अखबार में प्रकाशित कराया गया था और उसके विपरीत 83 भूखंडों का आवंटन किया गया। 26 भूखंडों के कराए गए आवंटन के विरूद्ध 242 आवेदन पत्र आए। निश्चित रूप से आवेदनकर्ताओं ने आवेदन करते समय 26 भूखंडों पर ही ध्यान केंद्रित किया होगा और उसी के अनुसार अपने–अपने आवेदन पत्र गीडा को प्रेषित किए गए होंगे। उनको यह पता नहीं रहा होगा कि 26 भूखंडों का प्रकाशन कराया जा रहा है और आवंटन 83 भूखंडों को कर दिया जाएगा। निश्चित रूप से यदि 83 भूखंडों का विज्ञापन कराया गया होता तो आवेदनकर्ताओं की संख्या अधिक होती और ऐसे आवेदनकर्ता जो 26 भूखंडों के विरूद्ध आवेदन के इच्छुक नहीं थे, वे 83 भूखंडों के विरूद्ध अपना आवेदन निश्चित रूप गीडा को भेजते और यह संख्या 242 के विपरीत निश्चित रूप से अधिक होती और इस प्रकार गीडा द्वारा भूखंड आवंटन की कार्यवाही अधिक पारदर्शी होती और अधिक से अधिक संख्या में इच्छुक आवेदनकर्ता इसमें भाग लेते, परंतु गीडा द्वारा ऐसा नहीं किया गया। गीडा की इस कार्यवाही में पारदर्शिता परिलक्षित नहीं होती है और की गई कार्यवाही दूषित है। ऐसा लगता है गीडा ने जानबूझकर ऐसा किया है और लोगों को भ्रम व अंधेरे में रखा, जिससे इच्छुक आवेदनकर्ता आवेदन करने से वंचित रह गए। उपरोक्तानुसार उक्त शिकायत गंभीर प्रकृति की है और गीडा के अधिकारियों द्वारा की गई कार्यवाही नियमानुसार नहीं है। इस प्रकार शिकायत बिंदु संख्या–1 सही है।"

45. In addition to above, the Lokayukta, U.P. has also issued a

direction to the State Government to enquire into the allegations of irregularity and corruption. Pursuant to the said communication of the Lokayukta the State Government had appointed the Commissioner, Consolidation, U.P., Lucknow to look into the matter. The Commissioner, Consolidation, has submitted a report dated 26th September, 2016 before the authority in respect of the same illegalities. The relevant part of the report reads as under:

"निष्कर्षः– उपरोक्त विस्तृत परीक्षण के पश्चात यह निष्कर्ष प्राप्त हो रहे हैं कि प्रकरण में 83 औद्योगिक भूखंडों का आवंटन किया गया। जबकि 26 भूखंडों के आवंटन के संबंध में ही विज्ञापन दैनिक समाचार पत्रों में कराया गया। भूखंडों के आवंटन में पूर्ण पारदर्शिता हेतु शेष 57 भूखंडों के आवंटन के सम्बन्ध में विज्ञापन संबंधी कार्य किया जाना श्रेयस्कर होता तथा गीडा के आर्थिक हित भी सुरक्षित रहते।"

46. From a perusal of both the enquiry reports it is evident that several serious lapses were committed by the then officials. On the basis of the enquiry report submitted by two members of the fact- finding enquiry the State Government vide its order dated 19.02.2016 initiated the disciplinary proceedings against two officers, namely, Sri Gyan Prakash Tripathi, the then CEO, and Sri A.K. Singh, Manager (Property) of the GIDA, who were placed under suspension. The aforesaid two officers preferred a writ petition, being Service Bench No. 5769 of 2016, Gyan Prakash Tripathi and another v. State of U.P. and others, challenging the decision of the State Government on the ground that the officers who have submitted the preliminary report were junior to them. The High Court vide order dated 16.03.2016 disposed of the said writ petition and permitted the respondents to enquire the matter by some senior officers independently and the report submitted by those officer would only be the basis for further action, and the High Court set aside the order of the State Government.

47. From the material on the record we find that although this Court in its order dated 16.03.2016 (supra) has permitted the respondents to get fresh enquiry conducted by some senior officers but, for the reasons best known to the State Government and the GIDA, the matter was treated to be closed in pursuance of the directions of the High Court and no further enquiry was conducted though the High Court has not expressed any opinion on the merit and permitted the respondents "to enquire the matter by some senior officers independently".

48. Admittedly, only 26 plots were advertised by the respondent no. 2. However, total 83 plots have been allotted. The justification put forward by the petitioner that since there were 219 applicants and there were only 26 plots allotted, therefore, the authorities deemed it appropriate to allot remaining 57 vacant plots without advertisement. We find it difficult to accept the said explanation. If 26 plots were advertised, remaining plots which were not advertised should not have been allotted to other persons. Moreover, from a perusal of the enquiry reports we are of the opinion that the action of the respondents to cancel the entire advertisement was not arbitrary, unreasonable and unfair. Thus, under Article 226 of the Constitution we do not find any justifiable ground to interfere in the matter. As held by the Supreme Court, in the case of breach of contract it is open to the petitioner to work out other remedy available under the law. From the

impugned order it is also evident that 8 persons have already deposited the entire amount and they have raised some construction. In the case of those 8 applicants, the GIDA has sought legal opinion and it was resolved that further decision shall be taken subsequently. We find that the cases of those 8 persons are different than the petitioner, who had admittedly not been given possession of the plot. Thus, there is no question of raising any construction over Plot No. F-5, Sector-15.

49. In view of the above, we do not find any ground to interfere in our extraordinary jurisdiction under Article 226 of the Constitution. Accordingly, the writ petition is dismissed.

50. We also direct the State Government to continue further action against two officials namely Sri Gyan Prakash Tripathi, the then CEO, and Sri A.K. Singh, Manager (Property) of the GIDA, against whom the disciplinary proceedings were initiated. The disciplinary proceedings must be brought to its logical end. Even if the said officers are retired, action be taken against them in terms of the relevant service rules/law.

51. Office is directed to send a copy of this order to the Chief Secretary, Government of Uttar Pradesh, Lucknow for appropriate orders.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2019

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE UMESH KUMAR, J.

Writ-C No. 27307 of 2019

Dr. Neera Chandra ...Petitioner
Versus
Union of India &Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh

Counsel for the Respondents:
A.S.G.I.

A. The Passports Act, 1967: Sections 10 and 12(1)(b). Sections 177 and 188 IPC. Non-disclosure of the pendency of criminal case cannot be taken as material suppression of fact for impounding the passport.

Impugned order dated 28.05.2018, directed petitioner either to surrender her passport or to produce an order from the competent Court. The petitioner was granted permission to go abroad by competent Court. Disposing of this petition, the High Court. The basis of impounding passport of the petitioner is only pendency of a criminal case of a minor nature. When the competent Court has granted permission by passing a reasoned order, the reasons given by Regional Passport Officer do not stand. (Para 14)

Precedent followed: -

1.Mohd. Farid Vs. Union of India & another, decided on 20.12.2016 in Writ – C No. 59959 of 2016

2. Menaka Gandhi Vs. Union of India, 1978 (1) SCC 248 (Para 8)

3. Suresh Nanda Vs. CBI, 2008(3) SCC 6744 (Para 9)

4. Naresh Chandra Vs. Union of India and 3 others, Writ – C No. 39572 of 2018(Para 11) (E-4)

(Delivered by Hon'ble Shashi Kant Gupta, J. & Hon'ble Umesh Kumar, J.)

1. Heard Sri Nipun Singh, learned Counsel for the petitioner, Ms.

Aradhna Chauhan, learned Central Govt. Advocate who has filed appearance on behalf of Union of India and learned Standing Counsel for State Authorities.

2. This petition has been filed seeking relief to quash the impugned order dated 28.5.2019 passed by respondent no.3 by which, the passport of the petitioner has been ordered to be impounded imposing penalty.

3. Briefly stating the facts giving rise to this petition are that initially, a passport was issued to the petitioner on 30.4.2008 bearing Passport No. G 7983341 having validity up to 29.4.2018; that before its expiry, the petitioner applied on line for its renewal on 14.1.2018 and she was given appointment for completing requisite formalities by the Regional Passport Office, Ghaziabad on 31.1.2018 bearing File No. GZ04C4010003218 which the petitioner complied with; but when, the petitioner did not receive her passport, she again took appointment on 20.3.2018 and personally met the official at Regional Passport Office, Ghaziabad, upon which, on 21.3.2018, the petitioner received her passport on 25.3.2018 bearing No. R 9685546; that on 26.3.2019, police verification on renewal application of the petitioner was done by police authorities; that after getting police verification report, the Regional Passport Officer, Ghaziabad issued a show cause notice dated 13.4.2018 seeking clarification from the petitioner about pendency of a criminal case, relevant extract whereof, is quoted below;

" COURT CASE IS PENDING CRIME NUMBER 475/2012 188/171 J IPC BY REPORT

You may recall that a passport bearing passport number R9685546 dated 21/03/2018 was dispatched to you by this office on the basis of your application dated 01/02/2018.

You are therefore, called upon to provide a suitable explanation and submit a fresh application with correct details. Please note that you are required to furnish a proper explanation regarding the circumstances under which you had suppressed the material information in your passport application and obtained the above said passport.

Also state why action should not be taken to impound the passport number R9685546 dated 21/03/2018, of the Passport Act, 1967 and Section 12(1)(b) of the Passport Act, 1967 should not be initiated against you.

Please quote the reference number mentioned in the top block of this letter for further correspondence."

4. The petitioner submitted reply to the show cause notice and after receipt of the reply, the Regional Passport Officer, Ghaziabad passed the impugned order on 24.5.2018 directing the petitioner either to surrender her passport or to produce an order from the competent Court as is required by notification (GSR 570E); that on 12.6.2018, the petitioner submitted reply again to the Regional Passport Officer, Ghaziabad through registered post; that thereafter on 7.9.2018, the petitioner received e-mail letter bearing Reference No. SCN312165822/18 seeking clarification as to why, the material information was not disclosed in the application; that just within 14 minutes of the above e-mail letter, the petitioner received another order dated 7.8.2018 (Reference No. IMP/ 312166100/18) which the petitioner challenged by filing Civil Misc. Writ Petition No. 344419 of 2018, which ultimately was dismissed as withdrawn by

order dated 11.10.2018 with liberty to approach the appropriate authority /forum.

5. The petitioner in term of the aforesaid order, approached the competent Court below where criminal case was pending under Section 188 and 177 of IPC and sought permission to go abroad and the learned Court below granted permission by order dated 26.3.2019, which is quoted here in below;

" पत्रावली पेश। पुकार पर प्रार्थिनी के विद्वान अधिवक्ता उपस्थित।

प्रार्थिनी की ओर से आवेदन इस आशय का प्रस्तुत किया गया कि प्रस्तुत प्रकरण न्यायालय में वर्ष 2012 से विचाराधीन है और काफी समय पूर्व आरोप विरचित हो चुका है। और वह नियमित रूप से हाजिर अदालत है किन्तु अभियोजन पक्ष द्वारा गवाह प्रस्तुत नही किए गए है। प्रार्थिनी पेशे से चिकित्सक है और वर्ष 2012 मे मवाना नगरपालिका की चेयरमेन रही है किन्तु सत्ता पक्ष के दबाव के कारण उसके विरूद्ध आरोप पत्र पुलिस द्वारा न्यायालय में दाखिल किया गया है। जिससे उसे मानसिक तनाव है। उसकी पुत्री ब्रिटेन मे रहकर पढ़ाई कर रही है। प्रार्थिनी उससे मिलने जाना चाहती है किन्तु कार्यालय द्वारा पासपोर्ट जमा करने हेतु कहा जाता है तो उसे मानसिक पीड़ा होती है। और पासपोर्ट जमा करने पर वह अपनी पुत्री से मिलने से वंचित हो जायेगी। प्रार्थिनी द्वारा मुकदमा लम्बित रहने के दौरान पुत्री से मिलने हेतु ब्रिटेन जाने की अनुमति हेतु याचना किया है।

प्रा.पत्र पर विद्वान अभियोजन अधिकारी द्वारा विरोध करते हुए प्रा.पत्र निरस्त किए जाने की याचना किया है।

सुना एवं पत्रावली का परिशीलन किया।

पत्रावली के परिशीलन से विदित है कि प्रकरण वर्ष 2012 की घटना से सम्बंधित है। और प्रकरण मे पुलिस द्वारा विवेचना उपरांत पर्याप्त साक्ष्य पाते हुए आरोप पत्र न्यायालय दाखिल किया है। यह तथ्य सही है कि प्रकरण वर्ष 2012 से लम्बित है और अभियोजन पक्ष की ओर से कोई साक्षी प्रस्तुत नही किया गया है। प्रकरण के तथ्य व परिस्थितियो में प्रार्थिनी को सशर्त विदेश जाने की अनुमति प्रदान की जा सकती है।

आदेश

प्रार्थिनी का प्रा.पत्र इस शर्त के साथ स्वीकार किया जाता है कि प्रार्थिनी इस आशय का शपथ पत्र दाखिल करेगी कि वह प्रत्येक तिथि पर द्वारा वकालतन न्यायालय में उपस्थित रहेगी तथा एक लाख रूपए का एफ.डी.आर. न्यायालय में इस आशय का दाखिल करेगी कि यदि उसके द्वारा न्यायालय आदेश का उल्लघंन किया जाता है तो उक्त एफ.डी.आर. राज्य सरकार के हक में जब्त हो जायेगा। पत्रावली नियत दिनांक 15.04.2019 को पेश हो।

ह0 अपठीत
26/03/2019
(अंशुमन धुन्ना)
न्यायिक मजिस्ट्रेट,
मवाना, मेरठ।

6. The petitioner complied with the condition imposed by learned Court below by filing affidavit and the FDR.; that the grievance of the petitioner is that although the petitioner has completed all the formalities as was required by the Regional Passport Office, yet the respondent no.3(Regional Passport Officer, Ghaziabad) by his order dated 28.5.2019, has issued passport only for a period of one year, subject to payment of penalty amounting to Rs. 5000/-. which is arbitrary and illegal. In support of his submission learned Counsel has relied upon the decision of a co-ordinate Bench of this Court passed in **Writ-C No.59959 of 2016** (Mohd. Farid Vs. Union of India & another) decided on 20.12.2016.

7. Learned Counsel appearing on behalf of Union of India submits that the Regional Passport Officer is empowered to impound/revoke passport under Section 10 of Passport Act, 1967 and grounds thereof have been mentioned in Clause(a) to (h) of sub-Section 3 of Section 10 of the Act.

8. The Hon'ble Supreme Court in **Menaka Gandhi Vs. Union of India 1978(1) SCC 248**, has observed that sub-section 5 of Section 10 of the Passports Act, 1967 requires the Passport Authority impounding the passport to record reasons

of making such order and the necessity of giving reasons has obviously been introduced in the sub-section so that it may act as a healthy check against abuse or misuse of power. If the reasons given are not relevant and there is no nexus between reasons and the ground on which the passport was impounded, it would be open to the holder of the passport to challenge the order of impounding in a Court of law and if the Court is satisfied that the reasons are extraneous or irrelevant, the Court would struck down the order.

9. The Apex Court in the case of **Suresh Nanda Vs. CBI 2008(3) SCC 6744** has held that impounding of a passport has civil consequence and therefore, the Authorities are duty bound to afford opportunity of hearing to the person aggrieved.

10. Suffice to note that there is no doubt about the discretion vested with the Authority in terms of the provisions of Section 10 of the Act, but that is not at all mandatory to impound or caused to be impounded the passport or any travel document if proceedings in respect of offence merely alleged to have been committed by the holder of the passport pending in the Court . The pendency of criminal offence against the holder of the passport would not automatically results in impounding of the passport

11. It will not be out of place to mention here that in the case of the husband of petitioner, this Court has been pleased to pass the following order in **Writ-C No. 39572 of 2018** (Naresh Chandra Vs. Union of India and 3 others);

".....In the instant case, passport of the petitioner was impounded by the Regional Passport officer Ghaziabad on the count that the petitioner had suppressed certain material facts. The facts stated were relating to subsequent criminal cases wherein the Investigating Agency had filed negative police report under section 173 of the Cr.P.C."

Having considered the facts of the case, this Court by the impugned order dated 16.1.2019, directed the Regional Pass Officer Ghaziabad to reconsider the decision for impounding of passport by taking into consideration the facts relating to the criminal cases concerned and by ignoring suppression of facts relating to the cases aforesaid. In pursuance of the order dated 16.1.2019, a passport has already been issued in favour of the petitioner but that is subject to final decision of this petition for writ. As already stated, the passport was impounded on the count of suppression of facts but in the light of the order dated 16.1.2019, ignoring that aspect of the matter, the passport has now been released.

Looking to all the facts of the case specially in view of the fact that the cases concerned are having no material effect relating to the conduct and character of the petitioner, we deem it appropriate to make the issuance of passport absolute.

In view of the facts stated above, the writ petition is disposed of by making issuance of the passport by Regional Passport Officer Ghaziabad, absolute and without the condition of subject to final decision of the present writ petition."

12. Submission of learned Counsel for the petitioner that non disclosure of the pendency of criminal case cannot be taken as a material suppression of the fact

for impounding the passport of the petitioner has substance. Moreover, the petitioner is a lady doctor having political background. Her daughter Nishitha Chandra is doing her Ph.D in Biotechnology from the University of Manchester, U.K and the petitioner has reason to visit her daughter who is studying abroad. The criminal case taken note by the Passport Authority is of minor nature under Sections 177 and 188 of I.P.C. which provides punishment for maximum period of six months and one month respectively and that too has been registered due to alleged political vengeance. Moreover, the offence in question is not against property or person.

13. For ready reference, provisions of Sections 177 and 188 of IPC is reproduced below as follows;

177. Furnishing false information.- Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

188. Disobedience to order duly promulgated by public servant.- Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.-It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

14. Initially, the FIR was lodged under Sections 188, 171G, IPC and Section 127(ka) of The Representation of the People Act, but after investigation, charge sheet has been submitted under Sections 177 and 188 of IPC as is clear from Annexure-10 to the writ petition. In the present case, very basis for impounding the passport of the petitioner is only pendency of a criminal case as stated above, but the fact remains that the competent Court has granted permission by passing a reasoned order and thus, it goes without saying that the reason disclosed by the Regional Passport

Officer, Ghaziabad for impounding the passport of the petitioner has no legs to stand.

15. In view of the discussion made here in above, this petition is disposed of with the direction to the Regional Passport Officer, Ghaziabad to re-consider the decision of impounding the passport of the petitioner, without taking note of the pendency of a criminal case, within a period of one month from the date of presentation of a certified copy of this order.

16. Before parting with the case, we feel it necessary in the ends of justice to direct the concerned Court below to decide the Criminal Case No. 430 of 2012 under Section 188 and 177 IPC, P.S. Mawana pending in the Court of Judicial Magistrate, Mawana, Meerut, in accordance with law, as expeditiously as possible, preferably within a period of 6 months from the date of presentation of a certified copy of this order.

17. Registry of this Court is directed to send a copy of this order to the learned District Judge, Meerut for compliance within a week from today.

18. With the above observations, this petition stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-C No. 16516 of 2019

AGME Marketing Pvt. Ltd. &Ors.
...Petitioners

Versus

Canara Bank &Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Pande

Counsel for the Respondents:
C.S.C., Sri Kartikeya Saran, Sri Arvind Srivastava

SARFAESI ACT,2002-Section 14; Transfer of Property Act,1882-Section 65A-Unregistered Rent agreement intending to create an interest over the secured asset for a period exceeding 3 years without reserving a right of re-entry - is violative of Section 65-A-Petitioners cannot resist action of bank.

Viewed in that light it is evident that the lessor intended to create an interest over the secured asset for a period exceeding three years and did not reserve a right of re-entry in case rent was not paid. Clause-7 is thus evidently in violation of the injunct comprised in clause (e) of sub-section (2) also. The Court consequently comes to the irresistible conclusion that the Rent Agreement did not meet the requirements placed by clauses (a) and (e) ofSection 65-A(2). (para 24)

B. Transfer of Property Act,1882-Section 107 read with Section 17 and 49 of the Registration Act,1908-lease exceeding one year has to be compulsorily registered under Section 107 of the Act,1882 read with Section 17 and 49 of the Registration Act,1908.

C. SARFAESI ACT,2002-Section 13(13)–restrain borrower from transferring by way of sale, lease or otherwise the secured asset after receipt of the notice u/s13(2) without prior written consent of the secured creditor.

The contention that the statutory restraint engrafted in Section 13 (13) of the SARFAESI Act operates only against the lessor/original debtor is misconceived. The creation of a tenancy is the formation of a contract based upon the action of two parties assenting to enter into a legal relationship. The acceptance

of this submission would not only be contrary to the plain legislative intent infusing that provision, it would also deprive it of rigour and purpose.(Para M)

Cases cited: -

1. Harshad Goverdhan Sondagar v. International Assets Reconstruction Company Limited and Others8 and Vishal N. Kalsaria v Bank of India

2. P.M. Kelukutti And Others v. Young Men's Christian Association and Others

3. Sanjeev Bansal v. Oman International Bank SAOG And Other

4. Gajraj Singh Vs. State Transport Appellate Tribunal

5. Vishal N. Kalsaria Vs. Bank of India and others

6.Anthony v. K.C. Ittoop & Sons

7. Sudarshan Trading Company Limited, Bangalore v.L. D' Souza. (E-4)

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri Rakesh Pande, learned Senior Counsel in support of the petition, Sri Arvind Srivastava, learned counsel has appeared for the Canara Bank while Sri Kartikeya Saran addressed submissions on behalf of the eighth respondent (the "**auction purchaser**"). The third and fourth respondents (the "**original borrowers**") although duly served as evidenced from the Affidavit of Service filed in these proceedings have not appeared. Learned Standing Counsel appeared for the respondent Nos. 5 to 7.

2. The petitioners claim to be tenants "holding over" pursuant to a lease deed executed by the original borrowers on 4 April 2012. They assail the order dated 21 February 2019 passed by the Debt Recovery Tribunal1 in proceedings instituted by Canara Bank2 referable to Section 14 of the **SARFAESI Act, 2002**. Challenge is also laid to the order dated 3 May 2019 as passed by the Debt Recovery Appellate Tribunal4 upholding the decision rendered by the DRT. The challenge before the Tribunal was to the initiation of action under Section 13 of the 2002 Act by the Bank. The petitioners assert that since they were tenants holding over under a valid lease executed in their favour by the original borrowers, in the absence of a valid termination of that tenancy the Bank could not divest them of possession. Both the D.R.T. as well as the D.R.A.T. have negatived the objections raised holding that the lease did not fulfill the conditions imposed by Section 65A of the Transfer of Property Act, 18825 and consequently the petitioners were not entitled to retain possession of the premises in question. Before proceeding to notice the rival submissions advanced, it would be appropriate to set out the following essential facts.

3. The original borrowers were extended various credit facilities by the Bank. In order to secure repayment of the loans and credit facilities so sanctioned, they created an equitable mortgage in favour of the Bank insofar as the premises in question are concerned on 24 March 2004. On 4 April 2012, the original borrowers are stated to have executed a "**Rent Agreement"** in favour of the petitioners. The premises in question [which shall hereinafter and for the sake of brevity be referred to as the "secured asset"] was let out to the petitioners at a yearly rate of 24,00,000/- and on a monthly rent of Rs.2,00,000/-. Admittedly, the Rent Agreement is an

unregistered instrument. The tenure of the lease was set out in Clause 1, which reads thus:

"NOW THIS DEED WITNESSETH AS FOLLOWS:

1. In pursuance of the said agreement and in consideration of rent hereby granted and the lessee's covenants hereinafter mentioned, the Lessor hereby demise unto the lessee the demise premises, to hold the demise premises unto the lessee for a period of 3 years commencing from the 4th day of April, 2012, at a yearly rent of 24 lakhs for which it is due, the first of such yearly rent shall be paid on every 1st week of the month in installment out of 12 equal installment which is Rs. 2 lakh. And the subsequent rent shall be paid on in the above described manner of every succeeding year regularly."

4. Clause 7 of the Rent Agreement has an important bearing on the questions which have been raised for the consideration of the Court and therefore is extracted herein below:

"7. That this rent agreement is valid for 3 years but the Lessee or their assigned shall have the right to continue the possession of the demise property until, the cancellation of rent agreement or unless the Lessee shall pay the all costs & expenses of the construction or renovation of the structure of the property which made by the Lessee on depreciated value of the cost of construction."

5. The Rent Agreement recites that the premises had been established by the original borrowers for the purposes of processing and treatment of raw hides and tanned leather. The Rent Agreement conferred a right on the petitioners here to use the property as well as the plant and machinery installed thereon for the purposes of manufacturing articles and the tanning of raw hides. The Rent Agreement also conferred a right on the petitioners to construct and renovate structures existing within the premises in question. It is significant to note that although a monthly rent was reserved, it did not contain any condition of re-entry. The issue of cancellation of the Rent Agreement was governed by Clause 7 exclusively.

6. On 26 May 2012, the loan account of the original borrowers was declared to be a Non Performing Asset (N.P.A.). Consequent thereto the Bank invoked the provisions of the 2002 Act and issued a notice under Section 13(2) of that Act on 9 October 2012. Symbolic possession of the mortgaged premises is stated to have been taken on 24 January 2013. The application of the Bank under Section 14 is was allowed on 2 November 2017. Since the State respondents were unable to deliver possession, the Bank instituted **Writ Petition No. 38518 of 2018** before this Court. In that writ petition, the petitioners here moved an application seeking impleadment. The petition itself was disposed of on 17 December 2018. The Division Bench while disposing of the petition issued a direction calling upon the District Collector and other police authorities to provide necessary aid to the Bank to enable it to take possession of the secured asset as expeditiously as possible. Dealing with the impleadment application which had been made by the petitioners here, the Division Bench observed thus:

"At this juncture, an impleadment application has been filed with regard to

the Arazi no. 471 by the AGME Marketing Private Limited and another stating therein that they are the tenants of the property vide agreement dated 04.04.2012 with the owner and, therefore, unless they are evicted in accordance with law, no proceeding for taking over possession can be initiated by the District Magistrate and, therefore, they are necessary party to be impleaded in this writ petition.

Learned counsel for the respondents filed a counter affidavit to the impleadment application stating therein that they have no locus as they were subsequent tenant. As the property was mortgaged on 24.03.2004 with the Bank the applicants have no right or locus standi in the secured assets to challenge the proceedings at this stage.

Sri Arvind Srivastava, learned counsel for the petitioner has laid emphasis upon the provision of Section 17 (4) of the Act which prescribes that the Debt Recovery Tribunal has power even to decide the tenancy right of any person with regard to secured assets.

Considering the aforesaid, we are not inclined to allow the applicants to be impleaded in the present proceedings as the applicants have a remedy to approach the Debt Recovery Tribunal, under Section 17 (4) of the Act, therefore, the impleadment application is rejected. "

7. The petitioners are thereafter stated to have approached the D.R.T. by filing Securitization Application No. 50 of 2019. It appears that at the relevant time, the Tribunal was not functioning at Allahabad constraining the petitioners to approach this Court by way of **Writ -C No. 4540 of 2019** That petition was disposed of on 8 February 2019 upon the Division Bench being informed that the vacancy in the office of the Presiding Officer as existing had since been filled and therefore it would be open to the petitioners here to move an urgency application before the Tribunal for grant of appropriate relief. The Court further provided that till 11 February 2019, no coercive action would be taken against the petitioners. The Securitization Application was ultimately dismissed by the D.R.T. in terms of its order dated 21 February 2019. While dismissing that application the Tribunal noted that the Rent Agreement in question was unregistered and that it was in violation of Section 65A(2)(c) of the 1882 Act. From a reading of that order it appears that Clause 7 of the Rent Agreement, extracted hereinabove, was construed to be a provision for renewal and therefore in violation of the injunct engrafted in Clause (c) of Section 65A(2).

8. It would also be relevant to note that in the interregnum the petitioners also appear to have moved an application before the District Judge, Kanpur Nagar referable to Section 9 of the **Arbitration and Conciliation Act, 1996** seeking an interim restraint against the original borrowers from interfering in the business being carried on by them from the secured asset. The District Judge passed an order of 26 February 2019 restraining the original borrowers from interfering with the possession of the petitioners and for maintenance of status quo. It is significant to note at this juncture that a similar application under Section 9 of the 1996 Act was previously filed before the District Judge, Kanpur Dehat. The original borrowers who appeared in those proceedings are stated to have conceded to the grant of interim protection to the petitioners here. Notwithstanding the

consent between parties, the District Judge, Kanpur Dehat, rejected the application on 30 May 2018 holding that since the Rent Agreement was unregistered, no relief could be granted to the petitioners. This order, it becomes pertinent to note, does not appear to have been brought to the attention of the District Judge, Kanpur Nagar who granted interim protection to the petitioners on 26 February 2019. Significantly, the order of the District Judge, Kanpur Dehat referred to above was also not disclosed in the writ petition. It has come on the record of these proceedings along with the Counter Affidavit which has been filed by the Bank. It is in that backdrop that Sri Srivastava, learned counsel has contended that the petitioners are guilty of suppression of material facts and that the instant writ petition thus must be dismissed on this ground alone. However, the Court shall deal with this submission at an appropriate juncture in this judgment.

9. Since the Securitization Application had come to be rejected by the D.R.T. on 21 February 2019, the petitioners preferred a Securitization Appeal before the D.R.A.T. on 8 March 2019. That appeal has been dismissed by the D.R.A.T. On 03 May 2019. The D.R.A.T while rejecting the Securitization Appeal has affirmed the view taken by the D.R.T. holding that Clause 7 of the Rent Agreement violated the provisions of Section 65A(2)(c). Additionally, it has held that since the period of three years when computed from the date of execution of the lease deed had admittedly expired on 3 April 2015, the petitioners had lost their right to be treated as statutory tenants. Clause 7, the D.R.A.T noted, was a continuance clause clearly in violation of Clause (c) of Section 65A(2).

10. Aggrieved by those orders, the instant writ petition came to be preferred before this Court on 14 May 2019. On 24 May 2019, a learned Judge of the Court after hearing submissions addressed on behalf of the respective parties, directed them to exchange affidavits and in the meanwhile provided that status quo would be maintained. That order of status quo has been extended on this petition from time to time.

11. Before this Court, the principal submission which has been addressed by Sri Rakesh Pande, the learned Senior Counsel appearing on behalf of the petitioners, was that the Rent Agreement was for a fixed tenure of three years and upon the expiry of that term the petitioners are liable to be treated as tenants holding over. Sri Pande contends that since the tenancy so existing has not been terminated in accordance with the provisions made in Section 106 of the **1882 Act**, the petitioners are not liable to be evicted from the premises in question. According to Sri Pande, a tenant holding over is entitled to enjoy the demised premises by virtue of the provisions made in Section 116 of the **1882 Act** and after the expiry of the term of three years, the lease executed in favour of the petitioners would be liable to be viewed as continuing from month to month till it is determined in accordance with Section 106. Sri Pande has submitted that both the D.R.T. as well as the D.R.A.T have clearly misconstrued Clause 7 of the Rent Agreement and have consequently committed a manifest illegality in holding it to be in violation of Section 65A(2)(c). According to Sri Pande, on a plain

reading of that clause, it is manifest that it confers no right of renewal. Sri Pande has further submitted that the proceedings as initiated by the Bank are liable to be quashed on account of a failure to comply with the provisions made in Section 14 of the 2002 Act. This submission is addressed since according to Sri Pande, the application made by the Bank was not supported by an affidavit as mandatorily required. It is his further submission that the application must also be quashed since the Bank did not advertise the steps initiated by it in newspapers having wide circulation. Sri Pande submits that these objections taken to the proceedings initiated by the Bank though specifically urged by the petitioners have neither been dealt with nor considered by either the D.R.T. or D.R.A.T. Sri Pande in support of his submissions has placed reliance upon the decisions rendered by the Supreme Court in Harshad Goverdhan Sondagar v. International Assets Reconstruction Company Limited And Others8 and Vishal N. Kalsaria v Bank of India9 to contend that the rights of a tenant do not stand effaced or overridden by the provisions of the 2002 Act. According to Sri Pande since the petitioners were tenants holding over whose lease had not been terminated in accordance with the provisions made in Section 106 of the 1882 Act, the Bank could not be permitted to take over possession of the secured asset. While Sri Pande submitted that in case the Court were to agree with the contention of the petitioners that clause 7 is not a provision for renewal, the matter be remitted back to the DRT, he was invited to establish that the Rent Agreement otherwise satisfied the requirements of Section 65-A (2) of the 1882 Act. Addressing submissions in that light and proceeding further, Sri Pande submitted that the Court must assume the lease to be of a monthly tenure. According to Sri Pande clause 7 of the Rent Agreement while not entitled to be viewed or accepted as evidence of a clause of renewal or continuance, it can be considered to adjudge the character of the possession of the petitioner. Dealing with clause (e), Sri Pande referred the Court to Clause 7 of the Rent Agreement and the provisions of termination made thereunder.

12. Countering these submissions, Sri Srivastava, learned counsel appearing for the Bank, has firstly contended that the petitioners are guilty of suppression of material facts and therefore are clearly disentitled from the grant of any relief by this Court while exercising its jurisdiction under Article 226 of the Constitution. It was contended that there was a deliberate concealment of facts by the petitioners who failed to disclose before the District Judge, Kanpur Nagar that their earlier application under Section 9 had already been dismissed. Sri Srivastava argued that the deliberate suppression of facts was continued when the order of the District Judge, Kanpur Dehat dated 30 May 2018 was not even disclosed in the writ petition. Elaborating further, Sri Srivastava submitted that the original borrowers never disclosed to the Bank the creation of the alleged tenancy in favour of the petitioners. He highlighted the facts that the original borrowers in their application filed under Section 17 of the **2002 Act** nowhere mentioned nor disclosed the factum of the tenancy created in favour of the petitioners. It was further highlighted that even in **O.A. No. 32 of 2013** in which the original borrowers appeared and filed their written statement on 18 November 2013, no

disclosure was made with respect to the creation of the tenancy in question. Sri Srivastava has vehemently contended that the creation of the tenancy is clearly a sham designed to defeat the lawful claim of the Bank. According to him the Rent Agreement has been antedated only to thwart the rights of the Bank to take possession of the secured asset. Sri Srivastava has also highlighted the fact that the petitioners are stated to have entered into business transactions with companies that were managed by the family members of the Directors of the original borrowers. What was essentially sought to be conveyed was that the petitioners here were merely a front of the original borrowers set up to defeat the claims of the Bank.

13. Addressing the Court on the merits of the questions raised, Sri Srivastava contended that the claim of the petitioners is liable to be negatived since evidently the terms of the Rent Agreement are in manifest violation of Section 65(2)(e) of the 1882 Act. Sri Srivastava contends that since Clause 7 created a right in favour of the petitioners to enjoy the secured asset in perpetuity, it must be held to be a lease exceeding a period of three years and thus being in clear violation of Clause (e). It was further submitted that the Rent Agreement would fall foul of Clause (e) also because it did not contain any clause of re-entry. Countering the submissions addressed by Sri Pande that the provisions of Section 14 were violated, Sri Srivastava has placed on the record an authenticated copy of the Affidavit filed by the Bank in Writ Petition No. 38518 of 2018 to establish that the application under Section 14 as moved by the Bank was, in fact, duly supported by an affidavit. Sri Srivastava has also drawn the attention of the Court to the advertisements taken out in various leading newspapers to submit that the Bank had scrupulously adhered to the requirements as placed by the 2002 Act. Sri Srivastava submits that since the Rent Agreement in question was admittedly an unregistered agreement, it was clearly in violation of the mandatory requirements put in place by Section 107 of the **1882 Act** and that consequently the petitioners were not entitled to the grant of any protection in law. Sri Arvind Srivastava has pressed in aid a decision rendered by a Division Bench of the Kerala High Court in **P.M. Kelukutti And Others v. Young Men's Christian Association And Others** to submit that since the lease in question was clearly violative of the provisions made in Section 65-A (2)(e), no protection could be accorded to the petitioners here from the action initiated by the Bank under the 2002 Act.

14. Sri Kartikeya Saran, learned counsel appearing for the auction purchaser, has submitted that the Rent Agreement which was unregistered was clearly hit by Section 49 of the Registration Act, 1908 and consequently no rights could be recognized as having been created in favour of the petitioners. Sri Saran has also drawn the attention of the Court to the fact that although four plots were auctioned by the Bank, the dispute in the present case relates to Plot No. 461 only and that the auction purchaser who has paid valuable consideration is being unjustifiably deprived of possession. Sri Saran has submitted that the auction proceedings were duly advertised and notices published in reputed newspapers. Sri Saran contends that both the D.R.T. as

well as the D.R.A.T. have rightly held that the Rent Agreement in question was violative of the provisions of Section 65 A and therefore the petitioners would clearly not be entitled to any relief. Sri Saran while reiterating the contentions addressed on behalf of the Bank that the lease was in clear violation of the provisions of Section 65-A drew the attention of the Court to a decision rendered by a Division Bench of the Delhi High Court in **Sanjeev Bansal v. Oman International Bank SAOG And Others** to submit that the petitioners had no right to assail the action initiated by the Bank or to challenge the auction conducted under the provisions of the 2002 Act.

15. The Court before proceeding to deal with the fundamental questions raised deems it appropriate to dispose of two preliminary issues at this juncture. Although it has been strenuously urged [and which allegation cannot perhaps be lightly brushed aside] that the petitioners suppressed and concealed material facts, the Court does not deem it expedient to non-suit the petitioners on this charge for the following reasons. Firstly this writ petition was entertained by a learned Judge of the Court and set down for admission after hearing counsels for respective parties. The issue of concealment and suppression which may have had some relevance on the question of this Court entertaining the writ petition does not appear to have been raised. Moreover parties have been heard at length by the Court and have made elaborate submissions on the merits of the matter. It would therefore be in furtherance of the ends of justice to lend a quietus to the controversy raised more so since this Court cannot be unmindful of the fact that the right of a financial institution seeking to recover public moneys is at stake. There is thus an evident expediency to render an authoritative pronouncement on the questions that have been raised and ring the curtains down on this litigation.

16. Insofar as the issue of the application of the Bank not being in accordance with the requirements of statute, suffice it to note that a copy of the counter affidavit filed by the Bank in the earlier round of litigation clearly puts the controversy to rest. Insofar as the issue of advertisement of proceedings is concerned, the same have also been brought on record. Sri Pande has failed to establish or prove that the newspapers in which these advertisements were published were not of wide circulation. More fundamentally he has also failed to prove that the petitioners had no knowledge of the proceedings initiated by the Bank.

17. That then takes the Court to consider the correctness of the findings returned by both the DRT and DRAT that clause 7 was a renewal clause which violated the provisions of clause (c) of Section 65A(2). In the considered view of this Court, the contention of Sri Pande on this facet of the controversy appears to be correct. On a plain reading of clause 7, it is evident that the lessee was conferred a right to continue in possession of the demised premises till the cancellation of the Rent Agreement itself or till the lessor paid costs and expenses of the constructions/renovation of the constructions raised thereon. Viewed in the backdrop of the plain language employed in that provision, it is evident that clause 7 was really not a clause envisaging renewal. The **Black's Laws**

Dictionary (Ninth Edition) defines the expression "renewal" in the following terms:

"renewal, n (17c). 1. The act of restoring or reestablishing. 2. parliamentary law. The introduction or consideration of a question already disposed of.-Also termed renewal of a motion. See restorative motion under MOTION(2), Cf. RECONSIDER. 3.The re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere tension of a previous relationship or contract. Cf. EXTENSION(1); REVIVAL(1)."

P Ramanatha Aiyer's in the **Law Lexicon** has defined the word "renew" and "renewal" as under: -

"Renew. "To renew", in its popular sense, is to refresh, revive, or rehabilitate an expiring or declining subject.

To continue in force for a fresh period; to make new.

The word "renewed", or "renewal" as applied to promissory notes in commercial and legal parlance, means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time, to restore to its former conditions an obligation on which the time of payment has been extended.

"Renew in relation to grant of lease is, to grant a new or to grant or give a lease for a fresh period" R.M. Mehta V. H.P.F.M.Co. Ltd., AIR 1976 Mad 194.203.

Generally a bill or note "is renewed by another being taken in its place, the parties and the amount being the same, though perhaps in some cases the interest due on the first is added" (per LINDLEY, L.J. Barber v. Mackrell, 68 LT 29: 41 WR

To "renew" a bill or note, does not, always not necessarily, import that a new or additional bill or notice is to be given; such an instrument is "renewed" merely by the time for its payment being extended (Russell v. Philips, 19 LJQB 297: 12 QB 892).

Renewal. A change of something old for something new. An act of renewing any permission, grant, etc. [S. 71, T.P. Act (4 of 1882)]

"The renewal of a "license" means, a new license granted by way of renewal". (Paterson's Licensing Acts: 7 Encyc.400,401).

The renewal of negotiable bill or note is regarded simply as a prolongation of the original contract.

The office of a "renewal", as it is termed, of a life, policy, is to prevent discontinuance or forfeiture."

18. Explaining the ambit of that expression, the Supreme Court in **Gajraj Singh Vs. State Transport Appellate Tribunal** held thus

35.This may be angulated from yet another legal perspective, namely, consequences that would flow from the meaning of the word `renewal' of a permit under Section 81 of the Act. Black`s Law Dictionary Sixth Edn., defines the word `renewal' at p. 1296 thus:

"The act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established. The substitution of a new right or obligation for another of the same nature. A change of something old to something new. To grant or obtain extension of;"

36. In P. Ramanatha Aivar's "The law Lexicon" (Reprint Edn. 1987), the

word `renewal' is defined at p. 1107 to mean "a change of something old for something new". The renewal of a `licence' means "a new licence granted by way of renewal". The renewal of a negotiable bill or note is regarded simply as a prolongation of the original contact. The office of a 'renewal', as it is termed, of a life policy, is to prevent discontinuance of forfeiture.

37. In Provash Chandra Dalui v. Biswanath Banerjee [1989 Supp (1) SCC 487] (SCC at p. 496] in para 14, this Court drew the distinction between the meaning of the words extension and renewal. It was held that:

"... a distinction between 'extension' and 'renewal' is chiefly that in the case of renewal, a new lease is required while in the case of extension the same lease continues in force during additional period by the performance of stipulated act. In other words, the word `extension' when used in its proper and usual sense in connection with a lease, means prolongation of the lease."

19. As is evident from the dictionary meaning ascribed to the word "renewal", it is principally an act of restoration or re-establishment. It has been defined to mean the recreation of a legal relationship and the replacement of an old contract with a new as opposed to a mere extension of a previous relationship or contract. Similarly it has been defined to mean to restore or to grant a new or fresh lease. It has also been defined to mean and convey a prevention of discontinuance or forfeiture. From the nature of the language which is employed in clause 7, it is manifest that it conferred a right on the petitioners to continue to occupy the secured asset even after the expiry of the original period of three years and to continue as such till the agreement was ultimately cancelled or till they were paid the costs of construction/renovation. In one sense the provision clearly appears to confer a right on the petitioners to occupy the premises in perpetuity or at least till the agreement was cancelled or costs of construction reimbursed to the petitioners. It, in any case, did not envisage a periodical extension or restoration of the original term of the lease. In the considered view of this Court, both the DRT as well DRAT have clearly erred, therefore, in construing clause 7 to be a provision for renewal. The conclusion so drawn by these authorities of the Rent Agreement being in violation of clause (c) of Section 65A(2) consequently does not merit acceptance.

20. The core issue which falls for consideration is whether the Rent Agreement of 04 April 2012 stands saved under the provisions of Section 65-A. Section 65-A reads thus: -

"**[65-A. Mortgagor's power to lease.-**

(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance,

(c) No such lease shall contain a covenant for renewal,

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made,

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]"

21. Explaining the interplay and impact of the provisions of the 2002 Act on the rights of a tenant as preserved and protected by the 1882 Act, the Supreme Court in **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others** expounded the legal position in the following terms: -

21. When we read the different provisions of Section 13 of the SARFAESI Act extracted above, we find that Sub-section (4) of Section 13 provides that in case the borrower fails to discharge his liability in full within sixty days from the date of notice as provided in subsection (2) of Section 13 of the SARFAESI Act, the secured creditor may take recourse to one or more of the measures mentioned therein to recover his secured debt. One of the measures mentioned in clause (a) in Sub-section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in Sub-section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Subsection (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in sub-section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in sub-section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub-section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65-A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub-section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease.

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Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain

time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300-A of the Constitution. As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals.

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25. The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor "under the provisions of the Act", the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period of 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realize the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case

the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

.....

32.When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr. Vikas Singh that the words 'any person' are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debt Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the SARFAESI Act to the lessee to protect his lawful possession under a valid lease.

....

34. We have perused the aforesaid decision of this Court in Transcore (supra) and we find that in that case, the question whether the secured creditor, in exercise of its rights under Section 13 of the SARFAESI Act, can take over possession of the secured asset in possession of a lessee under a valid lease was not considered nor was the question whether there is anything in the SARFAESI Act inconsistent with the right of a lessee to remain in possession of the secured asset under the Transfer of Property Act considered. In our view, therefore, the High Court has not properly appreciated the judgment of this Court in Transcore (supra) and has lost sight of the opening words of sub-section (1) of Section 13 of the SARFAESI Act which state that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without

the intervention of the court or tribunal, by such creditor in accordance with the provisions of the Act. The High Court has failed to appreciate that the provisions of Section 13 of the SARFAESI Act thus override the provisions of Section 69 or Section 69A of the Transfer of Property Act, but does not override the provisions of the Transfer of Property Act relating to the rights of a lessee under a lease created before receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by a borrower. Hence, the view taken by the Bombay High Court in the impugned judgment as well as in Trade Well so far as the rights of the lessee in possession of the secured asset under a valid lease made by the mortgagor prior to the creation of mortgage or after the creation of mortgage in accordance with Section 65A of the Transfer of Property Act is not correct and the impugned judgment of the High Court insofar it takes this view is set aside.

.....

36. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.

22. The legal position of the rights of a tenant not being derogated or completely annihilated by the provisions of the 2002 Act was reemphasized by the Supreme Court in **Vishal N. Kalsaria Vs. Bank of India and others** where the following observations were made: -

30. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year to year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral agreement. According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-

tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself nugatory. If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the landlord. In light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non registration of the tenancy deed against the tenant.

....

37. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act. The expression "any other law for the time being in force' as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State legislatures. It can only extend to the laws operating in the same field.

....

40. In view of the above legal position, if we accept the legal submissions made on behalf of the Banks to hold that the provisions of SARFAESI Act override the provisions of the various Rent Control Acts to allow a bank to evict a tenant from the tenanted premise, which has become a secured asset of the bank after the default on loan by the landlord and dispense with the procedure laid down under the provisions of the various Rent Control Acts and the law laid down by this Court in a catena of cases, then the legislative powers of the state legislatures are denuded which would amount to subverting the law enacted by the State Legislature. Surely, such a situation was not contemplated by the Parliament while enacting the SARFAESI Act and therefore, the interpretation sought to be made by the learned counsel appearing on behalf of the Banks cannot be accepted by this Court as the same is wholly untenable in law.

23. While the Court is conscious of the fact that the Rent Agreement is unregistered and consequently its terms cannot be read in evidence of a lease validly created in favour of the petitioners, it must necessarily scrutinize the instrument for the limited purpose of ascertaining whether its terms were in accord with the provisions made in Section 65A (2) of the 1882 Act. This would clearly be within the permissible territory of what has legally come to be defined as a "collateral purpose". In doing so, the Court is really not adjudicating upon the rights of the lessor or lessee based upon the provisions contained in that instrument but only looking at it from the periphery in order to ascertain whether it would be entitled in law to be recognised as being in conformity with Section 65A(2) of the 1882 Act.

24. It is not disputed that the unregistered Rent Agreement came to be

executed between the parties after the creation of the mortgage in favour of the Bank. A lease of mortgaged property binds a mortgagee provided it is established to not fall foul of the provisions made in sub-section (2) of Section 65-A. The requirement of a lease of immovable property for a term exceeding one year being compulsorily registered cannot possibly be disputed. That is clearly the mandate flowing from Section 107 of the 1882 Act read with Sections 17 and 49 of the Registration Act. In the present case the rent agreement is stated to have created a lease in favour of the petitioners initially for a period of three years. It thus, clearly fell within the ambit of Section 107 of the 1882 Act read with Sections 17 and 49 of the Registration Act. Clause (a) of Section 65A(2) requires a lease made in the ordinary course of management of the property to be in accord with any local law, custom or usage. The expression 'local law' would clearly bring within its ambit both the 1882 Act as well as the Registration Act. Since the Rent Agreement indubitably fails to comply with a mandatory statutory requirement placed in terms of the enactments aforementioned, it is manifest that it does not satisfy the provisions made in Clause (a). Even if the terms of the lease were scrutinized for the collateral purpose of testing whether the provisions made in Section 65-A were not violated, the Court notes that in terms of Clause-7, a lease interest over the secured asset in perpetuity appears to have been purported to be created in favour of the petitioners. Clause-7 intended to confer a right on the lessee to continue in possession of the secured asset until cancellation of the Rent Agreement or till such time as the petitioners were paid all costs and expenses of the construction/renovation undertaken over the property. Clause-7 does not clarify at whose instance the Rent Agreement could be cancelled. A reading of the Rent Agreement further establishes that no right of termination appears to have been specifically reserved in favour of the lessor. The lease, therefore, appears to have been created with the intent of clothing the petitioners with a right to occupy the premises not only beyond the period of three years but at their option solely. Viewed in that light it is evident that the lessor intended to create an interest over the secured asset for a period exceeding three years and did not reserve a right of re-entry in case rent was not paid. Clause-7 is thus evidently in violation of the injunct comprised in clause (e) of sub-section (2) also. The Court consequently comes to the irresistible conclusion that the Rent Agreement did not meet the requirements placed by clauses (a) and (e) of Section 65-A (2).

25. Since the Rent Agreement is evidently in violation of the restraints and conditions placed by Section 65-A, it cannot possibly be recognised as being saved. It consequently does not bind the mortgagee, namely, the Bank. Dealing with a similar situation of a violation of the mandatory provisions of Section 65A and its consequential impact on the rights of a lessee, a Division Bench of the Kerala High Court in **P.M. Kelukutty and others Vs. Young Men's Christian Association and others**15 held: -

"In View of the aforesaid discussion, the Apex Court in Viashal N. Kalsaria's case (supra) has held that once tenancy is created the tenant can be evicted only after due process of law as described

under the Rent Control Act. For the purpose of the present case, it is not necessary to go into the issue as to whether the appellants could have been evicted only under the provisions of the Kerala Rent Control Laws. The proposition as laid down in Vishal Kalsaria's case (supra) has to read as proposition laying down that valid tenancy cannot be terminated by resorting to Section 14 of the 2002 Act. We are not to take any other view in the present case in view of the pronouncement of the Apex Court as noted above. The question to be considered in the present case is as to whether the lease on the basis of tenancy as being claimed by the appellants are valid leases in the event the leases are to be held in accordance with Section 65A(2) of the 1882 Act obviously, appellants cannot be dispossessed in exercise of the power under Section 14 of the 2002 Act. As noticed above, in the present case the terms and conditions of the lease deed which is claimed by the appellants and brought on record as Exts. P-4 to P-16 indicate that leases were executed (1) for a period ranging from 51 to 99 years (ii) for a period containing renewal clause (iii) on payment of advance amount of several lakhs refundable interest security. Certain terms and conditions in the lease deed dated 27.12.2004 are relevant to be noticed herein below:

21. In view of the pronouncements made by the Apex Court in Harshad Govardhan Sondagar's case (supra) that protection from dispossession under Section 14 of the 2002 Act is available only to a lessee who claims to have executed a lease deed after creation of the mortgage in accordance with the provisions under Section 65A. Leases which are claimed by the appellants are not in acceptance with Section 65A(2), we are afraid that appellants are not entitled to have protection from dispossession under the 2002 Act. Issue Nos. I to V are answered in the following manner:

(1) Agreement dated 27.12.2004, Ext. P-3 is neither a mortgage deed nor an integral part of mortgage created by memorandum dated 31.12.2004 depositing title deeds, Exhibit P-3 however, can be relied for finding out consent by mortgagee for execution of lease deed after creation of the mortgage.

(2) Leases executed in favour of the appellants are leases who have been executed with the permission of the mortgagee which is evident by Annexure III to the Schedule A of agreement dated 27.12.2004, Ext. P-3.

(3) Leases granted after execution of the mortgage has to conform the provisions of Section 65A(2) of the 1882 Act. No contrary intention modifying any of the conditions in Section 65A(2) are present in the facts of the present case.

(4) Consent of the mortgage for execution of the lease deed cannot be treated as consent for execution of a lease contrary to the conditions as enumerated in Section 65A(2) of the 1882 Act.

(5) Lease in favour of the appellants not being in accordance with Section 65A(2) of the 1882 Act, appellants are not entitled to for protection from dispossession under Section 14 of the 2002 Act."

26. Another Division Bench of the Delhi High Court in **Sanjeev Bansal Vs. Oman International Bank SAOG** and others dealing with an identical question held: -

"6. Manifestly the said unregistered lease was created for the alleged unlimited period through unregistered lease deed in complete contravention of

Section 65-A of the Transfer of Property Act. As per the said provision of Section 65-A, the lessee can enjoy the protection if the lease is created by the mortgagor in conformity with the mandate of requirements laid down in Section 65-A of TP Act and not otherwise. Neither the mortgagor nor the lessee can defeat the right of mortgagee and no lessee can claim any protection unless his tenancy is as per the requirements of Section 65-A of Transfer of Property Act. The present petition is devoid of any merits. We would not like to interfere in the orders passed by the DRAT."

27. It is thus manifest that the instrument in question in the absence of being found to exist within the protective umbrella of Section 65A(2) cannot bind the Bank and consequently cannot entitle the petitioners to resist the action taken by it under the provisions of the 2002 Act.

28. As observed hereinbefore since the lease deed was unregistered, the stand of the petitioners of a lease of three years being created in their favour cannot be countenanced. The non-registration of the instrument clearly forbids the Court from looking into its terms in order to ascertain the terms of the contract between the parties. The instrument cannot be recognised in law to be the repository of the bargain between the parties. It can at best and is well settled be viewed only for collateral purposes. That then raises the question of the nature of tenancy if at all which stood created in favour of the petitioners.

29. As has been repeatedly held, an unregistered instrument purporting to create a lease for a period exceeding one year is inadmissible in evidence. However the matter cannot possibly rest here since construing the provisions of the 1882 Act, Courts have also recognised the creation of a lease by implication and attendant circumstances. The issue of a lease by inference coming into existence and being created was dealt with by the Supreme Court in **Anthony v. K.C. Ittoop & Sons** where the legal position was explained as under: -

"8. The lease-deed relied on by the plaintiff was intended to be operative for a period of five years. It is an unregistered instrument. Hence such an instrument cannot create a lease on account of three-pronged statutory inhibitions. The first interdict is contained in the first paragraph of Section 107 of the Transfer of Property Act, 1882 (for short "the TP Act") which reads thus:

"107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving an yearly rent, can be made only by a registered instrument."

(emphasis supplied)

9. The second inhibition can be discerned from Section 17(1) of the Registration Act 1908 and it reads thus: (only the material portion)

"17.Documents of which registration is compulsory. -(1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:

(a)-(c) * * *

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

10. The third interdict is contained in Section 49 of the Registration Act which speaks about the fatal consequence of non-compliance of Section 17 thereof. Section 49 reads thus:

"49. Effect of non-registration of documents required to be registered.- No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

[Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.]"

No endeavour was made by the counsel to obviate the said interdict with the help of the exemptions contained in the proviso.

11. The resultant position is insurmountable that so far as the instrument of lease is concerned there is no scope for holding that appellant is a lessee by virtue of the said instrument. The court is disabled from using the instrument as evidence and hence it goes out of consideration in this case, hook, line and sinker (vide Smt. Shantabai v. State of Bombay: [AIR 1958 SC 532; 1959 SCR 265], Satish Chand Makhan vs. Govardhan Das Byas, [(1984) 1 SCC 369] and Bajaj Auto Ltd. v. Behari Lal Kohli [(1989 4 SCC 39:AIR 1989 SC 1806].

12. But the above finding does not exhaust the scope of the issue whether appellant is a lessee of the building. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first para has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third para can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second para. Thus, dehors the instrument parties can create a lease as envisaged in the second para of Section 107 which reads thus:

"All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

13. When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.

14. When it is admitted by both sides that appellant was inducted into the possession of the building by the owner

thereof and that appellant was paying monthly rent or had agreed to pay rent in respect of the building, the legal character of appellants possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact situation of this case, cannot be placed anything different from that of lessor and lessee falling within the purview of the second paragraph of Section 107 of the TP Act extracted above. From the pleadings of the parties there is no possibility for holding that the nature of possession of the appellant in respect of the building is anything other than as a lessee.

15. Shri P.Krishnamoorthy learned Senior Counsel contended that a lease need not necessarily be the corollary of such a situation as possession of the appellant could as well be permissive. We are unable to agree with the submission on the fact-situation of this case that the appellants possession of the building can be one of mere permissive nature without any right or liabilities attached to it. When it is admitted that legal possession of the building has been transferred to the appellant there is no scope for countenancing even a case of licence. A transfer of right in the building for enjoyment, of which the consideration of payment of monthly rent has been fixed, can reasonably be presumed. Since the lease could not fall within the first paragraph of Section 107 it could not have been for a period exceeding one year. The further presumption is that the lease would fall within the ambit of residuary second paragraph of Section 107 of the TP Act.

16. Taking a different view would be contrary to the reality when parties clearly intended to create a lease though the document which they executed had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. Non registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains un-rebutted."

30. If one bears the principles enunciated by the Supreme Court in **Anthony** in mind, it is evident that the petitioners would be liable to be recognised as having been inducted into the demised premises on a monthly tenancy. Undisputedly the annual rent of Rs. 24 lakhs as provisioned for under the agreement envisaged the payment of that amount on a monthly basis. It is also not disputed before this Court that the petitioners were inducted into the premises with the assent of the landlord. The payment of monthly rent has also not been questioned. In view of the above the tenancy as created in favour of the petitioners would clearly fall within the ambit of the second part of Section 107 of the 1882 Act. The Court comes to this irresistible conclusion in light of the principles elucidated in **Anthony** where it was held that the mere fact that an unregistered instrument came to be executed between the parties would not stand in the way of the Court determining that there was, in fact, a lease which came to be created otherwise than through such a deed. In **Anthony** it was further held that mere non-registration of the instrument would only lead to the

consequence of the Court recognising that no lease exceeding one year was created and secondly that the instrument itself was of no legal consequence. However and significantly it was held that notwithstanding the aforementioned consequences it could still be presumed that a lease not exceeding one year came into existence.

31. The Court may then consider the rights of the petitioners proceeding on the assumption that a monthly tenancy came to be created in their favour. If this contention were to be accepted, it would necessarily bid the Court to presume the creation of a tenancy on the first date of every month and its expiry on the last date of that month. The problem, however, in considering whether this tenancy would stand saved and not be contrary to the provisions of the 2002 Act arises when one takes into consideration the injunction as engrafted in Section 13(13) thereof. Subsection (13) restrains a borrower from transferring by way of sale, lease or otherwise the secured asset after receipt of a notice under Section 13(2) without the prior written consent of the secured creditor. Undisputedly even a monthly tenancy can be recognised to have come into existence only as an outcome of a bilateral and consensual act of parties. The acceptance of the contention addressed at the behest of the petitioners compels this Court to view the creation of a monthly tenancy by the original borrower in favour of the petitioners at the beginning of every month. This would logically lead to the creation of a monthly tenancy even after 09 October 2012 when the Section 13(2) notice came to be issued. The creation of a monthly tenancy cannot be viewed as an extension or renewal of an earlier term. It essentially and in law amounts to the creation of a fresh tenancy at the beginning of every month. If this submission of a monthly tenancy as urged on behalf of the petitioners is accepted, it would lead to a logical conclusion of a monthly tenancy being created and coming into existence even after the Section 13(2) notice came to be issued. It is not the case of the petitioners that the so called monthly tenancy came to be created with the prior and written consent of the secured creditor. Viewed in that light it is manifest that the provisions of Section 13(13) would stand breached. The contention that the statutory restraint engrafted in Section 13 (13) of the SARFAESI Act operates only against the lessor/original debtor is misconceived. The creation of a tenancy is the formation of a contract based upon the action of two parties assenting to enter into a legal relationship. The acceptance of this submission would not only be contrary to the plain legislative intent infusing that provision, it would also deprive it of rigour and purpose.

32. That then takes the Court to consider the argument addressed on behalf of the petitioners that they were tenants holding over. It would at the very outset be important to underline that the petitioners insofar as this aspect is concerned have clearly taken a vacillating and contradictory stand prior to the filing of the instant writ petition. Before the DRT and DRAT it was asserted that the lease was initially for a period of three years and extendable thereafter on mutual consent on a month-to-month basis. This is evident from the averments made in paragraph 6.4 of the Securitization Application as filed before the DRT which reads thus:-

"6.4 That on 04.04.2012 the Respondent No.3 through Respondent No. 4 entered into

an agreement with applicant no.1(represented by Applicant no.2) whereby the open land of respondent no. 2 situated at Arazi No. 461 Fatehpur Roshnai, Rania, Kanpur Dehat was let out on rent @ 24 lacs per annum for which lease deed was executed between parties. Copy of the rent agreement dated 04.04.2012 is being annexure hereto & marked as **ANNEXURE NO.A-3** to this S.A.

It is further submitted that in said Rent Agreement it was clearly provided that Lease Deed will be initially for a period of 3 years shall be extended thereafter on mutual consent month to month basis at the payment of rent."

33. A similar stand was taken before the DRAT in the Securitization Appeal instituted. The assertions made in clause 5.4 of that appeal are for the sake of convenience extracted herein below:-

"6.4 That on 04.04.2012 the Respondent No.3 through Respondent No. 4 entered into an agreement with Appellant no.1(represented by Appellant no.2) whereby the open land of respondent no. 2 situated at Arazi No. 461 Fatehpur Roshnai, Rania, Kanpur Dehat was let out on rent @ 24 lacs per annum for which lease deed was executed between parties. Copy of the rent agreement dated 04.04.2012 is being annexure hereto &marked as **ANNEXURE NO.A-3** to this Appeal.

It is further submitted that in said Rent Agreement it was clearly provided that Lease Deed will be initially for a period of 3 years shall be extended thereafter on mutual consent month to month basis at the payment of rent."

34. However in the application moved under Section 9 of the 1996 Act, the petitioners appear to have taken a completely distinct stand. Before the District Judge Kanpur Dehat, the argument addressed was that the Rent Agreement was terminable only when the lessor paid to the petitioners' costs of the plant and machinery as well as the constructions raised thereon. Similarly in the Section 9 application which was made before the District Judge Kanpur Nagar an identical stand was struck as is evident from the averments made in paragraph-7 of that application which is extracted herein below:-

"That it is deemed necessary to be mentioned here that no termination of the Rent lease can be made by the respondent-company until and unless the respondent-company shall make a payment of all costs and expenses of the construction or renovation of the structure situated at Factory Premises No. 461, Fatehpur Roshnai, Rania, Kanpur Dehat as per Rent Agreement dated 04.04.2012."

35. From the above narration of facts it is thus evident that while in the arbitration applications, the petitioners sought to contend that the lease was to continue till such time as the lessor paid over the costs of plant and machinery and the constructions raised over the demised premises and consequently being liable to be viewed as a continuing lease not restricted to the initial period of three years, before the DRT and DRAT it was asserted that upon the expiry of the initial term of three years, the lease interest assumed the character of a monthly tenancy.

36. However the contradictory stand as struck by the petitioners need not detain this Court. This since the Court is of the firm view that the submission of Sri Pande based on the principles of holding

over is clearly fallacious. A tenant is stated to be one holding over when he continues to occupy the demised premises after the expiry of the original term of the lease. Coupled with this and in terms of Section 116 is the requirement of the continued possession being with the assent of the lessor and in the absence of an agreement to the contrary. That, however, takes the Court back to Clause 7 of the Rent Agreement which has already been recognised as purporting to confer a right on the petitioners to occupy the demised premised in perpetuity. If that be the correct position there would be no occasion for this Court to presume the petitioners' continuance in the secured asset beyond the original term of the lease.

37. Alternatively and bearing in mind that the Rent Agreement was unregistered, it would as a logical corollary compel the Court to hold that no initial term of lease was ever fixed and in any case is not legally recognizable. The submission of holding over is based on the assumption that the lease was to initially operate for a period of three years where after the petitioners continued to occupy the premises from month to month. This also appears to be the underlying theme of the objections taken before the DRT and DRAT. However and as has been noted above this argument itself proceeds on a legally impermissible assumption. Since no original tenure of lease is entitled to be recognised as existing in law, the principles of holding over can possibly have no application.

38. Further and as would be evident from the discussion which follows, the contention of a monthly tenancy as urged on behalf of the petitioners itself undercuts the line of argument adopted. The argument of a monthly tenancy would itself be clearly incompatible with the application of the principle of holding over. As noted above the stand of the petitioners was that they became tenants on a monthly basis. If they be correct in this submission, the logical corollary would be the creation of a tenancy every month. Viewed in this light and since a tenancy would spring into existence on the first day of every month, they could never be recognised as continuing to occupy the demised premises after the expiry of an initially reserved period of lease. In the case of a monthly tenancy a determination would not occur since at the beginning of every month a fresh tenancy would come into existence. Dealing with the concept of holding over a Division Bench of the Karnataka High Court in **Sudarshan Trading Company Limited, Bangalore v. L. D'Souza** held as under:-

Re: Point (b):

22. The question is whether after the expiry of the lease under Ext. P. 1 there is a tenancy by holding-over. If there was one, it would be month to month one requiring for its determination 15 days' notice expiring with the end of the tenancy month. It is no doubt true that there are some statements in the plaint itself that there was such a month to month tenancy after the expiry of Ext. P. 1. Is that, by itself, conclusive?

23. If, after the expiry of the period of lease or after its determination, a tenant merely holds over without the landlords, consent there is no tenancy of any kind at all. If in such case, the tenant continues in possession without landlord's consent he becomes what in English law is called a "tenant by sufferance". This is really no,

tenancy at all in the strict sense and requires no notice to determine it, the expression being merely a fiction to avoid the continuance of possession operating as a trespass. It is different from the concept of a tenancy at will which arises by implication of law in certain cases of permissive possession. No notice is necessary to terminate a tenancy at sufferance.

24. But the case of tenancy by holding over is different and is governed by the provisions of Section 116, T. P. Act. Tenancy by holding over is a creature of a bilateral, consensual act and does not come into existence by a mere unilateral intendment or declaration of one of the parties.

25. As to the conditions requisite for a tenancy by holding over under Section 116, T. P. Act, Supreme Court observed: Bhawanji Lakhamshi v. Himattal Jamnadas Dani ((1972) 1 SCC 388 : AIR1972 SC 819):

"9. The act of holding over after the expiration of the term does not create a tenancy of any kind ..... What the section contemplated is that on one side ' there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to continuance of possession by the landlord expressed by acceptance of rent or otherwise."

31. If as in the present case, there is no fresh contract of tenancy between the parties - and such a contract cannot come into existence without the consent of both - the position is that the position clearly falls under Section 111(a), T. P. Act, and no notice under Section 106 becomes necessary as there is no month to month tenancy by holding over. This would be so notwithstanding the unilateral assertions of the respondent in the plaint that there was a month to month tenancy. In all such cases the respective cases of both parties, and their pleadings as a whole had to be examined and a conclusion arrived at as to the existence of holding over tenancy on the basis of the material on record."

39. It is thus evident that the submissions addressed on the basis of Section 116 of the 1882 Act are thoroughly misconceived.

Summation

A. There was no violation of the provisions of Section 14 of the 2002 Act since the application is shown to have been duly supported by an affidavit. The petitioners have also failed to prove the charge that the proceedings were not duly advertised in accordance with the provisions of the 2002 Act. They have, in any case, failed to prove that they were unaware of the proceedings initiated.

B. The petitioners have struck a vacillating and contradictory position insofar as the tenure of the lease is concerned. While in the Section 9 applications they took the stand that the lease was terminable only upon the lessor paying for the plant/machinery and existing structures, before the DRT and DRAT it was contended that the lease was for a period of three years upon expiry of which they continued as tenants from month to month.

C. The assertion of the petitioners that the lease initially was for a period of three years upon the expiry of which they become tenants de novo cannot possibly be accepted on account of the Rent Agreement being in admitted violation of Sections 107 of the 1882 Act read with Sections 17 and 49 of the Registration Act 1908. In the absence of the Rent Agreement being registered, as mandatorily required in law, it is not possible

for the Court to look into the term and tenure of the lease as enshrined in the Rent Agreement. It cannot possibly be admitted in evidence or countenanced in law.

D. As a necessary consequence of the Rent Agreement being unregistered, the petitioners cannot be recognised to have lawfully held the property either for a terms of three years or in perpetuity as claimed at one stage.

E. In light of the Rent Agreement being unregistered, it clearly falls foul of clause (a) of Section 65A(2). The Rent Agreement fails to abide by the requirement of compulsory registration under the applicable local laws namely the Transfer of Property Act, 1882 and the Registration Act, 1908.

F. Since the parties purported to create a lease interest exceeding a period of thee years, it also falls foul of clause (e) of Section 65A(2). The absence of a clause of re-entry also renders the Rent Agreement violative of clause (e) of Section 65A (2).

G. In light of the Rent Agreement having been found to be violative of clauses (a) and (e) of Section 65A(2), the lease is not protected by the provisions of the Transfer of Property Act, 1882 and does not bind the mortgagee.

H. Although the premises were taken for manufacturing purposes, in the absence of a registered instrument having been drawn, the petitioners, at best, can be recognised as having been inducted as tenants from month to month.

I. The monthly tenancy can be assumed in light of the conduct of the lessor and lessee where the petitioners are stated to have occupied the premises with the assent of the respondent Nos. 3 and 4 on the payment of a monthly rent.

J. The monthly tenancy bids the Court to presume a tenancy coming into existence on the first day of each month and expiring on the last date of that month. Parties by way of a bilateral act would be deemed to have created such a tenancy every month.

K. If the creation of monthly tenancy as urged on behalf of the petitioners is accepted, it would as a necessary corollary also compel the Court to recognise the creation of a tenancy even after the notice issued under Section 13(2) of the 2002 Act.

L. The creation of such a tenancy would clearly be violative of the statutory injunct engrafted in Section 13 (13) of the 2002 Act. On this ground also the petitioner must be held disentitled to the grant of any relief or to assail the action initiated by the Bank.

M. The contention that the statutory restraint engrafted in Section 13 (13) of the SARFAESI Act operates only against the lessor/original debtor is misconceived. The creation of a tenancy is the formation of a contract based upon the action of two parties assenting to enter into a legal relationship. The acceptance of this submission would not only be contrary to the plain legislative intent infusing that provision, it would also deprive it of rigour and purpose.

N. Section 116 of the Transfer of Property Act, 1882 is clearly not attracted. Since the petitioners claim to be tenants occupying the premises on the basis of a monthly tenancy, the question of holding over cannot possibly arise. The principle of holding over can have application only in a case where the terms of the original lease expires and the lessee continues to occupy the premises with the assent of the lessor.

O. Once it is held that the lease violated the restrictions imposed by clauses (a) and (e) of Section 65A(2), it ceases to bind the mortgagee and does not protect the possession of the petitioners.

The contention of a monthly tenancy being created would undisputedly result in violation of the mandatory provisions engrafted in Section 13(13) of the 2002 Act. On both counts, therefore, the petitioners can neither be recognised in law to be in lawful occupation nor can they thwart the action of the Bank initiated under the 2002 Act.

P. Although the DRT and DRAT were not correct in construing Clause 7 of the Rent Agreement to be a clause for renewal thus violating clause (c) of Section 65A (2) and would not merit acceptance, in light of the conclusions recorded above the petitioners are not entitled to any relief.

40. In light of the aforesaid discussion and the conclusions recorded hereinabove, the challenge to the impugned orders, to the extent noted above, fails. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2019

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ-C No. 2810 of 2004

State of U.P. ...Petitioner
Versus
Haushala Prasad ...Respondent

Counsel for the Petitioner:
S.C.

Counsel for the Respondent:
Sri Durga Prasad, Smt. D. Tiwari, Sri M.N. Singh, S.C., Sri V.K. Singh

A. U.P. Imposition of Ceiling on Land Holdings Act 1960: Sections 4A, 5(6), 10(2), 12A; Civil Procedure Code, 1908: Order 47 Rule 1, Section 151 - Review on merits - power must have sanction of statute specifically or by necessary implication.

Evaluation of land "capable of" being utilised for sowing two crops - determinative factor of whether land should be characterized as irrigated or unirrigated. Order of the Prescribed,Authority upheld in appeal. Review application allowed by Appellate Authority on merits. In the absence of a specific provision conferring power of review upon the authorities under the Act, it cannot be recognized as an inherent power. (Para 7)
Distinction between a "merit review" and "procedural review". The mistake or error must be established to be glaring, patent, substantial and of a compelling character. A petition for review is not a remedy of rehearing or reconsideration of issues which stand finally settled by the judgment or order. The power of "procedural review", is a genre of review that has been judicially recognised to inhere in all quasi- judicial authorities.
(Paras 10, 11, 12)

Appellate Authority did not record any finding that the entire land holding of the respondent was unirrigated, any finding that may dislodge the record of fact by the Prescribed Authority that the land fell into the command area U/S 4A. The authorities did not evaluate whether the land was in fact "capable of" being utilised for sowing two crops, which is a determinative factor of whether it should be categorized as irrigated or unirrigated. (Para 18)

Precedent followed: -

1. Patel NarshiThakershi Vs. Pradumansingh ji Arjunsinghji, [1970 AIR (SC) 1273] (Paras 8,9)

2. U.P. Steels Limited Vs. State of Uttar Pradesh, [2003 (1) AWC 145] (Para 7) no power of review can be recognized to inhere in authorities under the Act.

3. Lily Thomas Vs. Union of India, (2000) 6 SCC 224 (Para 10)

4. Kapra Mazdoor Ekta Union Vs. Birla Cotton Spg. Wvg. Mills Ltd., (2005) 13 SCC 777 (Para 12)

Precedent distinguished: -

Ram Autar and Others v. The State of U.P., [1989 RD page 338] (Paras 6, 7) (E-4)

(Delivered byHon'ble Yashwant Varma, J.)

1. Heard Sri Sanjay Goswami, the learned Additional Chief Standing Counsel, for the petitioner and Sri M.N. Singh who has appeared for the contesting respondent. The Court notes that an application for impleadment had been made on behalf of one Rama Shankar Singh who is stated to be the vendee in a sale deed dated 03 February 1983 executed by the respondent here. When the matter has been taken up, none has appeared to press that application. The application for impleadment is consequently rejected. The Court notes that even otherwise no prejudice as such stands caused to the applicant since as would appear from the subsequent paragraphs of this decision both the Prescribed Authority as well as the Appellate Authority have recognised the bona fides underlying the sale transaction in question and on the basis thereof had upheld the exclusion of the area comprised in the sale deed dated 03 February 1983 while computing the land held by the respondent in excess of the ceiling limit.

2. The State has petitioned this Court challenging the orders dated 21 December 2000 passed by the Prescribed Authority as affirmed by the Additional Commissioner in appeal in terms of its judgment dated 29 July 2002. Additionally, challenge is laid to the order of 18 October 2002 in terms of which the Additional Commissioner, purportedly exercising powers of review, has recalled his earlier judgment of 29 July 2002 and also brought to a closure all proceedings which had been initiated against the respondent tenure holder under the **U.P. Imposition of Ceiling on Land Holdings Act 1960**. Sri Goswami, the learned Additional Chief Standing Counsel has, however, in the course of his submissions stated that the challenge in the instant petition stands confined to the order of 18 October 2002 passed on the review petition as preferred by the respondent. It is in the above backdrop that the petition was set down for hearing. The facts in brief which may be noticed and would be relevant for disposal of the present writ petition are as follows.

3. The respondent tenure holder was put to notice in terms of Section 10(2) of the Act on 12 March 1993 by the State with respect to a proposed adjudication being undertaken in respect of surplus land held by him. Pursuant to that notice the respondent tenure holder submitted a reply which was ultimately considered on merits and the surplus land computed by the Prescribed Authority by an order of 21 December 2000. While passing that order the Prescribed Authority upheld the bona fides of the transaction as embodied in the sale deed of 03 February 1983 and consequently proceeded to grant benefit of Section 5(6) of the Act to the tenure holder. Dealing with the nature of the land, the Prescribed Authority referring to the revenue records of 1378 and 1399 Faslis proceeded to record that the land was irrigated and its soil was capable of bearing two crops. On the strength of these findings it proceeded to compute the land which was liable to be recognised as being held by the landholder in excess of

the ceiling limit prescribed. This decision of the Prescribed Authority was assailed by the landholder as well as the State. Both the appeals were dismissed by the Additional Commissioner on 29 July 2002. The landholder however appears to have filed an application for review of this order on 02 August 2002. It is not disputed before this Court that the application was purportedly filed under Section 151 CPC. This application has been allowed by the Appellate Authority in terms of its order of 18 October 2002. Ruling on the question of whether a power to review vested in it, the Appellate Authority takes resort to Section 151 CPC to hold that a quasi-judicial authority must be recognised to have an inherent power to review and correct errors apparent on the face of the record. The Appellate Authority in terms of the order impugned has ultimately proceeded to hold that the majority of the land holding of the respondent was liable to be viewed as unirrigated and had only borne a single crop. It has, on the basis of these findings, come to hold that the proceedings initiated against the landholder were liable to be dropped. The Appellate Authority in terms of the operative directions framed has brought the proceedings initiated under the Act to a close.

4. Assailing this order Sri Goswami, the learned Additional Chief Standing Counsel, contends that the theory of inherent power as recognised to be available with the Appellate Authority is a view which is clearly untenable. According to Sri Goswami, the power to review must be found to be statutorily conferred expressly or by necessary implication. According to him in the absence of a statutory conferment of such power, a quasi-judicial authority cannot be recognised to have the power to review its earlier decision. According to Sri Goswami the power which was exercised by the Appellate Authority in the facts of this case also does not meet the tests as judicially recognised and which must inform the exercise of power under Order XLVII Rule 1 CPC. Sri Goswami in support of his submissions has placed reliance upon the judgment rendered by three learned Judges of the Supreme Court in **Patel Narshi Thakershi Vs. Pradyumansinghji Arjunsinghji1.** He has also drawn the attention of the Court to a decision rendered by a learned Judge of this Court in **U.P. Steels Limited Vs. State of Uttar Pradesh2** arising out of proceedings emanating from the Act wherein it was held that no power of review can be recognised to inhere in authorities under the Act.

5. Countering these submissions Sri M.N. Singh, learned counsel appearing for the contesting respondent, contends that from the material which has been taken into consideration by the Appellate Authority and as encapsulated in the impugned order, it is evident that its earlier decision of 29 July 2002 suffered from errors apparent on the face of the record. According to Sri Singh the power to correct and rectify an error which is ex facie evident, must be recognised as an inherent power vesting in every judicial or quasi-judicial authority. Sri Singh learned counsel has placed reliance upon the decision rendered in **Ram Autar And Others v. The State of U.P.**3 to submit that the authorities under the Act were recognised to have an inherent power to rectify mistakes apparent on the face of the record. Sri Singh submits that the recordal of facts by the Appellate

Authority clearly shows and establishes that the majority of the plots of the landholder were unirrigated and had produced only one crop. He submits that in light of the facts that existed on the record, the Appellate Authority was clearly justified in recalling and reviewing its earlier judgment of 29 July 2002 and bring the proceedings initiated against the landholder to a closure. It is these rival submissions, which consequently fall for determination.

6. At the very outset let it be noted that although learned counsel for the respondent would contend that Ram Autar is an authority for the proposition that every quasi-judicial authority has an inherent power to review, that may not be a correct reading of that decision. The learned Judge in Ram Autar has held thus: -

"15. True, when there is no specific statutory provision for reviewing an order by an authority contemplated under the Act, the authority has no power to review its order. At this place I think it proper to mention that no Court or Tribunal is debarred from exercising inherent jurisdiction apart from statutory jurisdiction to correct any error committed by itself. The aforesaid power for correcting error by the Court itself is based on the maxim that no party should suffer because of the fault of the Court or Tribunal. Taking the aforesaid view into consideration I think it proper to emphasize that every Court and Tribunal has inherent jurisdiction to rectify its mistake. The question in what circumstance the Court or Tribunal shall rectify its mistake will depend upon the nature of the mistake committed by the Court and whether that mistake cannot be termed as clerical mistake or mistake apparent on the face of the record." (emphasis supplied)

7. As is evident from the observations made in that decision, the learned Judge essentially sought to hold that the power of rectification must be recognised to stand invested in every quasi-judicial authority. This is evident from the opening part of paragraph 15 itself where the learned Judge recognises the settled principle that the power to review must be statutorily conferred. That there is an inherent distinction between the power to "rectify" and the power of "review" is an issue, which is no longer res integra. Ram Autar can thus only be recognised as an authority for the proposition that the power to rectify must be recognised as being inherently inhering in a quasi-judicial authority. In any case and is evident from a reading of the subsequent decision of this Court in U.P. Steels Limited, it has been clearly held that in the absence of a specific provision conferring power of review upon the authorities under the Act, it cannot be recognised as an inherent power Dealing with this aspect the learned Judge in U.P. Steels Limited observed thus:-

"8. The aforesaid order passed by this Court has become final as validity of the said order was not challenged before the Supreme Court. The authorities below after the aforesaid order was passed by this Court, decided the case in the light of the observations made and findings recorded by this Court and re-determined the ceiling area of the petitioner. The petitioner also filed an application giving its choice as provided under Section 12 A of the Act. The calculation made by the authorities below were also verified and

certified by the counsel of the petitioner. Therefore, after the order dated 23.10.1980, passed by the Prescribed Authority declaring 46 bighas 14 biswas 5-1/3 biswansi of land as surplus, the petitioner had no right to file an appeal. However, the appeal was filed which was also dismissed. Thereafter, the review application was also filed, which also met the same fate and was dismissed by order dated 10.2.1984. The appellate authority in its aforesaid order observed as under:

"There were no calculations in the appellate's judgment. List has been given and it had been checked by the counsel of the appellant who had conceded that it was correct.

It is urged now by him that there could be a mistake and certain plots in respect of which declaration under Section 143 had been granted, were not excluded. He had to concede that declaration was not in record in respect of some of the plots which he claimed to be covered by that declaration and that it is not traceable. His contention is that he should be allowed 234-14-15 bighas of land it is not necessary to show declaration under Section 143. That, in my opinion, is not correct and in any case review is not rehearing of appeal. If the counsel had conceded certain point and there could have been mistake, review will not be maintainable. Judgment shows no clerical or arithmetical error and if there is some mistake for which we have to go through the record again, it will not be a ground for review.

As it is, in my opinion, review is not maintainable and there is no clerical error which is apparent on the record.

The application is without any force.

9. Under the Act, there is no provision of filing a review application. Section 13A of the Act simply provides for an application for rectification of clerical mistake. In the present case, learned counsel for the petitioner conceded before the appellate authority that there was no mistake in the calculation, thus, the appellate authority was right in holding that the review was legally not maintainable." (emphasis supplied)

8. The controversy in any case does not survive in light of the decision rendered by the Supreme Court in **Patel Narshi Thakershi** where in unambiguous terms it was held that the power to review could never be recognised as being an inherent power. Their Lordships held that the power to review must be conferred by law either specifically or by necessary implication. These observations as they appear in paragraph-4 of the decision are extracted herein below: -

"4. The first question that we have to consider is whether Mr. Mankodi had competence to quash the order made by the Saurashtra Government on October 22, 1956. it must be remembered that Mr. Mankodi was functioning as delegate of the State Government. The order passed by Mr. Mankodi, in law amounted to a review of the order made by Saurashtra Government. It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to our notice from which it could be gathered that the Government had power to review its own order. If the Government had no power to review its own order, it is obvious that its delegate

could not have reviewed its order. The question whether the Government's order is correct or valid in law does not arise for consideration in these proceedings so long as that order is not set aside or declared void by a competent authority. Hence the same cannot be ignored. The Subordinate Tribunals have to carry out that order. For this reason alone the order of Mr. Mankodi was liable to be set aside." (emphasis supplied)

9. In light of the decision of the Supreme Court which is relied upon by Sri Goswami, it is manifest that the legal principle of the power of review necessarily being found to be statutorily conferred or flowing by necessary implication from statute, is beyond the realm of doubt.

10. Before proceeding further and dealing with the challenge to the impugned order on merits, it would be apposite to pause and reflect briefly on the power of review as well as to spell out the clear and well understood distinction between a "merit review" and "procedural review". Review, as is well settled, is a power conferred to rectify a patent or glaring error of fact or law apparent on the face of the record. If a judgment or order has come to be rendered on an erroneous assumption, in ignorance of an essential fact or piece of evidence and its perpetuation would result in a miscarriage of justice, the Courts and quasi-judicial authorities would be bound to correct and rectify that decision or order. The mistake or error must be established to be glaring, patent, substantial and of a compelling character. The mistake must be found to be one that goes to the very root and foundation of the judgment or order sought to be reviewed.

11. At the same time, a petition for review is not a remedy of re-hearing or reconsideration of issues which stand finally settled by the judgment or order. Though curative, it is not intended to be a remedy for fresh consideration or a re-assessment of the case on merits. It must, by its very inherent character coupled with the need to accord finality to an adjudicatory process, be confined to the issue of whether the decision rendered suffers from an unmistakable, conspicuous or patent error. As has been repeatedly stated, the jurisdiction of review is not intended to be an occasion to substitute a view already taken. An elaborate and lucid exposition on the scope of review is found in the decision of the Supreme Court in Lily Thomas Vs. Union of India4 where it was held: -

52.The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This Court inPatel Narshi Thakershiv.Pradyumansinghji Arjunsinghji[(1971) 3 SCC 844 : AIR 1970 SC 1273] held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage

of justice nothing would preclude the Court from rectifying the error. This Court inS. Nagarajv.State of Karnataka[1993 Supp (4) SCC 595 : 1994 SCC (L&S) 320 : (1994) 26 ATC 448] held: (SCC pp. 619-20, para 19)

"19. Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. InRaja Prithwi Chand Lal Choudhuryv.Sukhraj Rai[AIR 1941 FC 1] the Court observed that even though no rules had been framed permitting the highest court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council inRajunder Narain Raev.Bijai Govind Singh[(1836) 1 Moo PC 117 : 2 MIA 181] that an order made by the Court was final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, errors have been introduced, these courts possess, by common law, the same power which the courts of record and statute have of rectifying the mistakes which have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.'

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.'

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order 47 Rule 1 of the Civil Procedure Code. The expression, "for any other sufficient reason' in the clause has been given an expanded meaning and a

decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength.

53.This Court inNorthern India Caterers (India) Ltd.v.Lt. Governor of Delhi[(1980) 2 SCC 167 : 1980 SCC (Tax) 222 : AIR 1980 SC 674] considered the powers of this Court under Article 137 of the Constitution read with Order 47 Rule 1 CPC and Order XL Rule 1 of the Supreme Court Rules and held: (SCC pp. 171-72, para 8)

"8. It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so:Sajjan Singhv.State of Rajasthan[AIR 1965 SC 845 : (1965) 1 SCR 933, 948] , SCR at p. 948. For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment:Girdhari Lal Guptav.D.H. Mehta[(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 760] , SCR at p. 760. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice:O.N. Mohindroov.Distt. Judge, Delhi[(1971) 3 SCC 5 : (1971) 2 SCR 11, 27] , SCR at p. 27. Power to review its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order XL Rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility':Sow Chandra Kantev.Sk Habib[(1975) 1 SCC 674 : 1975 SCC (Tax) 200 : 1975 SCC (L&S) 184 : 1975 SCC (Cri) 305 : (1975) 3 SCR 933]. (emphasis supplied)

12. That then takes us to the concept of "procedural review" as judicially formulated. The power of "procedural review", as distinct from a "merit review", is the genre of review that has been judicially recognised to inhere in all quasi-judicial authorities. The power of procedural review is invoked where a judgment has been rendered ex parte, without notice or in the absence of a necessary party. It is a power inhering in all quasi-judicial authorities to recall a

judgment or order that has come to be entered in the absence of parties. Explaining this concept the Supreme Court in **Kapra Mazdoor Ekta Union Vs. Birla Cotton Spg. Wvg. Mills Ltd5** held as under:

"18.It was, therefore, submitted before us, relying uponGrindlays Bank Ltd.v.Central Govt. Industrial Tribunal[1980 Supp SCC 420 : 1981 SCC (L&S) 309] that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court inGrindlays Bank Ltd.v.Central Govt. Industrial Tribunal[1980 Supp SCC 420 : 1981 SCC (L&S) 309] clearly highlighted this distinction when it observed: (SCC p. 425, para 13)

"Furthermore, different considerations arise on review. The expression "review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court inPatel Narshi Thakershi case[(1971) 3 SCC 844 : AIR 1970 SC 1273] held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be correctedex debito justitiaeto prevent the abuse of its process, and such power inheres in every court or Tribunal."

19.Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch as the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without

going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. InGrindlays Bank Ltd.v.Central Govt. Industrial Tribunal[1980 Supp SCC 420 : 1981 SCC (L&S) 309] it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again." (emphasis supplied)

13. It would thus be evident that a procedural review is not really concerned with the merits of the decision rendered. It is restricted to cases where an adjudication has come to be made without notice to a necessary party or where a party to the cause was prevented by sufficient cause from attending to the proceedings. Having noticed the basic principles which underlie the power of review, the Court proceeds to consider the validity of the impugned order.

14. It is manifest from a reading of the impugned order passed by the Appellate Authority in this case that it clearly does not fall in the genre of a procedural review. This is not a case where the order of 29 July 2002 came to be rendered without hearing the tenure holder or in violation of the principles of natural justice. The order impugned clearly embodies a "merit review" undertaken by the Appellate Authority. A merit review power must have sanction of statute specifically or by necessary implication. The Act undisputedly confers no such power on the Appellate Authority. It is thus evident that the impugned order suffers from a patent jurisdictional error.

15. That takes the Court to the last issue of whether the judgment of 29 July 2002 suffered from a glaring or manifest error meriting its reopening and review. At the outset the Court notes that the tenure holder does not appear to have urged or addressed any challenge to the findings that came to be recorded by the Prescribed Authority with respect to the nature of the land before the Appellate Authority. The order of 29 July 2002 carries no recital of such contentions being raised or urged. Although Sri Singh learned counsel for the respondent submits that such a ground was taken in the memo of appeal, in the considered view of this Court, that would clearly not be determinative since it was imperative for the landholder to establish that the point was in fact actually urged, raised and pressed before the Appellate Authority. As this Court reads the order of 29 July 2002, it is more than evident that the objections with respect to the nature and character of the land does not appear to have been pressed. Even the review petition does not assert that such an assertion was in fact raised but due to inadvertence has either escaped the attention of the Appellate Authority or was not dealt with.

16. Notwithstanding the above, the Court ventures forth to deal with the findings on merits which have been recorded by the Appellate Authority in the impugned order in terms of which it proceeds to hold that the land was liable to be treated as unirrigated and capable of producing only one crop. In order to appreciate the question which arises, it

would be relevant to refer to the provisions made in Section 4A of the Act which reads thus: -

"**[4A. Determination of irrigated land.** - The prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1979 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion: -

firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years; by

(i) any canal included in Schedule No. 1 of irrigation rates notified in Notification No. 1579-W/XXIII-62-W-1946, dated March 31, 1953, as amended from time to time; or

(ii) any lift irrigation canal; or

(iii) any State tube-well or a private irrigation work; and

(b) that at least two crops were grown in such land in any one of the aforesaid years; or

secondly, that irrigation facility became available to any land by a State Irrigation Work coming into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10; or

thirdly, (a) that any land is situated within the effective command area of a lift irrigation canal or a State tube-well or a private irrigation work; and

(b) that the class and composition of its soil is such that it is capable of growing at least two crops in an agricultural year; then the Prescribed Authority shall determine such land to be irrigated land for the purposes of this Act."

17. As is evident from a reading of that provision the Prescribed Authority is enjoined to examine the Khasras for the years 1378, 1379 and 1380 Fasli along with other contemporaneous record in order to ascertain the character of the land. The provision then takes care of three independent scenarios in order to ascertain whether the land is liable to be treated as irrigated or otherwise. Firstly it deals with the class of land irrigated by a canal, lift irrigation canal or any State tube well together with an enquiry in respect of the character of the soil which must be found to be such on which at least two crops were grown. The second category of land which is considered is that which came to have access to irrigation facilities after the commencement of the 1972 Amendment to the statute and on which two crops were in fact grown in any agricultural year. The third category of irrigated land is that which is situate within the effective command area of a lift irrigation canal and the soil of which is "capable of" being utilised to grow at least two crops. The Prescribed Authority on an examination of the relevant records pertaining to 1378F had found that the land in question fell within the command area and its soil was capable of being utilised for the plantation of two crops in a year.

18. A careful examination of the findings recorded by the Appellate Authority, however, show that it has on an evaluation of the records for 1378 Fasli noted that a majority of the plots were unirrigated and that it was shown from the

revenue record that only one crop had been sown. From a bare perusal of the findings which are returned, it is evident that the Appellate Authority has firstly not recorded any finding that the entire land holding of the respondent was unirrigated. Even if he had found that a majority of the plots were unirrigated, this would have necessarily entailed a further exercise of demarcating plots between the category of irrigated and unirrigated being undertaken. In any case the Appellate Authority does not record any finding that may dislodge the recordal of fact by the Prescribed Authority in his original order where he had held that the land did fall in the command area. The Appellate Authority has also not borne in mind that in terms of Section 4A it was incumbent upon the authorities concerned to also evaluate whether the land was in fact "capable of" being utilised for sowing two crops as distinct from whether two crops had in fact been sown. As is evident from the language employed and the highlighted part of Section 4A extracted above, land which is "capable of" bearing at least two crops is also a determinative factor of whether it should be characterized as irrigated or unirrigated. It is thus evident that the order of the Prescribed Authority as was affirmed by the Appellate Authority could not be said to be suffering from any palpable or apparent error on the face of the record which would have warranted the exercise of power of review. The Appellate Authority has clearly undertaken an exercise of a re-appreciation of the evidence which existed and sought to revise and revisit a final decision that had been made. This was clearly an exercise beyond jurisdiction and cannot be sustained in law. In light of the above, this Court is of the considered view that the order of 18 October 2002 merits being set aside.

19. The petition is accordingly allowed. The impugned order dated 18 October 2002 is hereby quashed. Sri M.N. Singh, learned counsel appearing for the tenure holder, in the end submitted that since proceedings had been brought to a close by virtue of the impugned order, the respondent was never dispossessed and therefore, he be permitted to invoke the provisions of Section 12 A of the Act before the State proceeds in the matter. Sri Goswami learned Additional Chief Standing Counsel states that subject to verification of the aforesaid statement, the petitioner shall, as is duty bound, proceed in the matter in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 21236 of 2019

M/s Virat Constructions And Anr.
...Petitioners
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitoners:
Sri Udayan Nandan, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C.

A. Administrative Law - Blacklisting-Serious civil consequences-opportunity of hearing is essential and a prerequisite.

Petitioner could not have been blacklisted without being afforded an opportunity of hearing. It cannot be disputed that an order of

blacklisting does carry serious civil consequences. It therefore follows as a necessary corollary that an adherence to the fundamental precepts of natural justice is essential and a prerequisite. (Para 14)

Cases referred: -

1. Erusian Equipment and Chemical Ltd. Vs. State of West Bengal (1975) 1 SCC 70

2. Gorkha Security Services vs. Government of NCT of Delhi and others 92014) 9 SCC 105

3. Raghunath Thakur vs. State of Bihar (1989) 1 SCC 229

4. M/s Mahabir Auto Stores and others vs. Indian oil corporation Ltd.(1990) 3 SCC 752 (E-9)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Shri Shashi Nandan learned Senior Advocate assisted by Sri Udayan Nandan learned counsel for the petitioners and Ms. Archana Singh, learned Additional Chief Standing Counsel learned counsel for the respondents.

2. The petitioners have preferred the present writ petition writ challenging the order 31.5.2019 and consequential recovery certificate dated 1/4.6.2019 (Annexure Nos.4 and 5 to the writ petition respectively) passed by the District Magistrate, Shahjahanpur.

3. Facts in brief, as contained in the writ petition are that the petitioners were granted lease on 15th February, 2018 for a period of five years, i.e., from 15.2.2018 to 14.2.2023 at the rate of Rs.604/- per cubic meter for the first year with a stipulation of 10% increase in the said amount in each successive year during the currency of the lease. After the aforesaid lease was granted, the petitioners deposited a sum of Rs.1,64,95,995/- towards security as per the terms of the lease deed. A further amount of Rs.1,64,95,995/- was payable by the petitioners during the first year of the lease period in four equal installments. From the date of execution of the lease deed, the petitioners started excavating the minerals from the area forming part of the lease deed as per the terms and conditions of the lease deed dated 15.2.2018.

4. It is contended in the writ petition that respondent No.2 on a number of occasions orally directed the petitioners to stop the work of excavation without any rhyme and reason and as such, the petitioners were unable to pay certain installments on time as per the payment schedule of the lease deed, a show-cause notice dated 16.2.2019 was issued by the District Mining Officer/respondent No.3 to the petitioners levelling certain allegations to the effect that the petitioners are executing mining lease in contravention of the terms and conditions of the lease deed and Minor Mineral Concession Rules, 1963. A further allegation was made in the show-cause notice that the petitioners have failed to pay some amount with regard to the fourth installment of the first year and first installment of the second year, thus, an amount of Rs.2,46,41,590/- was liable to be paid by the petitioners. The petitioners submitted a reply vide reply dated 8.3.2019.

5. It is further contended in paragraph 13 of the writ petition that on 16.4.2019, the petitioners addressed a communication to the respondent No.2 stating therein that the District Administration are completely non-co-

operative and created various difficulties in running the excavation work by the petitioners. It is contended that without considering the reply submitted by the petitioners, respondent No.2 passed order dated 31.5.2019 cancelling the lease deed granted in favour of the petitioners and blacklisted the petitioners' firm for a period of five years and the respondent No.2 has also directed for recovery of Rs.3,37,38,653.30/- along with 10% amount payable on royalty and 2% TDS along with 18% interest per year.

6. After the aforesaid order dated 31.5.2019 was passed, a consequential recovery certificate dated 1/4.6.2019 was also issued against the petitioners for recovery of amount of Rs.3,97,87,185/- along with 2% TDS and 10% mineral development charges. The total amount payable by the petitioners as per the recovery certificate is Rs.4,79,72,794.17/- . The petitioners have filed the present writ petition challenging the order of blacklisting dated 31.5.2019 as well as recovery certificated dated 1/4.6.2019 issued by the respondent No.2, copies of which are appended as Annexure Nos.4 and 5 to the writ petition respectively.

7. It is contended by Sri Shashi Nandan, learned Senior Counsel that order dated 31.05.2019 passed by respondent No.2 is wholly illegal and arbitrary and has been passed without providing any opportunity of hearing to the petitioners. It is further contended that a reply of the petitioners dated 8.3.2019 was not at all taken into consideration, while passing the order dated 31.5.2019. It is further contended that the District Level Committee under the chairmanship of Additional District Magistrate was formed by the order of the District Magistrate on 11.3.2019 and the said committee submitted its report on 24.4.2019. It is contended that the report submitted by the Committee dated 24.4.2019 has formed the basis of the impugned order passed by the respondent No.2. However, the petitioners have never been provided copy of the said report before passing the order impugned dated 31.5.2019. It is further contended that the petitioners are entitled to get a copy of the report submitted by the District Level Committee dated 24.4.2019 before passing the order impugned. It is further contended that since the copy of the aforesaid report was not provided to the petitioners which was heavily relied upon by respondent No.2 while passing the order impugned, therefore, the order impugned is liable to be set aside only on account of non-supplying of the said report.

8. Heard learned counsel for the parties. With the consent of learned counsel for the parties, the present writ petition is disposed of at the admission stage itself without calling a counter affidavit from the respondents.

9. From perusal of the facts which are not disputed by the learned Additional Chief Standing Counsel, it appears that before passing the order of blacklisting, no opportunity of hearing whatsoever has been provided to the petitioners. It is further not disputed that copy of the report submitted by District Level Committee dated 24.2.2019, which was relied upon by respondent No.2 while passing the order dated 31.5.2019, was never supplied to the petitioners. Although the order of blacklisting having serious civil consequences but in the present case before passing the same, no

opportunity of hearing has been provided to the petitioners at any point of time. The law on the subject of blacklisting is well settled in light of numerous decisions of the Supreme Court on this subject.

10. In the case of ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal (1975) 1 SCC 70***, it was held by the Supreme Court that blacklisting has the affect of preventing a person from the privilege and advantage of name into relationship with the Government for purpose of aim. It was held by the Supreme Court in the aforesaid case that the fundamentals of fair play require that a person concerned should be given an opportunity to represent his case. Paragraphs 12 and 20 of the said judgment is quoted below :-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

11. Further in the case of ***Gorkha Security Services Vs. Government of NCT of Delhi & Others (2014) 9 SCC 105,*** the Supreme Court reiterated the principles laid down in the case of Erusian ***Equipment & Chemicals Ltd. v. State of W.B. (supra)*** and highlighted the necessity of giving an opportunity of hearing or show-cause before blacklisting him. Paragraph 17 of the aforesaid judgement is quoted below:-

17. Way back in the year 1975, this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B. [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] , highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person."

12. Again in the case of ***Raghunath Thakur Vs. State of Bihar [(1989) 1 SCC 229]*** the aforesaid principles was reiterated in the following manner: (SCC p. 230, para 4).

"4. ..... But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law....."

20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]."

13. In the case of ***M/s Mahabir Auto Stores &Ors. Vs. Indian Oil Corporation Ltd. (1990) 3 SCC 752*** it was held by the Supreme Court that arbitrariness and discrimination in every matter is subject to judicial review. Paragraph 11 of the aforesaid judgement is quoted below :-

"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in M/s Radha Krishna Agarwal &Ors. v. State of Bihar &Ors., [1977] 3 SCC 457.1t appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual par- ties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. M/s Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitu- tion in entering or not entering into contracts and must be reasonable and taken only upon lawful

and relevant consideration, it depends upon facts and circumstances of a particular transaction whether heating is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the ***(1975) 1 SCC 70.*** *State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unrea- sonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu &Anr., [1974] 4 SCC 3; Maneka Gandhi v. Union of India &Anr., [1976] 1 SCC 248; Ajay Hasia &Ors. v. Khalid Mujib Sehravardi &Ors., [1981] 1 SCC 722; R.D. Shetry v. International Airport Authority of India &Ors., [1979] 3 SCC 1 and also Dwarkadas Marlaria and sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."*

14. From perusal of the the aforesaid legal preposition, which itself is a reiteration of the principles laid down by the Supreme Court in ***Erusian Equipment & Chemicals Ltd. v. State of W.B. (supra),*** we are of the view that the petitioner could not have been blacklisted without being afforded an opportunity of hearing. It cannot be disputed that an order of blacklisting does carry serious civil consequences. It therefore follows as a necessary corollary that an adherence to the fundamental precepts of natural justice is essential and a prerequisite.

15. Since in the facts of the present case, there is a complete failure to follow due process, we find ourselves unable to sustain the order dated 31.05.2019 and the recovery certificate dated 1/4.6.2019 passed by the respondent No.2 (Annexure No.4 and 5 to the writ petition respectively)

16. We accordingly allow the writ petition and quash the the order dated 31.05.2019 and the recovery certificate dated 1/4.6.2019. We further clarify that in case the respondents do choose to initiate fresh proceedings for blacklisting the firm of the petitioner, we leave it open to them to do so subject to the observation that the proceedings if initiated shall be undertaken in accordance with law and the observations appearing herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ – C No. 23689 of 2019

Babban Singh ...Petitioner
Versus
State of U.P. And Others. ...Respondents

Counsel for the Petitioner:
Sri Hanuman Prasad Dube, Sri Vipul Dube

Counsel for the Respondents:
C.S.C

A. Administrative Law- Natural Justice- notice issued by senior mines officer, Prayagraj but the order was passed by the District magistrate, Prayagraj. Invalid.
Purpose behind serving show cause notice is to apprise case and action to be taken against the delinquent-Petitioner was blacklisted without mentioning the same in the show cause notice.

Held: - The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the notice understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the notice is able to point out that proposed action is not warranted in the given case, even if the defaults /breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action. (Para 17)

Cases cited: -

1.Gorkha security Services vs. Government (NCT of Delhi) and others(2014) 9 SCC 105

2. Erusian Equipment and Chemical Ltd. Vs. State of West Bengal (1975) 1 SCC 70

3. Raghunath Thakur vs. State of Bihar (1989) 1 SCC 229

4. M/s Mahabir Auto Stores and others vs. Indian oil corporation Ltd.(1990) 3 SCC 752 (E-9)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Hanuman Prasad Dube, learned counsel for the petitioner and Smt. Archana Singh, learned Additional Chief Standing Counsel representing respondents-State.

2. The petitioner has filed the present writ petition with the prayer to quash the order dated 21.6.2019 passed by respondent No.2 with a further prayer to issue a mandamus commanding the respondent No.2 to give effect to the impugned dated 21.6.2019. A further prayer is also made to issue a Mandamus directing the respondent to determine the contract of the petitioner with respect to the mining lease and further to refund the amount deposited by the petitioner under the agreement dated 1.2.2018 including the amount of security along with interest at the market rate.

3. Facts in brief as contained in the writ petition are that the petitioner is a Class A category contractor and registered in various departments of the State Government. An advertisement No.824 dated 7.9.2017 was published/uploaded on the website of the respondents inviting e-tenders for allotment of mining lease of various

locations including Plot No.25 comprising of the village Kabra to Deeha and Kakra to Jamunipur.

4. Numbers of e-tenders were submitted by the desirous applicants. The petitioner also submitted e-tender for allotment of mining lease in respect of sand area for the location in question. The tender submitted by the petitioner was found to be most suitable and, therefore, the respondent No.2 vide its order dated 29.11.2017 sanctioned the mining lease in respect of sand for the area in question in favour of the petitioner. Additional District Magistrate (Administration) Allahabad issued a letter of intent in favour of the petitioner on 30.11.2017. Subsequently, an agreement was also executed in favour of the petitioner on 12.1.2018.

5. After the execution of the agreement, when the petitioner went to sand area in the Month of January, 2018 for the purpose of operating mining lease, the petitioner was confronted with certain ante-social and Gunda elements who were excavating sand from the plot in question in an illegal manner. In this regard, the petitioner met with the S.H.O. Police Station Sarai Inayat, Allahabad as well as Circle Officer, Phoolpur, District Allahabad regarding illegal excavation and transportation of the sand from his mining area by ante-social and Gunda elements but nothing was done by the aforesaid authorities. Thereafter the petitioner submitted an application dated 21.1.2018 before the respondent No.2 and 3 stated therein that necessary directions to be issued to the SHO P.S. Sarai Inayat and Circle Officer, Allahabad to prevent illegal mining of sand from his mining area. It is further contended that in spite of the same, no action whatsoever has been taken by the respondent Nos.2 and 3 to verify the illegal mining of sand from the area allotted to the petitioner.

6. A demand notice dated 1.5.2018 was issued to the petitioner by respondent No.3 requiring the petitioner to deposit the amount specified in the demand notice as installment of the mining lease in question and second installment of the first year's lease. The amount of installment as indicated in the notice dated 1.5.2018 was duly deposited by the petitioner but in spite of the same, he was not allowed to operate the mining lease. Since, the petitioner was not permitted to run his mining operation due to the facts as stated hereinabove, the petitioner submitted another application dated 9.5.2018 before respondent Nos.2 and 3 stating again that all the state officials are required to take appropriate action in the matter.

7. It is further contended that since no positive response was given to the petitioner, the petitioner gave a legal notice dated 07.11.2018 under Section 80(1) of the C.P.C. to cancel his lease agreement dated 12.1.2018 and amount deposited by him may be refunded. Since no action was taken, the petitioner had submitted so many representations addressed to the respondent Nos.2/3 from time to time. It is further contended that F.I.Rs were also lodged against various persons by the Police Authorities in this regard. It is further contended that instead of taking appropriate action in the matter, a demand notice dated 26.4.2019 was issued by the respondent No.3 requiring the petitioner to deposit a huge amount under different heads as specified in the notice in question within a period of 30 days.

8. In response to the same, the petitioner submitted a detailed reply on 13.5.2019. It is contended that since no action was taken and the petitioner was not being allowed to operate mining operation, the petitioner preferred a writ petition before this Court being Writ C No.19246 of 2019 (Babban Singh Vs. State of U.P. and two others) with the relief inter-alia to quash the demand notice dated 26.4.2019. During the pendency of the writ petition, order dated 21.06.2019 was passed by respondent No.2 by which the lease granted to the petitioner was cancelled and the petitioner was blacklisted for a period of two years. When the petitioner came to know regarding the aforesaid order, he withdrew Writ C No.19246 of 2019 on 11.7.2019 with a liberty to file a fresh petition. Now the petitioner has preferred the present writ petition challenging the order dated 21.6.2019 passed by the respondent No.2 by which respondents cancelled his mining lease and directed the petitioner to deposit a sum of Rs.1,27,68,000/- towards installments (Third and Fourth installments of first year and first and second installments of second year), Rs.3,76,960/- towards T.C.S. and Rs.18,84,800/- towards District Mineral Foundation Trust.

9. It is contended by learned counsel for the petitioner that the order impugned passed by the respondent No.2 is arbitrary, unjust, illegal and liable to be set aside by this Court due to following reasons :-

(i) No opportunity of personal hearing was given to the petitioner before passing the order impugned by which not only the lease of the petitioner was cancelled, his security amount was forfeited but he has also been blacklisted for two years.

(ii) The show cause notice was issued to the petitioner by Senior Mines Officer but the order impugned has been passed by the District Magistrate.

(iii) Nothing has been stated in the show cause notice regarding blacklisting of the petitioner but in the impugned order, the petitioner was also blacklisted without giving any opportunity of hearing as such the order of blacklisting passed against the petitioner is in complete violation of principles of natural justice.

10. On the other hand, it is contended by Smt. Archana Singh, learned Additional Chief Standing Counsel, that since terms and conditions contained in the lease deed were violated by the petitioner, therefore, the action was rightly taken by the respondent No.2. It is further contended by her that the order impugned in the present writ petition is absolutely perfect and valid order does not warrant any interference specially under Article 226 of the Constitution of India.

11. Heard learned counsel for the parties and perused the record. With the consent of learned counsel for the parties, this writ petition is disposed of finally at the admission stage itself.

12. The petitioner has assailed the order dated 21.06.2019 passed by respondent No.2, i.e. District Magistrate, Prayagraj by which reply submitted by the petitioner was rejected and an order was passed directing the petitioner to deposit a sum of Rs.1,27,68,000/- towards installments (Third and Fourth installments of first year and first and second installments of second year), Rs.3,76,960/- towards T.C.S. and

Rs.18,84,800/- as contribution to District Mineral Foundation Trust. Apart from the same, the petitioner was also black listed for a period of two years.

13. From perusal of the record it is clear that before passing the impugned order no opportunity of personal hearing was given to the petitioner. It is also clear from perusal of the record that notices were issued by the Senior Mines Officer but the impugned order was passed by the respondent No.2, i.e. District Magistrate Prayagraj. Apart from the same, it is also clear that although nothing is contained in the show cause notice regarding factum of blacklisting of the petitioner but while passing the order impugned, the petitioner was also blacklisted for a period of two years.

14. The order impugned is in two parts:-

(i) recovery against the petitioner

ii) blacklisting of the petitioner for two years.

15. Insofar as the first part is concerned, it is clear from the record that the notices were issued to the petitioner by the Senior Mines Officer, Prayagraj but the order was passed by District Magistrate Prayagraj, in this view of the matter, we are of the opinion that the order passed by the District Magistrate Prayagraj is in complete violation of principles of natural justice.

16. Insofar as the blacklisting of the petitioner is concerned, From perusal of the impugned order, we find that the respondents have proceeded on the basis of a show cause notice. Nothing has been stated in the show cause notice regarding blacklisting of the petitioner. Learned Standing Counsel has not been able to refute this fact on record. In our opinion, the issue which was not raised even in the show cause notice, therefore, could not be made the basis for blacklisting of the petitioner.

17. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action. In the case of ***Gorkha Security Services Vs. Government (NCT of Delhi) and others (2014) 9 SCC 105,*** the Supreme Court was pleased to hold that it is incumbent on the part of the department to state in show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to show cause against the same. Relevant paragraph namely paragraph 27 of the aforesaid judgement is quoted below:-

"27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show

cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter."

18. In the case of ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal (1975) 1 SCC 70,*** it was held by the Supreme Court that blacklisting has the affect of preventing a person from the privilege and advantage of name into relationship with the Government for purpose of aim. It was held by the Supreme Court in the aforesaid case that the fundamentals of fair play require that a person concerned should be given an opportunity to represent his case. Paragraphs 12 and 20 of the said judgment is quoted below :-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

19. Again in the case of ***Raghunath Thakur Vs. State of Bihar [(1989) 1 SCC 229]*** the aforesaid principles was reiterated in the following manner: (SCC p. 230, para 4).

"4. ..... But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person

concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law....."

20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]."

20. In the case of ***M/s Mahabir Auto Stores &Ors. Vs. Indian Oil Corporation Ltd. (1990) 3 SCC 752*** it was held by the Supreme Court that arbitrariness and discrimination in every matter is subject to judicial review. Paragraph 11 of the aforesaid judgement is quoted below :-

"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in M/s Radha Krishna Agarwal &Ors. v. State of Bihar &Ors., [1977] 3 SCC 457.1t appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual par- ties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. M/s Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitu- tion in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether heating is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the ***(1975) 1 SCC 70.*** *State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to*

satisfy the test of reasonableness, the same would be unrea- sonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu &Anr., [1974] 4 SCC 3; Maneka Gandhi v. Union of India &Anr., [1976] 1 SCC 248; Ajay Hasia &Ors. v. Khalid Mujib Sehravardi &Ors., [1981] 1 SCC 722; R.D. Shetry v. InternationalAirport Authority of India &Ors., [1979] 3 SCC 1 and also Dwarkadas Marlaria and sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

21. Since in the facts of the present case, there is a complete failure to follow due process, we find ourselves unable to sustain the order dated 21.06 .2019 passed by the respondent No.2.

22. We accordingly allow the writ petition and quash the the order dated 21.06.2019. We further clarify that in case the respondents do choose to initiate fresh proceedings for blacklisting the firm of the petitioner, we leave it open to them to do so subject to the observation that the proceedings if initiated shall be undertaken in accordance with law and the observations appearing herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2019

BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ – C No. 19771 of 2019

Pramod Kumar ...Petitioner
Versus
Commissioner, Varanasi Division And Others ...Respondents

Counsel for the Petitioner:
Sri Kailash Nath Singh

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Yadav

A. U.P. Zamindari Abolition and Land Reform Act, 1950 - Section 198(4)- proceedings initiated u/s 198 (4). Held:- exparte and *void ab initio* as proceeding not instituted against the original bhumidhar despite being alive. Violation of natural justice-impugned order held bad.

That the authorities have manifestly erred in passing the order without giving notice to recorded tenure holder. Further in the present case, since the proceedings initially instituted against the person who was recorded as tenure holder, the proceedings are liable to be held void ab initio and the order deserves to be held as non est.(Para 12)

Cases cited: -

Olga Tellis and others v. Bombay Municipal Corporation and others, 1985 (3) SCC 545
Hinch Lal tiwari's case (E-9)

(Delivered by Hon'ble Ajit Kumar, J.)

1. By means of the present writ petition under Article 226 of the Constitution the petitioner has challenged the order dated 28th June, 2006 passed by the Additional District Magistrate (Land-

Revenue), Jaunpur in Case No.- 314 under Section 198(4) of U.P. Zamindari Abolition and Land Reforms Act, 1950 as well as the order dated 30th April, 2019 passed by the Commissioner, Varanasi Division, Varanasi.

2. The grievance of the petitioner is that the petitioner's grand father was given lease over the land in question way back in the year 1965 and thereafter he came to be recorded as bhumidhar over the land and after the death of the petitioner's grandfather and father, the name of the petitioner came to be recorded over the land. However, the authorities without giving any opportunity of hearing to the petitioner's father held that that the land was initially recorded as pond and, therefore, no notice was required to be given to the person, who is in unauthorized possession and straightway the order has been passed holding the lease to be void and directing for striking off the name of petitioner's father and restoring the land in the name of Gaon Sabha. There is further anomaly being pointed out by the learned counsel for the petitioner that father of the petitioner was alive and was recorded as bhumidhar over the land in question in the revenue records but the proceedings were drawn in the name of the petitioner and, therefore, the entire proceedings were *void ab initio* and the order passed by Additional District Judge (Land-Revenue) Jaunpur dated 28th June, 2006 is rendered to be *non est.* The petitioner preferred revision before the Commissioner and the Commissioner has concurred the findings returned by the Additional District Magistrate and dismissed the revision vide order dated 30th April, 2019.

3. Per contra, learned Standing Counsel contends that once the land has come to be found initially recorded as pond, it turned out to be a land of public utility and, therefore, the lease in respect of a public land recorded as a public utility land under Section 132 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 cannot be leased out and such a lease is liable to be rendered as *void.* Learned Standing Counsel has pointed out that in view of the series of the judgments of this Court and the view taken by the Apex Court in the case of Hinch Lal Tiwari no useful purpose will be served even if notice is served as outcome of the ultimate proceedings is going to be the same.

4. Having heard learned counsel for the parties and having perused the records, what I find is that proceedings have been initiated in the year 2006 under Section 198(4) of U.P. Zamindari Abolition and Land Reforms Act, 1950 only against the petitioner whereas the petitioner's father was alive and was recorded as bhumidhar over the land and, therefore, to that extent the argument of the petitioner that the proceedings are *void ab initio* appears to be correct.

5. Besides above, I also find that in the order passed by the Additional District Magistrate (Land-Revenue) Jaunpur dated 28th June, 2006 it has been categorically recorded that no notice was required to be issued to the tenure holder as the land was found to be recorded initially at earlier point of time in the relevant revenue record as pond.

6. In the considered opinion of the Court the view taken by the Additional District Magistrate (Land-Revenue) Jaunpur that no notice deserved to be issued to the persons who had been allotted lease where the land is a public

utility land and was so recorded in the earlier point of time in the revenue records, is absolutely ill founded and deserves to be held bad in law.

7. The law is well settled that even if in unauthorized trespass is to be evicted or ejected from the public land, then the minimum requirement is the compliance of the principles of natural justice. Even in matters of administrative decision making this Court and Apex Court have held that the authorities are required to pass an order in consonance with principles of natural justice as the principle stands that nobody can be condemned unheard. In matters where quasi judicial function is being discharged by the authorities, it is all more necessary to follow these principles.

8. The principle of *audi alteram partem* is a cardinal rule of justice system. The Courts have ruled in the past that the justice must not only be done but must also seen to have been done. A larger Bench of the Apex Court while dealing with the petition questioning the vires of Section 314 of Bombay Municipal Corporation Act, 1888 that provided that the *Commissioner, may, without notice take steps for removal of encroachments in or upon any streets, channels, drains etc.,* it was argued before the Apex Court that the provision was clearly ultra vires Article 21 of the Constitution as the provision was not fair and reasonable. While upholding the vires of the aforesaid provision assailed before the Court, the Court observed that *Legislature intended to the power to be exercised sparingly and in cases of urgency which brook no delay* and in all other cases, the Court observed that *no departure from audi alteram partem rule could be presumed to have been intended.* So, the Court ultimately ruled that the aforesaid section was designed only to exclude the principles of natural justice by way of exception, not as a general rule. Ratio of the judgment was that such discretion is vested only for being exercised in exceptional and unavoidable circumstances but otherwise, the Commissioner needed to exercise the power in consonance with rule of *audi alteram partem.* Vide paragraph 46 and 47 of the judgment in **Olga Tellis and others v. Bombay Municipal Corporation and others, 1985 (3) SCC 545,** the Apex Court held thus:-

"46. It was urged by Shri K.K. Singhvi on behalf of the Municipal Corporation that the Legislature may well have intended that no notice need be given in any case whatsoever because, no useful purpose could be served by issuing a notice as to why an encroachment on a public property should not be removed. We have indicated above that far from so intending, the Legislature has left it to the discretion of the Commissioner whether or not to give notice, a discretion which has to be exercised reasonably. Counsel attempted to demonstrate the practical futility of issuing the show cause notice by pointing out firstly, that the only answer which a pavement dweller, for example, can make to such a notice is that he is compelled to live on the pavement because he has no other place to go to and secondly, that it is hardly likely that in pursuance of such a notice, pavement dwellers or slum dwellers would ask for time to vacate since, on their own showing, they are compelled to occupy some pavement or slum or the other if they are evicted. It may be true to say that, in the generality of cases, persons

who have committed encroachments on pavements or oh other public properties may not have an effective answer to give. It is a notorious fact of contemporary life in metropolitan cities, that no person in his senses would opt to live on a pavement or in a slum, if any other choice were available to him. Anyone who cares to have even a fleeting glance at the pavement or slum dwellings will see that they are the very hell on earth. But, though this is so, the contention of the Corporation that no notice need be given because, there can be no effective answer to it, betrays a misunderstanding of the rule of hearing, which is an important element of the principles of natural justice. The decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. For example, in the common run of cases, a person may contend in answer to a notice under Section 314 that (i) there was, in fact, no encroachment on any public road, footpath or pavement, or (ii) the encroachment was so slight and negligible as to cause no nuisance or inconvenience to other members of the public, or (iii) time may be granted for removal of the encroachment in view of humane considerations arising out of personal, seasonal or other factOrs. It would not be right to assume that the Commissioner would reject these or similar other considerations without a careful application of mind. Human compassion must soften the rough edges of justice in all situations. The eviction of the pavement or slum dweller not only means his removal from the house but the destruction of the house itself. And the destruction of a dwelling house is the end of all that one holds dear in life, humbler the dwelling, greater the suffering and more intense the sense of loss.

47. The proposition that notice need not be given of a proposed action because , there can possibly be no answer to It, is contrary to the well-recognized understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. (Kadish, "Methodology and Criteria in Due Process Adjudication - A Survey and Criticism," 66 Yale L.J. 319, 340 [1957]) The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. (Golberg v. Kelly 397 U.S. 254, 264-65 [1970] right of the poor to participate in public processes).

Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experience at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather

than a thing, is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "Validity and moral authority of a conclusion largely depend on the mode by which it was reached.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generation the feeling, so important to a popular government, that justice has been done". Joint Anti-fascist Refugee Committee v. Mc Grath 341 U.S. 123. At stake here is not Just the much-acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice. (See "American Constitutional Law" by Laurence H. Tribe, Professor of Law, Harvard University (Ed. 1978, page 503).

The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

It ensures that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure participation than to use participation to assure accuracy."

9. Thus, the above exposition of law by the larger Bench of the Apex Court makes it clear that one who is going to be adversely affected is needed to be heard before the order is passed. If a person is settled over the land for a number of years and if such land at same point of time i.e. 3 or 4 decades ago was recorded as pond, in the considered opinion of the Court, the authorities are not right in evicting such persons from their settled possession over the land by one stroke of pen and that two without giving proper notice or opportunity of hearing. Exceptions are the cases that involve a kind of case of urgency where immediately eviction or ejectment of construction is a must. While it is true that in public interest a public utility land cannot be directed to be divested for private use but if an action is sought to be taken after decades or for a long passage of time to remove such persons from possession over the land, the minimum rule is that they should be given notice, reasonable opportunity of hearing to defend their claim and case before any order is passed for their eviction from the land or striking of entries standing in their name on record. Even in the case of **Hinch Lal Tiwari***(supra),* the Apex Court has not held that the persons who are in possession should not be given notice and should not be heard. Principles enunciated in the case of **Olga Tellis** *(supra)* cannot be said to have been diluted in the case of Hinch Lal Tiwari *(supra).*

10. In the said case of **Hinch Lal Tiwari** *(supra)* there was long drawn litigation between the allottee and the complainant and the authority making allotment of the land coupled with the facts that on spot inspection it was detected that part of the land was still in the nature of pond. The Apex Court while referring the High Court's order impugned in the S.L.P. quoted the fact recorded in the order of High Court as under:-

"From the report of the Sub-Divisional Officer dated 3-4-2000 it is clear that the land had the character of a pond but due to passage of time most of its part became levelled. But some of the

portion had still the character of a pond and during the rainy season it is covered by water. The area which is covered by water or may be covered by water in the rainy season could not be allotted as abadi site to any person."

and then proceeded to hold as under:-

"On this finding, in our view, the High Court ought to have confirmed the order of the Commissioner. However, it proceeded to hold that considering the said report the area of 10 biswas could only be allotted and the remaining five biswas of land which have still the character of a pond, could not be allotted. In our view, it is difficult to sustain the impugned order of the High Court. There is concurrent finding that a pond exists and the area covered by it varies in the rainy season. In such a case no part of it could have been allotted to anybody for construction of house building or any allied purposes."

11. However, in the present case there is no such finding coming up in the order impugned nor, the order impugned can be justified to have been passed in compliance of the principles of natural justice.

12. Admittedly, in the present case notice has not been given to the petitioner before passing the order impugned and, therefore, applying the above exposition of law it is held that the authorities have manifestly erred in passing the order without giving notice to recorded tenure holder. Further in the present case, since the proceedings initially instituted against the person who was recorded as tenure holder, the proceedings are liable to be held *void ab initio* and the order deserves to be held as non est.

13. The authority sitting in revision has failed to look into this above aspect of the matter and, therefore, the order passed by the Commissioner, Varanasi Division Varanasi dated 30th April, 2019 affirming the order passed by the Additional District Magistrate (Land-Revenue), Jaunpur can also not be sustained in law and deserves to be set aside.

14. At this stage, learned Standing Counsel submits that that it may be left open for the authorities to reinitiate the proceedings in accordance with law, if they so desire and if they find it to be necessary in the interest of public.

15. I am of the opinion that in all cases including the present case if the authorities after inquiry find that a person is in possession over the land recorded as a public utility land, in an unauthorized way and land still have the character of land so recorded or even otherwise such land deserve to be protected, it is always open for the competent authority to proceed against such unauthorized occupant in accordance with law and in the light of the observations made hereinabove in this judgment.

16. In the result, the order dated 28th June, 2006 passed by the Additional District Magistrate (Land-Revenue) Jaunpur in case No. 314 under Section 198(4) of the U.P.Z.A.& L.R. Act, 1950 filed as Annexure-2 to the writ petition and the order passed by the Commissioner Varanasi Division Varanasi dated 30th April, 2019 in revision No. 00298 of 2019 are hereby set aside.

17. The writ petition is allowed to the extent indicated hereinabove.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2019

BEFORE
THE HON'BLE AJAY BHANOT, J.

Writ C No. 61899 of 2011

Darshan Singh ...Petitioner
Versus
State of U.P. And Others. ...Respondents

Counsel for the Petitioner:
Sri S.K. Chaturvedi

Counsel for the Respondents:
C.S.C.. Sri Awadhesh Prasad Pandey, Sri Rajeev Pandey, Sri S.K. Purwar

A. U.P. Zamindari Abolition and land Reforms Rules, 1952 - Section-285H, Section 285I, Section 285-K - essential prerequisite enshrined are mandatory to challenge the auction sale under the rules, 1952.

The competent authority to entertain the challenge to the auction is Commissioner and to challenge the auction-the owner of the auctioned property is eligible under rules. The provisions are a complete code. The limited set of persons, who are entitled to challenge an auction sale, are clearly defined. The producer to make a challenge to such auction sale, is specifically prescribed. The authorities, to decide the validity of such challenge, have also been identified. (Para 21)

Cases cited: -
1.Executive Engineer, Karnataka housing Board vs. LAO, 2011 (2) SCC 24

2. Sanwar pal Singh vs. Additional Commissioner, Saharanpur and others, 2017 (8) ADJ 550. (E-9)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the order, dated 14.10.2011, passed by the learned Commissioner, Jhansi Division, Jhansi, in Revision No.40 of 2010-2011, (Darshan Singh Vs. Jagdish Singh and others), the order passed by the learned Commissioner, Jhansi Division, Jhansi in like proceedings, on 20.6.2011, has been recalled, and the matter has been remitted to the trial court for fresh adjudication.

2. The petitioner, is aggrieved by the order dated 14.10.2011, passed by the learned Commissioner, Jhansi Division, Jhansi, in Revision No.40 of 2010-2011, (Darshan Singh Vs. Jagdish Singh and others), and has assailed the said order, in the instant writ petition.

3 . Sri S.K. Chaturvedi, learned counsel for the petitioner, in support of the writ petition, submits that the Collector, does not have the jurisdiction to recall the order, passed by the learned Revisional Court, on an earlier occasion. Secondly, the guarantor, at whose instance, the recall order was passed, does not have any locus standi, to question the auction, and challenge the order, passed by the learned Commissioner, Jhansi Division, Jhansi. The auction, was conducted in accordance with law. The petitioner, was the auction purchaser, and pursuant to said auction, sale certificate was issued in favour of the petitioner. He further submits, that the conditions precedent for setting aside the auction, framed under the rules of U.P. Zamindari Abolition & Land Reforms Rules, 1952, were not satisfied, in the instant case.

4. Sri Awdhesh Prasad Pandey, learned counsel and Sri Vinod Kumar, learned counsel or the respondent No.3, submit that the respondent No.3 being the guarantor, has the locus standi, to institute the recall application, since he has to

deposit the remaining amount due, from the borrower.

5. Heard the learned counsel for the parties.

6. Certain facts, relevant to adjudication of the controversy, are beyond the pale of dispute. One Jagdish Singh, had taken a loan, from the Central Bank of India. He, defaulted in the payment of loan amount. Distraint proceedings, were drawn by the bank, for recovery of the loan amount, under the U.P. Zamindari Abolition & Land Reforms Rules, 1952.

7. In the aforesaid recovery proceedings, the property of the borrower/defaulter Jagdish @ Narain, was put to auction. The auction, was conducted on 03.01.2011. At the fall of the hammer, the petitioner raised a bid of Rs.4 Lakhs. The petitioner, was the highest bidder. The petitioner, honoured his bid, and deposited the entire bid amount in two instalments, on 03.01.2011, and 17.01.2011 respectively. The sale certificate, was issued by the competent authority, in favour of the petitioner, on 15.09.2011.

8. The Tehsildar submitted a report on 10.02.2011, before the Paragana Magistrate, recording certain irregularities in the auction, and recommending the cancellation of the auction proceedings. The Paragana Magistrate, by cryptic order dated 24.02.2011, affirmed the recommendation of the Tehsildar. The order, passed by the Paragana Magistrate dated 24.02.2011, simply recorded "allowed as proposed", and thus cancelled the auction.

9. The petitioner, claiming to be a bona-fide auction purchaser, took the order passed by the Paragana Magistrate, in revision before the learned Commissioner, Jhansi Division, Jhansi. The revision, was registered as Revision No.40 of 2010-2011 (Darshan Singh Vs. Jagdish Singh and others).

10. The respondent No.3, was the guarantor in the aforesaid loan agreement. The guarantor/respondent No.3, also tendered his application, before the learned Commissioner, Jhansi Division, Jhansi, in the revision proceedings, registered as Revision No.40 of 2010-2011.

11. The order dated 03.09.2011 of the learned Commissioner, Jhansi Division, Jhansi, in the Revision No.40 of 2010-2011, (Darshan Singh Vs. Jagdish Singh and others), records, that the respondent No.3, Ram Babu was duly heard. The submissions, made on behalf of the respondent No.3 by his counsel, were recorded by the learned Commissioner, Jhansi Division, Jhansi. The respondent No.3, had submitted, that he had made an application, for correction of the recovery certificate, and was prepared to deposit the entire amount. Thereafter, upon a detailed consideration of the submissions of all parties, including respondent No.3-Ram Babu Shiv Hare, the learned Revisional Court found, that the auction was made in accordance with law, and there was no cause to interdict the aforesaid auction proceedings. On this foot, the revision filed by the petitioner, was allowed by order dated 20.06.2011.

12. The application for recall of the aforesaid order dated 20.06.2011, was submitted on behalf of the respondent No.3, on 03.09.2011 and was decided on 14.10.2011. The learned Commissioner,

Jhansi Division, Jhansi, by order dated 14.10.2011, recalled the order dated 20.06.2011, solely on the foot that the respondent No.3, was not heard by the learned Commissioner, Jhansi Division, Jhansi, in the earlier proceedings. The delay in filing the recall application was also condoned.

13. The order, dated 14.10.2011, passed by the learned Commissioner, Jhansi Division, Jhansi, which is assailed, records findings that are contrary to the record. The finding in the order dated 14.10.2011, that the respondent No.3, was not heard by the learned Commissioner, Jhansi Division, Jhansi, is perverse. The order of the learned Commissioner, Jhansi Division, Jhansi, dated 20.06.2011, specifically records, the submissions made on behalf of the respondent No.3, and returns his findings thereon. The recall application, was clearly misconceived, and was liable to be dismissed, on this ground alone.

14. But the matter, does not rest here. There are other contentions, raised by the learned counsel for the respondents, which in the interest of upholding the law, need to be gone into.

15. There is a sanctity, attached to the auction proceedings, taken out under the U.P. Zamindari Abolition & Land Reforms Rules, 1952 (hereinafter referred to U.P.Z.A.L.R. Rules, 1952). Auctions under the U.P.Z.A.L.R. Rules, 1952 cannot be lightly interfered with. It would be against the public interest and the statutory scheme. The best bids would not come forward for fear of uncertainty, and lack of finality of the auction.

16. It would be apposite, to reinforce the narrative with judicial authority in point. The Hon'ble Supreme Court, in the case of **Executive Engineer, Karnataka Housing Board v. LAO,** reported at **2011 (2) SCC 24** enumerated factors which depressed the bids in a public auction, by holding thus:

"6.But auction-sales stand on a different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction. Human ego, and desire to do better and excel over other competitors, leads to competitive bidding, each trying to outbid the others. Thus in a well advertised open auction-sale, where a large number of bidders participate, there is always a tendency for the price of the auctioned property to go up considerably. On the other hand, where the auction-sale is by banks or financial institutions, courts, etc. to recover dues, there is an element of distress, a cloud regarding title, and a chance of litigation, which have the effect of dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. There is therefore every likelihood of auction price being either higher or lower than the real market price, depending upon the nature of sale. As a result, courts are wary of relying upon auction-sale transactions when other regular traditional sale transactions are available while determining the market value of the acquired land. This Court inRaj Kumarv.Haryana State[(2007) 7 SCC 609] observed that the element of competition in auction-sales makes them unsafe guides for determining the market value."

17. Keeping this in mind, the legislature, has laid most onerous conditions, for conduct and setting aside

of a public auction, under the U.P. Zamindari Abolition & Land Reforms Rules, 1952. The said rules being relevant are extracted hereunder:

*"**285-H** (1) Any person whose holding or other immovable property has been sold under the Act may, at any time within thirty days from the date of sale, apply to have the sale set aside on his depositing in the Collector's office—*

(a) for payment to the purchase, a sum equal to 5 per cent of the purchase money; and

(b) for payment on account of the arrears, the amount specified in the proclamation in Z.A. Form 74 as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been paid on that account; and

(c) the costs of the sale.

***285-I.** (i) At any time within thirty days from the date of the sale, application may be made to the Commissioner to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it; but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake.*

***285-K.** If no application under Rule 215-I is made within the time allowed therefor, all claims on the ground of irregularity or mistake in publishing or conducting the sale shall be barred:*

Provided that nothing contained in this rule shall bar the institution of a suit in the Civil Court for the purpose of setting aside a sale on the ground of fraud."

18. The aforesaid provisions, cast a fetter and condition the challenge to a public auction, under the U.P.Z.A.& L.R. Rules, 1952. The conditions are essential pre-requisites, which have to be followed, before a challenge to the auction is entertained. The provisions, are mandatory.

19. The borrower never came forward, to challenge the aforesaid auction. Only the property of the borrower, was put to auction. The respondent No.3, is not the borrower, nor was his property, put to auction under Section 285H of the U.P.Z.A.& L.R. Rules, 1952. The respondent No.3-Ram Babu Shiv Hare, does not fall in the category of persons created under the U.P. Zamindari Abolition & Land Reforms Rules, 1952, who are eligible, to put an auction sale to challenge, before the competent authority.

20. In the wake of the preceding narrative, the petitioner does not have the locus standi to apply to set aside the sale. A similar view, was taken by this court, in the case of ***Sanwar Pal Singh Vs. Additional Commissioner, Saharanpur and others,*** reported at ***2017 (8) ADJ 550.***

21. The scheme of the auctions and the provisions to set aside the auction sale under the U.P.Z.A. & L.R. Rules, 1952, has been extracted in the preceding paragraphs. The provisions are a complete code. The limited set of persons, who are entitled to challenge an auction sale, are clearly defined. The procedure to make a challenge to such auction sale, is specifically prescribed. The authorities, to decide the validity of such challenge, have also been duly identified.

22. The facts of this case, as disclosed from the records, and confirmed by submission of the parties, establish the fact that the challenge to the auction sale was not instituted, before the competent authority, created under Rule 285(I) of the U.P. Zamindari Abolition & Land Reforms Rules, 1952 by an eligible person. The competent authority, to entertain the challenge to the auction, is the learned Commissioner, Jhansi Division, Jhansi, in terms of the U.P.Z.A. & L.R. Rules, 1952. The person, whose property was auctioned, is eligible to assail the auction under the U.P.Z.A. & L.R. Rules, 1952.

23. Further, a pre-deposit of the amount, as contemplated, under Rule 285(H) of the U.P.Z.A. & L.R. Rules, 1952, for entertaining such application, has not been made. Nothing has been brought in the record or pointed out by the learned counsel, to evidence such pre-deposit, contemplated under Rule 285(H)of the U.P.Z.A. & L.R. Rules, 1952.

24. The records and details of proceedings, before the competent authority, under Rule 285(I) of the U.P. Zamindari Abolition & Land Reforms Rules, 1952, have also not been brought in the record. Nor has anything to this effect been pointed out by the learned counsel. No pleadings, in regard to satisfaction of pre-requisites, to challenge the auction sale, under the U.P.Z.A. & L.R. Rules, 1952 have been taken by the respondent No.3, in the counter affidavit. In any case, the order impugned, does not arise from such proceedings.

25. The proceedings, initiated, at the behest of the Naib Tehsildar, were clearly in the teeth of the provisions of the rules, framed under the U.P. Zamindari Abolition & Land Reforms Rules, 1952. No fault in the order dated 20.06.2011, passed by the learned Commissioner, Jhansi Division, Jhansi, could be pin pointed by the learned counsel for the respondents.

26. The order dated 14.10.2011 passed by the learned Commissioner, Jhansi Division, Jhansi is arbitrary and illegal. The order dated 14.10.2011 is beyond jurisdiction. The order dated 14.10.2011 cannot stand.The order, dated 14.10.2011, passed by the learned Commissioner, Jhansi Division, Jhansi, is quashed.

27. The order dated 20.06.2011, passed by the learned Commissioner, Jhansi Division, Jhansi, is affirmed.

28. The writ petition, is allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – C No. 21448 of 1999

Indrapal Kori And Others ...Petitioners
Versus
U.P.S.R.T.C. ...Respondent

Counsel for the Petitioners:
Sri Samir Sharma, Sri Sunil Kumar Misra

Counsel for the Respondent:
C.S.C.,

A. U.P. Industrial Dispute Act-Section 6 (2-A)- Violation of natural justice-not supplying any documents or evidence in support of charges. Tribunal has power to substitute a lesser punishment in place of punishment of discharge or

dismissal only and not in any other punishment.

This Court, is, therefore, left with no option but to uphold that finding of the Tribunal that says that the inquiry was not procedurally fair but flawed and conducted in violation of principles of natural justice, for the reasons indicated hereinabove.But this conclusion could not have entitled the Tribunal to modify the award and substitute a lesser punishment than that awarded by the departmental authorities, invoking powers under Section 6(2-A) of the Act. The Tribunal finding it to be a case of denial of opportunity ought to have proceeded to record evidence itself, requiring the employers to prove charges before it by leading appropriate evidence. (Para 13 & nd 14)

Cases cited:-

Kulwant Singh Gill Vs. State of Punjab, 1990 (61) FLR 635 (E-9)

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Sri Sunil Kumar Mishra, learned counsel for the petitioner. No one appears on behalf of the respondent-workman.

2. This writ petition is directed against the judgment and award passed by the Presiding Officer, Industrial Tribunal-III, Kanpur dated 27.11.1998 passed in Adjudication Case No.37 of 1994 deciding an industrial dispute between the petitioner-U.P. State Road Transport Corporation and their workman, Indrapal Kori.

3. The petitioner-U.P. State Road Transport Corporation, who are represented by their Regional Manager, Kanpur, are hereinafter referred to as the 'Employers' whereas Indrapal Kori, a bus conductor, who is the contesting respondent, is hereinafter referred to as the 'workman'. The workman is admittedly a bus conductor in the service of the employers, posted in the Kanpur Region of the employer's establishment. According to the employer's case, on 27.08.1990, the workman was detailed to operate bus bearing No.UHJ-9515, plying on the Asoha-Mornwa route. This bus was checked by a checking team, who found out of the total of 75 passengers on board, 23 to be travelling without ticket. This bus was again checked the same day at Unnao, where it was found that out of the 32 passengers on board, 19 were travelling without ticket. The same bus was stopped for a third check the same day on the same route, and again, some serious irregularities were detected.

4. A report in the matter was submitted to the employers by the Checking Teams, who upon being satisfied that a case of misconduct worth initiating disciplinary proceedings against the workman was made out, issued a charge-sheet dated 6.10.1999.

5. The workman submitted a reply to the charge-sheet and in due course, a departmental inquiry was convened. According to the employers, full opportunity was afforded to the workman to defend himself. Witnesses on behalf of the employers, who were produced at the inquiry were offered to the workman for cross-examination. The workman was also given opportunity to produce evidence in his defence. The proceedings of the inquiry being concluded, an enquiry report was submitted to the effect that charges of serious misconduct stood proved against the workman. On the basis of the aforesaid report of the departmental inquiry, a show-cause notice dated 29.8.1992, along with a copy of the

inquiry report was served upon the workman by the employers requiring him to show-cause as to why he may not be reduced in the time-scale to his basic salary for three years with cumulative effect, and further, the balance of his salary for the period of suspension be not forfeited. It is the Employer's further case that the Appointing Authority considered the entire material on record and vide an order dated 31.10.1992, the workman was punished with reduction in time-scale to his basic salary for three years with cumulative effect, and further, the balance of salary for the period of suspension was ordered to be forfeited.

6. Aggrieved by the said order, the workman raised an industrial dispute under Section 4K of the U.P. Industrial Disputes Act, and hereinafter referred to as the 'Act', which was referred to the Industrial Tribunal for adjudication vide Government Order dated 25.10.1994. The reference was made in the following terms (translated into English from Hindi Vernacular)

"Whether the punishment awarded by the employers to their workman Indrapal Kori, conductor, Fatehpur Depot, vide punishment order dated 31.10.1992, is invalid and improper. If yes, to what benefit/relief is the concerned workman entitled."

7. A written statement each was filed on behalf of the employers and the workman, with a rejoinder statement each, filed by the workman and the employers, as well.

8. According to the written statement filed by the workman, he was employed as a Conductor, posted at the Fatehpur Depot. He was suspended pending inquiry on 6.10.1990 and preceding that on 6.9.1990, a charge-sheet dated 6.9.1990 was issued that was served upon him on 11.10.1990. According to the charge-sheet, amongst others, the workman was charged in terms that on 18.06.1990, when the bus operated by him was inspected, 17 passengers without ticket were found on board, but an attempt to make that entry on the waybill was prevented by him, which resulted in loss of revenue to the employers. He was charged further in terms that he did not act according to his obligation as a Conductor, carrying a quintal of freight and not issuing tickets, despite realizing fare from the passengers, amongst others. It was pleaded in the written statement that prior to issue of the charge-sheet in question, no preliminary inquiry was made by the employers and further that along with the charge-sheet, necessary documents were not supplied to the workman. It was further pleaded that the workman's defence offered at the inquiry was not considered and doing a mere show of consideration of the workman's case, an inquiry report was submitted on the basis of which, the order of punishment dated 31.10.1992 was passed whereby salary for the period of suspension was forfeited and the workman was reduced to his basic pay for a period of three years with cumulative effect. Together with this order of punishment, the workman was transferred, which has been castigated as illegal. The workman sought relief of invalidation of the order of punishment and payment of his salary for the period of suspension, after deducting the subsistence allowance, besides award of costs.

9. The employers in their written statement, raised a preliminary objection

that the workman had raised an industrial dispute through a Union, which was not registered. It was urged that since the dispute was not raised through a registered Union, the order of reference is bad. That apart, it was pleaded that the workman is still functioning on the post of a Conductor, but his conduct is not satisfactory. It was also urged that on 27.08.1990, while the workman was operating the bus bearing Registration No.YHJ-9515 on the Asoha-Moranwa route, a checking team intercepted the bus and found on board some 75 passengers, of whom 23 were travelling ticket-less. Lateron, the same bus when checked at Unnao, and was found ferrying 32 passengers of whom 19 were without ticket. The same vehicle was checked a third time on the Unnao-Lucknow route where it was found carrying one quintal of freight, comprising plastic raincoats (the word employed in Hindi is *"Barsati"* and whether it is a raincoat or some other kind of protection gear from rains, is not clear). It is on the basis of these three separate instances of checking done on the same day, at different points, relating to the same vehicle, operated by the workman that he was charge-sheeted on 6.10.1990. The workman was given adequate opportunity to dispel the charges at the inquiry held before Sri B.C. Jain, who was a duly appointed Inquiry Officer. The inquiry was done strictly in adherence to the principles of natural justice, where full opportunity was afforded to both parties to lead evidence before the Inquiry Officer. The Inquiry Officer submitted his report after a careful perusal of the evidence on record. A show-cause notice was issued to the workman on 29.08.1992, mentioning the proposed punishment. In answer to that, the workman submitted his reply bereft of any further documents or evidence. The reply was found not satisfactory. The Disciplinary Authority proceeded to pass an order dated 31.10.1992, punishing the workman in the terms already indicated. It was pleaded that the punishment awarded is lawful and just. It was also pleaded that in accordance with sub-rule (5) of Rule 63 of the Service Rules of 1981, that govern the service conditions of the workman, an employee can be reduced to a lower scale on the same post. It was also pleaded that the workman is not entitled to any relief. It was pointed out further that the workman did not prefer any appeal from the order of punishment, as provided under the Service Rules. It was, in addition, claimed that in case the Tribunal finds that the domestic inquiry held has not been conducted in accordance with the Rules of natural justice or it is otherwise unfair, the employers may be given an opportunity to lead evidence in support of the charges and establish them by evidence before the Tribunal.

10. The parties led evidence before the Tribunal in support of their respective cases. The workman in his evidence reiterated facts to the effect that he was given a charge-sheet relating to the three separate instances of checking of the bus operated by him, where in two cases, violation in the form of some ticket-less passengers was found, and in one case, freight being illegally carried was alleged. He said in his evidence that he demanded documents related to the three charges, which in turn related to the three instances of checking but the same were not supplied; instead, some other documents were supplied. He further said that out of the three checking Officers involved, only two appeared before the domestic inquiry and no charge was found proved against

him by the Inquiry Officer, who submitted an inquiry report exonerating him. He further said in his evidence before the Tribunal that the bus had stoppages at short distances where passengers were boarding and de-boarding on account of which, he was unable to make entries in the waybill. So far as the charge relating to freight being carried illegally was concerned, the checking Officers did not mount the bus and check what was placed in the luggage carrier at the top. They instead, made a guess work of it and mentioned all that they have said in their report. He also said that at that time the bus that he was operating did not have any freight on board. He also said in his evidence before the Tribunal that he had been awarded three punishments: one was forfeiture of his salary for the period of suspension beyond the subsistence allowance; the second was reduction to the basic pay-scale with cumulative effect; and, the third was a penal transfer. He had specifically demanded documents through an application and when those were not provided, he had sent applications marked as Exhibit D4 and D5 that were reminders for the purpose. There is still another document marked as Exhibit D6, through which he applied but was not given opportunity of hearing. He complained verbally to the Inquiry Officer about all these matters. All that he was given by way of documents on which the employers relied, was his order of suspension. He specifically said that no other document was given to him. He also said in his evidence that the officers carrying out the checking demanded of him illegal gratification, which he says he did not and could not pay, particularly so, as he does not do anything illegal while operating his bus. He also stated specifically in his evidence that these 23 and 17 passengers found on board, are passengers about whom entry in the waybill had not yet been made by him. So far as the freight/luggage is concerned, he had no such luggage being ferried by him.

11. The Tribunal has recorded it for a fact that so far as the employers are concerned, an Assistant Traffic Inspector proved some of the documents whereas the complainant is the Traffic Superintendent. The other documents were proved by the Office Superintendent, who said in his evidence that the Assistant Traffic Inspector is never detailed to duty alone. He further stated that it is incorrect to say that the 17 tickets that had been detached from their binding, were not taken into possession by the checking party. It was further stated that the checking teams were told by passengers that the Conductor had charged them, but had not issued tickets. He, however, stated that no written complaint was made or any note to that effect made by the checking officer, as to why entry regarding 17 passengers was not made on the waybill. About Exhibit D3, he said that he has no information. The Office Assistant said in his cross-examination that the inquiry was not held before him, and he was not in a position to say who testified in the domestic inquiry. The documentary evidence, marked as Exhibit E7 to E15, were proved by these witnesses.

12. At the hearing of this petition, the respondent-workman has not appeared despite sufficient service being effected. This Court has perused the impugned award and carefully considered the submission of Sri Sunil Mishra, in assail of it. One of the submissions of Sri Sunil Mishra, on which much emphasis has been laid is to the effect that the Tribunal could not have exercised powers under

Section 6(2-A), in the present case, and make an award setting aside part of the punishment alone, substituting it by a lesser punishment. In this connection, he submits that the power to substitute a lesser punishment by the Labour Court or Tribunal, while making an award is available under Section 6(2-A) of the Act, in the event punishment of discharge or dismissal has been ordered. In the instant case, since punishment of discharge or dismissal has not been ordered, the Tribunal could not have set aside the punishment order and substituted it by lesser punishment, in terms of its award. To this extent, Sri Mishra is right in his submission that a lesser punishment could not be awarded by the Tribunal, unless the punishment awarded by the employers was discharge or dismissal from service. The power to substitute a lesser punishment by the Tribunal under Section 6(2-A) of the Act is there alone with regard to punishment of discharge or dismissal under sub-section (2-A) of Section 6 of the Act, where in the opinion of the Labour Court or Tribunal, that punishment is disproportionate to what circumstances of the case require. Here is not that case, since the punishment awarded is one of reduction in time-scale to basic pay with cumulative effect.

13. However, that would not deprive the Tribunal of its jurisdiction to pronounce upon the validity of the award. It is also submitted by Sri Mishra that the award of the Tribunal holding the departmental inquiry to be not fair and proper is an incomplete disposition of the matter; for if the Tribunal was of opinion that the inquiry was not fair and there was denial of opportunity, it ought to have given opportunity to parties, including the employers, to lead evidence in support of the charges before the Tribunal, which it ought to have determined on merits. It is submitted that this demand was specifically made before the Tribunal but fell on deaf ears. A perusal of the impugned award shows that the Tribunal has recorded a finding that the process of inquiry is far from fair, particularly so as documents that are relevant to the charges were not supplied to the workman and further that the checking officer, who is a Traffic Superintendent was not examined before the Inquiry Officer or before the Tribunal on the pretext that he had retired from service. The Tribunal has also said that no evidence has been brought on record to show that the Checking Officer who had made the complaint, that is to say, the concerned Traffic Superintendent has indeed retired from service. The Tribunal beyond this finding has said that there is provision under Rule 63 of the Service Rules to impose major and minor punishment, but there is no provision for the reduction of a workman in time scale and, therefore, the punishment awarded is not in accordance with the Rules. The Tribunal has relied a decision of the Supreme Court in **Kulwant Singh Gill Vs. State of Punjab, 1990 (61) FLR 635.** This Court may say at once that the said decision is hardly relevant to the controversy involved here, as rightly submitted by Sri Mishra.

14. This Court on a wholesome consideration of the matter is of opinion that on two counts the Tribunal found the inquiry to be unfair and one conducted in violation of principles of nature justice. This was because documents relevant to the charges were not supplied and the complainant, who was a Traffic Superintendent was not examined, either during the domestic inquiry or before the Tribunal in support of the charges, on ground that he had retired from service.

This Court is of the clear opinion that the fact that an employee has retired from service would not absolve the employer of their liability to examine the complaint of the case at the domestic inquiry to prove charges against the workman. This the Tribunal has found not to have been done. Certainly on both these counts, the Tribunal cannot be said to be wrong that the inquiry was not fair and one held in accordance with the principles of natural justice. The fact that these two features of the inquiry have been found to be deficient by the Tribunal, leading to the inquiry being procedurally flawed and one in violation of principles of natural justice is a finding of fact which has not been demonstrated by the employers to be palpably wrong or one suffering from an error apparent on the face of the record. It is otherwise a finding of fact recorded by the Tribunal on a perusal of record and taking a reasonable view of the evidence. This Court has noticed the fact that the employers have not annexed any document relating to the inquiry, or the manner in which it has proceeded so as to enable this Court to verify whether findings of the Tribunal regarding violation of principles of natural justice or procedural unfairness are in any manner palpably wrong, manifestly illegal, or suffer from an error apparent. There is no document to cross-check those findings of the Tribunal. This Court, is, therefore, left with no option but to uphold that finding of the Tribunal that says that the inquiry was not procedurally fair but flawed and conducted in violation of principles of natural justice, for the reasons indicated hereinabove.

15. But this conclusion could not have entitled the Tribunal to modify the award and substitute a lesser punishment than that awarded by the departmental authorities, invoking powers under Section 6(2-A) of the Act. The Tribunal finding it to be a case of denial of opportunity ought to have proceeded to record evidence itself, requiring the employers to prove charges before it by leading appropriate evidence. It could then have held the case against the workman proved or concluded to the contrary, and set aside the award. This is what ought to have been done by the Tribunal, and this is what this Court thinks the Tribunal ought to do.

16. In the face of the circumstances that there is no petition at the instance of the workman challenging that part of the award by which punishment awarded by the employers has been maintained in part by the Tribunal, this Court cannot pass judgment finally deciding the industrial dispute. In addition, in the absence of a counter affidavit by the workman, this Court is all the more handicapped in ascertaining many essential facts and drawing its independent conclusion based on evidence. It is already remarked that there is absolutely no evidence before this Court except the impugned award passed by the Tribunal. Under the circumstances, this Court thinks that this matter must go back to the Tribunal with a direction that it should decide the matter afresh within three months next in accordance with law, after affording opportunity of hearing to parties. It is made clear that the Tribunal, while disposing of the matter afresh will permit the employers to lead evidence in support of the charges, and the workman, to defend himself on those charges before the Tribunal. It is also provided that the Tribunal may hold the award to be illegal and improper or legally sound and proper. In case it concludes in favour of the

workman, the Tribunal may do anything or pass any kind of orders within the four corners of law permissible, but the Tribunal will not substitute the punishment awarded by the Tribunal, though, it may, set aside the award or uphold the same, in accordance with the evidence that is forthcoming on record.

17. In the result, this petition **succeeds** and is **allowed** in part.

18. The impugned judgment and award passed by the Presiding Officer, Industrial Tribunal-III, Kanpur dated 27.11.1998 is hereby **quashed** and the matter is remanded to the Tribunal to decide Adjudication Case No.37 of 1994 afresh, after permitting parties to lead evidence and pass fresh orders within three months next from the date of receipt of a certified copy of this order, in accordance with law, and whatever has been said in this judgment.

19. There shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – B No. 50816 of 2009

Chandra Shekhar Vishwakarma
...Petitioner
Versus
Presiding Officer Labour Court- 2 U.P. Kanpur And Ors. ...Respondents

Counsel for the Petitioner:
Sri A.R. Dwivedi, Sri Ali Hasan, Sri Brijendra Deo Mishra

Counsel for the Respondents:
C.S.C., Sri R.A. Gaur, Sri Sunil Kumar Mishra

A. Exparte proceeding-Inquiry proceedings conducted without the schedule and venue intimated to the delinquent is exparte proceeding and is bad in eyes of law.

Labour Court committed error in not appreciating evidence as to receipt of notices. Two propositions are too well settled to brook any doubt. One is about the time-tested principle that an inquiry held without notice to the delinquent workman is a nullity, and all proceedings based on such an inquiry would collapse. The second is that a finding recorded by any Court, Tribunal or Authority, ignoring material evidence from consideration, or drawing perverse conclusions from evidence, can never be sustained.(Para15)

Cases cited: -

1.North West Karnataka Road Transport Corporation vs. H.H.Pujar, AIR 2008 SC 3060,

2. Divisional Manager, Rajasthan State Road Transport Corporation vs. Kamruddin , (2009) SCC 552 (E-9)

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Sri Brijendra Deo Mishra, learned counsel for the petitioner and Sri Sunil Kumar Mishra, learned counsel appearing for the respondent-Corporation.

2. This writ petition has been preferred by a workman challenging an award of the Labour Court 2nd, U.P., Kanpur in Adjudication Case No. 235 of 1999, dated 02.09.2008 and published on 13.01.2009. The said award is hereinafter referred to as 'the impugned award'. By the impugned award, an industrial dispute raised at the instance of the petitioner, Chandra Shekhar Vishwakarma, who is

hereinafter referred to as the 'workman', questioning his termination from service by respondent no. 3 has been answered against him.

3. The facts giving rise to this writ petition are that the workman was a bus conductor in the employ of the U.P. State Road Transport Corporation, represented before this Court by respondent nos. 2, 3 & 4. The aforesaid corporation and its various officers are hereinafter referred to as the 'Employers'. The petitioner was posted as a conductor at the Orai depot of the Employers in the District of Jalaun. On 27.03.1997, the petitioner was operating Bus No. UP 933599 on the Lucknow-Orai route. As the vehicle approached Kalpighat, it was checked by a Traffic Inspector of the Employers from the Banda Depot, one Wakeel Ahmad. According to the petitioner, the Traffic Inspector found sixteen passengers on board bus, which did a perfect tally with entries in the way-bill. The petitioner claims that lateron, the Traffic Inspector lodged a complaint dated 28.03.1997 with the Employers, to the effect that sixteen passengers were found traveling on the bus, when he checked the vehicle. He found one of them to be without ticket. It was claimed by the Traffic Inspector vide his complaint dated 28.03.1997 that the workman abused him in filthy language and misbehaved.

4. On 29.03.1997, the Employers initiated disciplinary proceedings against the workman, who was directed to be placed under suspension. A charge sheet was issued to him on 29.03.1997. The petitioner was actually placed under suspension vide order dated 31.03.1997, passed by the Assistant Regional Manager of the Employers at Jhansi, on charges summarized in the suspension order. A charge sheet was issued to the workman by the Regional Manager of the Employers, where eight charges in all figured. The charge sheet aforesaid was sent by the Regional Manager, last mentioned, along with a copy of the complaint dated 28.03.1997. The Assistant General Manager of the Employers, impleaded as respondent no. 4 to the petition was appointed the Inquiry Officer, with a direction to complete the inquiry and submit his report within a month.

5. Upon receipt of the aforesaid charge sheet the workman submitted his reply on 28.06.1997 saying there that along with the charge sheet, the workman was not supplied a copy of the way-bill. It was urged that in the absence of the way-bill that was the most vital document, the workman was not in a position to furnish an effective reply. However, the workman did submit his reply denying the charges carried in the charge sheet with a prayer that he be exonerated and reinstated in service. According to the workman, departmental inquiry did not proceed on schedule and the petitioner was provisionally reinstated in service by the Regional Manager of his Employers. The petitioner has come up with a categorical case in paragraph 13 of the writ petition that no notice of inquiry was served upon the petitioner and it was held without intimation of schedule and venue to him. The workman has further averred in paragraph 13 of the writ petition that the Regional Manager of his Employers at Jhansi, issued a show cause notice to him dated 26.02.1999, alongwith a copy of the inquiry report submitted by the Inquiry Officer holding the charges proved and the workman guilty. The show cause

notice required the workman to furnish his reply, why his service be not terminated, and his salary for the period of suspension forfeited.

6. Upon receipt of the aforesaid show cause notice, the workman alleges that he submitted a detailed reply on 10.03.1999, challenging various findings recorded by the Inquiry Officer behind his back. He requested that the proceedings be dropped and his salary for the period of suspension released. The Regional Manager of the Employers however passed an order dated 07.04.1999, on the basis of findings recorded in the inquiry report, that the petitioner has dubbed ex-parte, terminating his services and forfeiting salary for the period of his suspension. It is at this stage that the petitioner invoked the jurisdiction of the authorities under the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act') and raised an industrial dispute. The competent authority under the Act made a reference vide order dated 18.08.1999, under Section 2-K of the Act, which is in the following terms (translated into English from Hindi vernacular):-

"Whether termination of services of the workman Sri Chandra Sekhar Vishwakarma son of Raghubar Dayal, conductor vide order dated 07.04.1999 and forfeiture of his salary for the period of suspension by the employers is improper and illegal? If yes to what relief is the workman entitled?"

7. On the basis of the aforesaid reference, Adjudication Case No. 233 of 1999 was registered before the Labour Court, IInd U.P., Kanpur. The workman filed his written statement on 13.10.1999, supported by his affidavit. The Employers contested the workman's case by filing a written statement on their behalf. The Workman supported his case by oral and documentary evidence, examining himself as WW-1. The Employers too, adduced oral and documentary evidence in support of their case. One Taukheer Habib, an Assistant, posted in the Office of the Regional Manager of the Employers at Jhansi, took stand in the witness box and deposed in favor of the Employers. The Labour Court, by means of the impugned award, answered the reference, as already said, against the Workman and in favour of the Employers.

8. Learned counsel for the workman has argued that the inquiry proceedings were conducted without the schedule and venue being intimated to him, in the sense that he was never informed of the date and the place of inquiry by the Inquiry Officer. The entire proceedings were concluded ex-parte behind his back, that has resulted in gross violation of principle of natural justice. He submits that once the inquiry report is one submitted behind the petitioner's back and without intimation to him of the date, time and place of inquiry, all subsequent action taken, including the order terminating his services is vitiated. He has urged that the Labour Court has committed manifest illegality in not appreciating the aforesaid boldly written violation of principle of natural justice, committed in the most gross manner. He submits that conclusions of the Labour Court on this issue are perverse, rendering the impugned award bad in law.

9. In order to substantiate his contention he has invited the Court's attention to the employer's evidence, where in the examination-in-chief, the

Employers witness Taukheer Habib has stated that papers marked as paper Nos. 6/1, 6/2, 6/3, 6/4, 8/1, 8/2, 11/1, 13/1, 15/1 are notices sent to the workman to participate in the departmental inquiry, the original of which were before him. He has further said in the examination-in-chief that it is incorrect on the workman's part to say that these summons/notices regarding inquiry were delivered to him, after the scheduled date had passed by. In his cross examination regarding service of these notices, there is a very specific stand taken by this witness, to which learned counsel for the workman has drawn the Court's attention. This reads as follows(extracted from the record of the deposition carried in annexure-9 to the writ petition, dated 15.02.2001):-

,ग्जी0 ई–11 से ई–19 तक जो वादी **नोटिस/सम्मन को जारी किये गये हैं उसके समय से प्राप्त उसे करवाये गये वह मेरे द्वारा प्राप्त नहीं करवाये गये। स्वतः कहा कि यह नोटिस डिपो स्तर के वादी श्रमिक को प्राप्त करवाने के लिए भेजे गये और वादी श्रमिक को उक्त सम्मन प्राप्त करवाये गये या नहीं उनकी प्राप्ति रसीद वाद पत्रावली में दाखिल नहीं हैं।** जांच कार्यवाही में रिपोटकर्ता वकील अहमद यातायात निरीक्षक ने एग्जी0 ई–23 में जो कुछ दर्ज है वही बयान जांच अधिकारी के समक्ष उन्होंने दिया है जो काले घेरे में है इसके अतिरिक्त और कोई बयान इन्होंने नहीं दिया है। जांच कार्यवाही में रिपोर्ट कर्ता ने जांच अधिकारी के समक्ष पढ़कर नहीं सुनाई थी। **एग्जी0 ई0–11 से ई–19 तक जो वादी की जांच कार्यवाही में नोटिस भेजे गये उन पर सम्बन्धित श्रमिक के प्राप्ति के हस्ताक्षर नहीं है।**
(Emphasis by court)

10. It is urged on the basis of said categorical evidence of the Employers' witness that notices of inquiry though sent out to the workman and may be available on records of the Employer, the same do not bear his signatures, and, therefore, service is not all proved. There is thus, no proof at all to show or demonstrate the fact that the workman was intimated of the date, venue and time of inquiry before hand to enable him to appear and defend himself. In the impugned award, the Labour Court in the first part, has noticed the employer's case in this regard vide paragraph 4, where it has been recorded as under:-

विभागीय जांच अधिकारी के द्वारा जांच सम्पादित करने के उपरान्त जांच रिपोर्ट प्रदर्श ई–7 प्रेषित की गयी। विभागीय जांच रिपोर्ट का अवलोकन करने से स्पष्ट है कि जांच अधिकारी ने यह अवधारित करते हुए की मामले की जांच हेतु दिनांक 21/05/1997, 21/6/1997, 9/7/1997, 25/7/1997, 28/8/1997, 9/10/1997, 12/11/1997, 12/12/1997, 12/1/1998, 6/2/1998, 11/3/1998, 25/4/1998, 24/7/1998, 16/1/1998, 9/11/1998 एवं 2/12/1998 निश्चित की गयी किन्तु उक्त निर्धारित तिथियों में से किसी भी तिथि में आरोपी परिचालक उपस्थित नहीं हुआ जबकि रिपोर्टकर्ता दो तिथियों 9/7/1997 एवं 25/4/1998 में उपस्थित हुआ। दिनांक 9/7/1997 को निरीक्षरण कर्ता वकील अहमद यातायात निरीक्षक उपस्थित हुए और अपना बयान दर्ज कराया जिसमें कहा कि उनके द्वारा दिनांक 28/3/1997 को श्री चन्द्रशेखर परिचालक उरई डिपों के विरूद्ध जो रिपोर्ट की गयी है वह उसकी पुष्टि करते है और यही उनका बयान है। मामले में आरोपी कर्मचारी को बचाव का पूर्ण अवसर दिया गया किन्तु वह जांच कार्यवाही में अनुपस्थित होकर बचाव के अवसर से स्वयं वंचित रहा। **जांच कार्यवाही में 16 तिथियों में से किसी भी तिथि में परिचालक उपस्थित नहीं हुआ।**
(Emphasis by court)

11. This issue about service of notice of inquiry has been examined by the Labour Court in paragraph 13 of the award, where the case of non service has been repelled in terms of the following findings:-

इसके विपरीत विपक्षी सेवायोजको की ओर से कहा गया है कि वादी श्रमिक पक्ष जान–बूझकर कार्यवाही के दौरान अनेक अवसर एवं नोटिस देने के बावजूद जांच में जानबूझकर उपस्थिति नहीं हुआ, अतः ऐसी स्थिति में विभागीय जांच के अर्न्तगत पूर्ण रूपेण अवसर प्रदान किया गया था और जांच रिपोर्ट नैसर्गिक सिद्धान्तों के विरूद्ध नहीं कहा जा सकता इस संबंध में वादी श्रमिकपक्ष चन्द्र शेखर डब्लू–1 ने अपने प्रतिपरीक्षरण में कहा कि उसे जांच कार्यवाही में चूंकि समय से कोई कागज ही प्राप्त नहीं होता था। इसलिए वह जांच कार्यवाही में शामिल नहीं हो पाता था, परंतु मैं लिखित में कोई प्रार्थना पत्र नहीं दिया कि मुझे कागज समय से प्राप्त नहीं होता है। मैखिक रूप से शिकायत करते थे। **प्राप्ति परीक्षण के अर्न्तगत इसने विपक्षी सेवायोजकों के द्वारा सूची के कागज संख्या 15 को देखकर बताया कि मैं नहीं सकता कि यह वही पत्र है जो मुझे प्राप्त हुआ था और यही स्थिति सूची के कागज सं0 13ण्6ध्1ण 6ध्2ण्6ध्3ण 6ध्4ण्8ण 9ध्2 के हैं। इस साक्षी ने अपने प्रतिपरीक्षण के अर्न्तगत यह भी कहा है कि सूची के क्रमांक –9 पर जो प्राप्ति रसीद है उस पर उसके हस्ताक्षर है। इस प्रकार यह अभिलेखीय साक्ष्य प्रदर्श इ–11 लगायत प्रदर्श इ–19 वादी श्रमिक पक्ष चन्द्रशेखर को भेजे गये नोटिस की कार्यालय प्रति है जो उसे विभागीय जांच के अर्न्तगत उपस्थित होने के संबंध में जांच अधिकारी के द्वारा निर्गत किया गया है। इन अभिलेखीय साक्ष्यों एव वादी श्रमिक पक्ष चन्द्र शेखर डबलू–1 के उपरोक्त साक्ष्य से यह स्पष्ट हो जाता है कि विभागीय जांच के दौरान नोटिस एवं पर्याप्त अवसर देने के बावजूद भी यह जान–बूझकर जांच कार्यवाही में सम्मिलित नहीं हुआ।** (Emphasis by court)

ग्जी0 ई–11 से ई–19 तक जो वादी **नोटिस/सम्मन को जारी किये गये हैं उसके समय से प्राप्त उसे करवाये गये वह मेरे द्वारा प्राप्त नहीं करवाये गये। स्वतः कहा कि यह नोटिस डिपो स्तर के वादी श्रमिक को प्राप्त करवाने के लिए भेजे गये और वादी श्रमिक को उक्त सम्मन प्राप्त करवाये गये या नहीं उनकी प्राप्ति रसीद वाद पत्रावली में दाखिल नहीं हैं।** जांच कार्यवाही में रिपोटकर्ता वकील अहमद यातायात निरीक्षक ने एग्जी0 ई–23 में जो कुछ दर्ज है वही बयान जांच अधिकारी के समक्ष उन्होंने दिया है जो काले घेरे में है इसके अतिरिक्त और कोई बयान इन्होंने नहीं दिया है। जांच कार्यवाही में रिपोर्ट कर्ता ने जांच अधिकारी के समक्ष पढ़कर नहीं सुनाई थी। **एग्जी0 ई0–11 से ई–19 तक जो वादी की जांच कार्यवाही में नोटिस भेजे गये उन पर सम्बन्धित श्रमिक के प्राप्ति के हस्ताक्षर नहीं है।**

12. It is, thus evident, that the Labour Court has failed to take into consideration the specific assertions of the Employers' witness, Taukheer Habib, who has categorically said in his cross examination, dated 15.02.2001, that exhibits E-11 to E-19 that are notices sent to the workman to participate in the inquiry, do not bear his signatures. The Labour Court noticing the Employers case in the impugned award that these notices were served upon the workman about dates fixed in the inquiry but he did not appear has recorded the finding, above extracted, which says that the workman has admitted in his cross examination, the fact that receipt of acknowledgment at serial No. 9 of the list of documents, bears his signatures. The Labour Court has held that in this manner documents exhibited as E-11 to E-19, that are office copies of the notices sent to the workman to participate in the departmental inquiry are proved to be issued by the Inquiry Officer. It is further held that from these documents and the deposition of the workman, Chandra Shekhar Vishwakarma, WW-1, it is clear that during course of inquiry despite notice and adequate opportunity, the workman did not deliberately appear.

13. This Court is constrained to observed that the finding of the Labour Court on the most serious issue in the matter, that is service of notice about the

date, time and venue of inquiry is vitiated for non consideration of material evidence and drawing perverse conclusions from the evidence on record. This is so because the evidence of the Employers witness that is clear and categorical to the effect that exhibit E-11 to E-19, that are the notices sent to workman to attend various dates fixed during the inquiry, do not bear the workman's signatures. It would have been a different matter if in regard to each of these documents or their office copies, the Labour Court had recorded a categorical finding that the same actually bear the workman's signatures, which have been admitted or found to be his signatures. If that had been the case, ignoring the evidence of the Employers' witness, Taukheer Habib might not have vitiated the Labour Court's finding, but the Labour Court has not found in those terms against the workman. All that the Labour Court has said is that a receipt at serial no. 9 of the list of documents has been admitted by the workman, to bear his signatures of acknowledgment. It is no where said that this receipt relates to notices of the scheduled inquiry, marked as Exhibits E-11 to E-19. It is said in very unclear terms that do not establish any connection between the receipt at serial no. 9 of the list, and the office copies of the notices, marked as Exhibits E-11 to E-19. It is then said in a more mystifying finding that from these documentary evidence and testimony of the workman, Chandra Sekhar Vishwakama, it is clear that the during the course of inquiry he got notice and sufficient opportunity but did not appear. How this inference has been drawn from the admission of the workman, regarding his signatures being there on a receipt at serial no. 9 of the list of documents, is difficult to fathom. On the other hand what is clear is that a categorical assertion of the Employers witness, saying that there are no signatures of acknowledgment of the workman on the notices about the scheduled inquiry sent to him has not at all been taken into consideration by the Labour Court and has been completely ignored. This acknowledgment, by the Employers' witness is the most material evidence, which could not be left out of consideration by the Labour Court. On the other hand, the manner in which it has drawn its vague and mystifying conclusions from one receipt, the acknowledgment of which has been admitted by the workman, that all notices of inquiry, marked as Exhibits E-11 to E-19 have been served upon him is clearly perverse.

14. Sri Suneel Mishra for the Employers and Sri V.D. Mishra on behalf of the workman have extensively canvassed the other points regarding the merits of the charges, which according to the workman are not at all proved, while according to Sri S.K. Mishra they are proved to the hilt. Sri Mishra has placed reliance on the decision of the Supreme Court in **North West Karnataka Road Transport Corporation vs. H.H. Pujar, AIR 2008 SC 3060, Divisional Manager, Rajasthan State Road Transport Corporation vs Kamruddin, (2009) SCC 552,** to submit that in the case of a conductor who has been found carrying ticketless passengers, no other punishment except dismissal or removal from service is warranted. It is true that it may be the law, but this Court thinks that in the present matter, that stage has not arrived for reason that it is not yet established that the petitioner indeed had

notice of the various dates fixed during the inquiry, that led to findings about one passenger being carried by him without ticket, out of a total of 16. The other charges that emanate from allegations of Wakeel Ahmad, Traffic Inspector, that he was assaulted and abused, also for the same reason, cannot be judged on merits till it is proved that workman was indeed served with notice of the date, time and place of inquiry, as claimed by the Employers.

15. This Court does not for the moment hold that indeed the entire inquiry was held *ex-parte*, but thinks that on the state of evidence on record, the Labour Court must look into the evidence of Taukheer Habib, and carefully examine the office copies of notices claimed to be served upon the workman, relating to various dates fixed in the inquiry before returning a well informed finding on the said issue. Two propositions are too well settled to brook any doubt. One is about the time tested principle that an inquiry held without notice to the delinquent workman is a nullity, and all proceedings based on such an inquiry would collapse. The second is that a finding recorded by any Court, Tribunal or Authority, ignoring material evidence from consideration, or drawing perverse conclusions from evidence, can never be sustained.

16. In this view of the matter, this Court at this stage does not propose to go into the other points raised by the petitioner, assailing the findings of the Labour Court, but considers it appropriate to remit the matter to the Labour Court to determine afresh the issue in clear and categorical terms, after consideration of relevant evidence on record, whether the workman was indeed served with notices of inquiry issued by the Employers regarding the date, time and venue. In this regard, the evidence of the employers witness, Taukheer Habib will also be taken into consideration, besides whatever relevant evidence is there on record. The other findings recorded by the Labour Court would have little meaning or legal force, unless it is determined that the inquiry was indeed held, after due notice to the workman of the various dates fixed. Thus the findings of the Labour Court on other issues cannot be sustained, where the fundamental issue whether the inquiry at which these findings on the various charges have been recorded, was held after due and valid notice to the petitioner is required to be determined afresh in accordance with law.

17. In the result the writ petition is allowed in part. The award passed by the Labour Court is set aside, with a remit of the matter to the Labour Court concerned, which shall pass an award afresh in accordance with law, bearing in mind the directions in this judgment; all to be done within a period of four months next from the date of receipt of a certified copy of this order. Costs easy.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PANAKAJ BHATIA, J.

Writ-C No. 1216 of 2019

Sushil Chandra Srivastava And Anr. ...Petitioners
Versus
State of U.P. And Ors. ...Respondents

Counsel for the Petitioners:
Sri Arpan Srivastava

Counsel for the Respondents:
C.S.C. Sri Devi Prasad Mishra

A. Noise Pollution (Regulation and Control) Rules, 2000-Rule 5, 6, 7 and 8-are mandatory. Noise Pollution (Regulation and Control) Rules, 2000-Rule 3(2)- cast an obligation on state government to categorize area in industrial, commercial, residential and silence zone. Directions issued. (Para 27)

The Rule also enjoins the State Government to take steps for abatement of noise including noise emanating from vehicular movements, blowing of horns, bursting of sound emitting firecrackers, use of loud speakers or public address system and sound producing instruments and ensure that the existing noise levels do not exceed the ambient air quality standards specified under these rules. An area comprising not less than 100 meters from hospitals, educational institutions and courts may be declared as silence area/zone for the purpose of these rules. (Para 28)

B. Noise Pollution (Regulation and Control) Rules, 2000—Rule 7-The use of word 'shall" make it imperative that duty is cast on the authority to act on the complaint immediately. (Para30)

The Rule 8 requires furnishing opportunity of hearing to the wrong doer. But no such requirement is necessary under the Rule 7. One of the objects of Rule 7 seems to stop the sound emitting equipment immediately and not to insist to follow long drawn procedure to file a written complaint and to give opportunity to offender. Since noise pollution affects human health, it needs to be stopped immediately. (Para 31) (E-9)

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. This writ proceedings has been instituted by two petitioners who are aggrieved by indiscriminate use of Loudspeaker in a residential area regardless of time.

2. The grievance of the petitioners is that the District administration has installed huge L.C.Ds. equipped with amplifiers in the residential area. They are resident of Hashimpur Road, Prayagraj, which is a densely populated area. The L.C.D. starts from 4.00 A.M. till midnight regularly without any break with full sound. The L.C.D. creates sound problem as well as public nuisance in the residential area. It is stated that the mother of petitioner no.1 is aged about 85 years and she is suffering from multiple age related diseases and the high noise pollution is causing serious problem in her ears and heart. It is further stated that the son of petitioner no.2 is studying in Class 12th and due to sound pollution he is unable to prepare for the examination. It is stated that in the area there are three hospitals/ nursing homes, namely, Yashlok Hospital, Alka Hospital and Astha Clinic. A large number of patients are admitted in these hospital, some of them are suffering from heart and other serious ailments. They are also affected by high noise pollution.

3. Learned counsel for the petitioners submitted that authorities have failed to enforce the law and directions issued by the Supreme Court in a series of the decisions. It is stated that similar L.C.Ds. and speakers have been installed all over the city which have raised the noise pollution level to an impermissible limit under the Law. It is stated that in spite of the law laid down in the case of **NOISE POLLUTION (V), IN RE, 2005 (5) SCC 733** and the statutory rules framed by the Central Government, on

account of the inaction on the part of the concerned authority most of the citizens are feeling inconvenience and their health is affected by the noise pollution.

4. On 22.01.2019, time was granted to the State functionaries to file a counter affidavit and mention the fact that what action has been taken against the offenders of the Noise Pollution (Regulation and Control) Rules, 2000 and various directions issued by the Supreme Court from time to time, in the last five years. The relevant part of the order reads as under:

"Sri Ajit Kumar Singh, learned Additional Advocate General appears for State respondents and Sri J.N. Maurya, learned Advocate has accepted notices on behalf of newly impleaded respondent - U.P. Pollution Control Board.

As prayed, respondents are granted time to file counter affidavit. The State respondents shall mention in their counter affidavit that in how many cases the action has been taken against the offenders of the Noise Pollution (Regulation and Control) Rules, 2000 and various directions issued by the Supreme Court from time to time, in the last five years (1.1.2014 to 31.12.2018).

Put up this case on 13th February, 2019 in the additional cause list for further hearing. Learned Additional Advocate General assures the Court that in the meantime the administration shall make endeavor to comply with the directions of the Supreme Court in the matter of noise pollution."

5. On 29.03.2019, when no response was filed by the respondents, the Court passed the following order:

"On 22.01.2019, we had directed the learned counsel for the respondents to file a counter affidavit mentioning therein that in how many cases the action has been taken against the offenders of the Noise Pollution (Regulation and Control) Rules, 2000 and the various directions issued by the Supreme Court from time to time, in the last five years (1.1.2014 to 31.12.2018).

The said order has not been complied with as yet.

We direct the respondent no.3 to furnish the said information by 05.04.2019.

Put up this case for further hearing in the additional cause list on 05.04.2019."

6. In a companion **Writ Petition No. 41684 of 2018, Sanjay Sharma vs. State of U.P.**, the Additional Advocate General has received the instruction. A Xerox copy of the said instruction has also been taken on the record of this case. The said instruction is signed by the District Magistrate, Prayagraj.

7. We have perused the instruction. It is stated that in compliance of the earlier direction issued by this Court at Lucknow Bench in the case of **PIL (Civil) No. 24981 of 2017, Motilal Yadav vs. State of U.P.,** the District Magistrate has issued a direction on 10.01.2019 for the compliance of the directions of the Court. He has also constituted a team of the revenue and police officials to make regular inspection by visiting various religious places and other public places where the loudspeakers / public address system are used on permanent basis. This team will keep a strict vigil over these places.

8. It is worthwhile to mention that along with the instruction two charts have been furnished. Chart No. 1 deals with the

illegal use of loudspeakers in religious places and Chart No.2 shows violation of Rules, 2000 at public places. These charts indicate that in Allahabad total 1860 loud speakers were found without any license. In all such cases the notices were issued but no action has been taken against any of the offender. A perusal of column nos.8 and 9 clearly shows that no action under Rules, 2000 or any other relevant law has been taken against offenders and eventually licenses were granted to all the 1860 loud speakers without taking any action under the Rules. The said chart is extracted below:

मा0 उच्च न्यायालय, खण्डपीठ लखनउ द्वारा जनहित रिट याचिक (सिविल) सं0 – 24981/ 2017 मोती लाल यादव बनाम स्टेट आफ यू0 पी0 के संबध मे सूचना।

प्रपत्र सं0 – 1 ***धार्मिक स्थलों*** पर ध्वनि यंत्रो के प्रयोग के अनुमति के संबंध में सूचना

जनपद प्रयागराज

क0 सं0	जनपद	धार्मिक स्थलों की संख्या जिनमें लाउड स्पीकर/ ध्वनि यंत्र प्रयोग में लाये जा रहे है।	धार्मिक स्थलों की संख्या जिनमें लाउड स्पीकर/ ध्वनि यंत्र प्रयोग मे लाये जा रहे है परन्तु नियत प्राधिकारी से अनुज्ञा प्राप्त नही की गयी है।	कालम 04 में उल्लिखित धार्मिक स्थलों में स	काल म 04 में उल्लिखित धार्मिक स्थलों में स	काल म 04 में उल्लिखित धार्मिक स्थलों में स	काल म 04 में उल्लिखित धार्मिक स्थलों में से कितने कर्मचारियो/ अधिकारियो के विरुद्ध कार्यवाही की गयी	अभियुक्त / अन्य कार्यवाही का विवरण।
				कितनो को नोटिस दी गयी	नोटिस के उपरान्त कितनो ने अनुज्ञा प्राप्त की	नोटिस के उपरान्त भी अनुज्ञा न प्राप्त करने के कारण कितने धार्मिक स्थल से लाउडस्पीकर/ ध्वनि यंत्र उतर वाये गये।		
1	2	3	4	5	6	7	8	9
1	नगर मजिस्टैट	230	230	230	230	0	0	0
2	ए0 सी0 एम0 – 1	87	87	87	87	0	0	0
3	ए0 सी0 एम0 – 2	131	131	131	131	0	0	0
4	ए0 सी0 एम0 – 3	152	152	152	152	0	0	0
5	सदर	66	66	66	66	0	0	0
6	सोरांव	226	226	226	226	0	0	0
7	फूलपुर	292	292	292	292	0	0	0
8	हण्डिया	349	349	349	349	0	0	0
9	करछना	194	194	194	194	0	0	0
10	बारा	30	30	30	30	0	0	0
11	मेजा	77	77	77	77	0	0	0
012	कोरांव	26	26	26	26	0	0	0
	इलाहाबाद	1860	1860	1860	1860	0	0	0

ह0 अप0
अपर जिला मजिस्ट्रेट (नगर)
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9. Another chart shows that in public places also several violations of the Rules, 2000 have been found but in those cases also no action has been taken. The chart is extracted below:

मा0 उच्च न्यायालय, खण्डपीठ लखनऊ द्वारा जनहित याचिका (सिविल) सं0 –

24981/ 2017 मोतीलाल यादव बनाम स्टेट ऑफ यू0 पी0 के संबंध में सूचना।

प्रपत्र सं0 – 2 **सार्वजनिक स्थलों** पर ध्वनि यंत्रो के अनुमति के संबंध मे सूचना जनपद इलाहाबाद।

क्र0 सं0	जनपद	सार्वजनिक स्थलों की संख्या जिन में लाउडस्पीकर/ध्वनि यंत्र प्रयोग में लाये जा रहे है।	सार्वजनिक स्थलों की संख्या जिनमें लाउडस्पीकर/ध्वनि यंत्र प्रयोग मे लाये जा रहे है परन्तु नियत प्राधिकारी से अनुज्ञा प्राप्त नही की गयी है।	कितनो को नोटिस दी गयी	नोटिस के उपरान्त कितनो ने अनुज्ञा प्राप्त की	नोटिस के उपरान्त भी अनुज्ञा न प्राप्त करने के कारण कितने सार्वजनिक स्थल से लाउडस्पीकर/ध्वनि यंत्र उतरवाये गये	कालम 4 में उल्लिखित सार्वजनिक स्थलों के संबंध में कितने कर्मचारियों/अधिकारियो के विरुद्ध कार्यवाही की गयी।	अभियुक्त/अन्य कार्यवाही का विवरण।
1	2	4	4	5	6	7	8	9
	नगर मजिस्ट्रैट	11	11	11	0	11	0	0
	ए0 सी0 एम0 – 1	0	0	0	0	0	0	0
	ए0 सी0 एम0 – 2	35	35	35	35	0	0	0
	ए0 सी0 एम0 – 3	0	0	0	0	0	0	0
	सदर	0	0	0	0	0	0	0
	सोरांव	0	0	0	0	0	0	0
	फूलपुर	0	0	0	0	0	0	0
	हण्डिया	2	0	2	0	0	0	0
	करछना	0	0	0	0	0	0	0
	बारा	0	0	0	0	0	0	0
	मेजा	0	0	0	0	0	0	0
	कोरांव	0	0	0	0	0	0	0
	इलाहाबाद	48	46	48	35	11	0	0

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अपर जिला मजिस्ट्रेट (नगर)
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10. From a perusal of the said chart it is evident that 1860 loudspeakers are used in the religious places. None of the loudspeakers were granted permission under the Rules, 2000. Column no. 5 of the chart shows that they were issued notices. Column nos. 8 and 9 show that no action has been taken against the persons who were illegally using the loudspeakers/public address systems. The Column nos. 8 and 9 clearly indicate that the Rules, 2000 and the direction of the Supreme Court has not been complied with. Similar position is in respect of the public places where the loudspeakers are in use. This chart also shows that no action has been taken against the person who are using the loudspeakers indiscriminately.

11. In the instruction it is recorded that the District Magistrate in compliance with the direction of the Principal Secretary (Home) dated 04.01.2018 has issued certain directions on 10.01.2018 for strict compliance of the Noise Pollution Rules. He has constituted separate teams for City and Tehsils. The Additional District Magistrate (City) is the Nodal Magistrate, S.P. (city) is the Nodal Police Officer, City Magistrate and Circle officer (I) are members of the team.

Similar teams have been constituted for the different parts of city and Tehsils, i.e., Phulpur, Soraon, Handia, Karchhana, Meja, Koraon and Bara. These teams are required to visit all the religious and public places during any cultural, religious, or festive occasion.

12. The above chart shows that the State Government and its functionaries have miserably failed to perform their duties cast upon them under the Rules, 2000. They have equally failed to enforce the direction of the Supreme Court issued from time to time. The details of which has been mentioned in the forthcoming paras of this judgment.

13. It is pity that administration is not serious in taking any action against those who breach the law and directions of the Supreme Court.

14. In India the people generally do not consider the noise as sort of pollution, hence, most of the people are not fully conscious about the effect of the noise pollution on their health.

15. The Central Government in exercise of its powers conferred by clause (ii) of sub-section (2) of Section 3, sub-section (1) and clause (b) of sub-section (2) of Section 6 and Section 25 of the Environment (Protection) Act, 1986 has made the Noise Pollution (Regulation and Control) Rules, 2000 (for short Noise Pollution Rules) to control of noise producing and generating source.

16. To appreciate the contentions raised by the parties and the important issue of public importance raised in this proceedings, it would be convenient first of all to advert to the provisions of Rules, 2000. Rule 2 (c) (d), (e) and (f) of the Rules, 2000 define the authority, educational institution and hospital respectively. They are extracted below:

"(c) "authority" means and includes any authority or officer authorized by the Central Government, or as the case may be, the State Government in accordance with the laws in force and includes a District Magistrate, Police Commissioner, or any other officer not below the rank of Deputy Superintendent of Police designated for the maintenance of the ambient air quality standards in respect of noise under any law for the time being in force;

"(d) "court" means a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice and includes any court of law presided over by a judge, judges or a magistrate and acting as a tribunal in civil, taxation and criminal cases;

(e) "educational institution" means a school, seminary, college, university, professional academies, training institutes or other educational establishment, not necessarily a chartered institution and includes not only buildings, but also all grounds necessary for the accomplishment of the full scope of educational instruction, including those things essential to mental, moral and physical development;

(f) "hospital" means an institution for the reception and care of sick, wounded infirm or aged persons, and includes government or private hospitals, nursing homes and clinics."

17. The Rule 5 deals with the restrictions on the use of loudspeakers/public address system and

sound producing instruments. This Rule was inserted by Rule 5(1) of the Noise Pollution (Regulation And Control) Rules, 2000, which was notified on 11.01.2010. The said Rule reads as under:

"5. Restrictions on the use of loud speakers/public address system and sound producing instruments-

(1) A loud speaker or a public address system shall not be used except after obtaining written permission from the authority.

(2) A loud speaker or a public address system or any sound producing instrument or a musical instrument or a sound amplifier shall not be used at night time except in closed premises for communication, within like auditoria, conference rooms, community halls, banquet halls or during a public emergency.

(3) Notwithstanding anything contained in sub-rule (2), the State Government may subject to such terms and conditions as are necessary to reduce noise pollution, permit use of loud speakers or public address system and the like during night hours (between 10.00 p.m. to 12.00 midnight) on or during any cultural or religious festive occasion of a limited duration not exceeding fifteen days in all during a calendar year and the concerned State Government or District Authority in respect of its jurisdiction as authorised by the State Government shall generally specify in advance, the number and particulars of the days on which such exemption should be operative.

Explanation.- For the purposes of this sub-rule, the expressions-

(i)"festive occasion" shall include any National function or State function as notified by the Central Government or State Government; and

(ii) "National function or State function "shall include"-

(A) Republic Day;

(B) Independence Day;

(C) State Day; or

(D) Such other day as notified by the Central Government or the State Government.

(4) The noise level at the boundary of the public place, where loudspeaker or public address system or any other noise source is being used shall not exceed 10 dB (A) above the ambient noise standards for the area or 75 dB (A) whichever is lower.

(5) The peripheral noise level of a privately owned sound system or a sound producing instrument shall not, at the boundary of the private place, exceed by more than 5 dB (A) the ambient noise standards specified for the area in which it is used."

5A. ***Restrictions on the use of horns, sound, emitting construction equipments and bursting of fire crackers.-***

(1) No horn shall be used in silence zones or during night time in residential areas except during a public emergency.

(2) Sound emitting fire crackers shall not be burst in silence zone or during night time.

(3) Sound emitting construction equipment shall not be used or operated during night time in residential areas and silence zones."

18. Rule 6 deals with the consequences of any violation in silence zone/area. It provides as under:

"6. Consequences of any violation in silence zone/area.-

"Whoever, in any place covered under the silence zone/area commits any of the following offence, he shall be liable for penalty under the provisions of the Act:-

(i) whoever, plays any music or uses any sound amplifiers,

(ii) Whoever, beats a drum or tom-tom or blows a horn either musical or pressure, or trumpet or beats or sounds any instrument.

(iii) whoever, exhibits any mimetic, musical or other performances of a nature to attract crowds,

(iv) whoever, bursts sound emitting fire crackers; or

(v) whoever, uses a loud speaker or a public address system."

19. Rule 7 deals with complaints to be made to the authority. It provides as under:

"7. Complaints to be made to the authority.-

(1) A person may, if the noise level exceeds the ambient noise standards by 10 dB (A) or more given in the corresponding columns against any area/zone or if there is a violation of any provision of these rules regarding restrictions imposed during night time, make a complaint to the authority.

(2) The authority shall act on the complaint and take action against the violator in accordance with the provisions of these rules and any other law in force."

20. Rule 8 deals with power to prohibit etc. continuance of music sound or noise. It provides as under:

"8. Power to prohibit etc. continuance of music sound or noise.—

(1) If the authority is satisfied from the report of an officer incharge of a police station or other information received by him including from the complainant that it is necessary to do so in order to prevent annoyance, disturbance, discomfort or injury or risk of annoyance, disturbance, discomfort or injury to the public or to any person who dwell or occupy property on the vicinity, he may, by a written order issue such directions as he may consider necessary to any person for preventing, prohibiting, controlling or regulating:-

(a) The incidence or continuance in or upon, any premises of

(i) Any vocal or instrumental music,

(ii) sounds caused by playing, beating, clashing, blowing or use in any manner whatsoever of any instrument including loudspeakers, public address systems, horn, construction equipment, appliance or apparatus or contrivance which is capable of producing or re-producing sound,

(iii) Sound caused by bursting of sound emitting fire crackers, or

(b) The carrying on in or upon, any premises of any trade, a vocation or operation or process resulting in or attended with noise.

(2) The authority empowered under sub-rule (1) may, either on its own motion, or on the application of any person aggrieved by an order made under sub-rule (1), either rescind, modify or alter any such order:

Provided that before any such application is disposed of the said authority shall afford to the applicant and to the original complainant as the case may be, an opportunity of appearing before it either in person or by a person representing him and showing cause

against the order and shall if it rejects any such application either wholly or in part record its reason for such rejection."

21. On a plain reading of these Rules clearly shows that they are mandatory.

22. From the instruction it transpires that the district authorities have classified different areas/zones of this city in industrial area, commercial area, residential area and silence zone in terms of the Schedule under **the Rules, 2000**. In the City the following places have been declared silence zone:

(a) High Court
(b) District Court
(c) Beli Hospital
(d) Children Hospital
(e) Allahabad University

23. We find that the silence zones have been declared without adverting to the Rules, 2000.

24. Rule 2 (f) defines the hospitals. It indicates that an institution for the reception and care of sick, wounded, infirm or aged persons, and includes Government or private hospitals, nursing homes and clinics. In Prayagraj, there are about 200 hospitals, clinics and nursing homes which are registered. However, only two hospitals namely Beli Hospital and Children Hospital have been declared silence zone. Surprisingly, Swoop Rani Nehru Hospital (Medical College) and Kamla Nehru Hospital, who are amongst the prominent hospitals of the city have not been included in the silence zone. Both the hospitals are in the heart of city.

25. Rule 2 (e) defines the educational institutions. It covers a school, seminary, college, university, professional academies, training institutes or other educational establishment. A large number of colleges in district Prayagraj, such as, Chaudhary Mahadev Degree College, Allahabad Degree College, Government Inter College, St. Joseph College, St. Mary College, Boys High School, Maharshi Pantanjali, MaryWanamaker Girls Inter College, Jagat Taran Girls Inter College and Jagat Taran Girls Degree College etc. have not been included in the silence zone, which is contrary to the definition of the education institution.

26. In view of the above discussion, we direct the State Government / appropriate authority to undertake fresh exercise to declare the silence zone category in the light of the definition of Rule 2 (e) and Rule 2 (f) afresh.

27. The Rule 3 (2) cast an obligation on the State Government to categorize the area in industrial, commercial, residential and silence zone for the purpose of implementation of noise standards for different areas.

28. The ambient air quality standards in respect of noise for different areas/zones shall be such as specified in the Schedule annexed to these Rules. The Rule also enjoins the State Government to take steps for abatement of noise including noise emanating from vehicular movements, ***blowing of horns, bursting of sound emitting firecrackers, use of loud speakers or public address system and sound producing instruments and ensure that the existing noise levels do not exceed the ambient air quality standards specified under these rules.*** An

area comprising not less than 100 meters from hospitals, educational institutions and courts may be declared as silence area/zone for the purpose of these rules.

29. Rule 4 lays down the responsibility of the authorities for the enforcement of noise pollution control measures and due compliance of ambient air quality in terms of the Schedule. A person found guilty in violating the Rules shall be liable to be punished under the provisions of these Rules and other law in force.

30. Rule 7 confers right to any person to make a complaint if he finds that there is violation of law by a sound which is caused by playing, beating, clashing, blowing or use in any manner whatsoever of any instrument which is producing a noise exceeding the prescribed noise level in any part of the city, he can make a complaint to the authority. A perusal of the Rule further shows that any person can make a complaint oral or in writing to the authority regarding violation of the Rules, 2000. Sub-section (2) of Rule 7 says that the authority shall act on the complaint. The use of the word "shall" makes it imperative that duty is cast on the authority to act on the complaint immediately.

31. The Rule 8 is preventive in nature, it provides that if the authority is satisfied from the report of the concerned officer of police station or complaint from a person or an information received by him that it is necessary to prevent annoyance, disturbance, discomfort or injury to public or any person who resides in the vicinity, he may issue direction in writing to any person for preventing, prohibiting any instrumental music, loudspeaker, any instrument capable of producing, reproducing sound. The Rule 8 requires furnishing opportunity of hearing to the wrong doer. But no such requirement is necessary under the Rule 7. One of the object of Rule 7 seems to stop the sound emitting equipment immediately and not to insist to follow long drawn procedure to file a written complaint and to give opportunity to offender. Since noise pollution affects human health, it needs to be stopped immediately.

32. Having due regard to the materials on the record, we are constrained to observe that the administration either, appears to be totally oblivious of the law and directions issued by the Supreme Court or there is gross inaction on its part to enforce the statutory rules and the directions of the Supreme Court which are binding upon all the authorities under Article 141 of the Constitution. No valid reasons have been furnished by the authorities for not complying the law.

33. It needs no emphasis that in a democracy the rule of the law is the basic rule of governance of any civilized society. The Constitution has entrusted the onerous task upon the Superior Courts to uphold the Constitution and the law. The following passage of the judgement of Supreme Court in **Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, at page 602** is apposite:

"Under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of law. Since the

Courts are entrusted the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant or indifferent State agencies."

34. In ***N. Kannadasan v. Ajoy Khose, (2009) 7 SCC 1 : (2009) 3 SCC (Civ) 1, at page 31*** the Supreme Court observed thus:

".... 48. It is the majesty of the institution that has to be maintained and preserved in the larger interest of the rule of law by which we are governed. It is the obligation of each organ of the State to support this important institution. Judiciary holds a central stage in promoting and strengthening democracy, human rights and the rule of law. People's faith is the very foundation of any judiciary. Injustice anywhere is a threat to justice everywhere and therefore the People's faith in the judiciary cannot be afforded to be eroded."

35. There are a large number of the judgments of the Supreme Court, this Court and the other High Courts dealing with menace of the noise pollution. Before adverting to the Judgements of the Supreme Court we deem it appropriate to firstly refer to a recent order of a Division Bench of this Court wherein after affording the opportunity to State, several directions have been issued to the functionaries of the State Government for its compliance.

36.**In PIL (Civil) No. 24981 of 2017, Motilal Yadav Vs. State of U.P.,** this Court at Lucknow Bench has issued several directions to control the noise pollution in the State and for enforcement of Rules, 2000 and directions of the Supreme Court.

37. This Court directed the Principal Secretary, Department of Home, Civil Secretariat, Lucknow and the Chairman U.P. Pollution Control Board, U.P., Lucknow to file their separate personal affidavit specifying therein (a) what steps have been taken to ensure the strict compliance of the Rules, 2000; (b) whether all the loudspeakers installed over the religious structures, namely, mosques, temples, gurudwaras and other public places have been set up after obtaining written permission from the authority and if not what action has been taken for removal of the same; (c) if the said loudspeakers or public address systems were allowed to come over the temples, mosques, gurudwaras and other public places without any written permission from the authority then what action has been taken against such officials who were required to ensure that no such loudspeakers or public address system shall be used except after obtaining written permission from the authority; (d) what accountability has been fixed/sought to be fixed over such officials who have not strictly enforced provisions of Rules, 2000; (e) how many loudspeakers and public address system have been dismantled and removed from temples, mosques, gurudwaras and other buildings which are being used without written permission; (f) what action has been initiated against the processions which are taken out day and night with loud music including marriage processions and (g) whether a suitable enforcement machinery by means of an identified website has been set up or is in the process of being set up as directed by this Court in one of its judgment in Writ Petition (M/B) No. 11473 of 2014.

38. The Court expressed its dissatisfaction with the measures taken by the authorities to control the noise pollution, hence, they were directed to be personally present. The State functionaries in their affidavits have informed the Court regarding some of the measures which the State Government propose to take. One of the proposed measures was that the State Government is planning to purchase machine to measure the noise emanating from the loudspeakers/ public address system, music instruments, horns and other instruments capable of producing or reproducing sound. In this regard a Government Order dated 04.01.2018 was issued.

39. The Court again expressed its dissatisfaction over the measures provided in the Government Order dated 04.01.2018 to prevent and check the noise pollution and termed the Government Order to be a little use in absence of any check mechanism which needs to control noise pollution.

40. On 30.04.2018, the Division Bench further considered the better affidavits filed by the State functionaries, wherein it was mentioned that the notices have been issued (i) to approximately one lac religious places for the use of loudspeakers/noise machine of which permission has been sought by approximately 84,000 religious places; (ii) flying squads have been constituted to check the complaints pertaining to noise pollution; (iii) ***a proposal to Finance Department for sanction of Rs. 5.0 crores for purchase of noise measuring instrument has been sent; (iv) the Chairman of the U.P. Pollution Control Board had mentioned in his affidavit that a request has been made to the Uttar Pradesh Development Systems Corporation Ltd. (UPDESCO) to develop mobile application for measurement of noise levels for making it available to the prescribed authorities and the public which would be useful for filing of complaints and for taking action by the authorities and (v) the IIT, Kanpur was also requested to provide technical advice for the use of sound governors in the loudspeakers and other noise sources and for developing standard operating procedure for monitoring of noise from different sources.***

41. The Court was also informed that about 20,000 complaints were received pertaining to the noise pollution. On 12.03.2018 the Principal Secretary, Department of Home and the Chairperson, U.P. Pollution Control Board were present in the Court and informed that the State Government has sought guidelines/opinion from the Secretary, Environment and Forest Department, New Delhi for the best practice or Standard Operating Procedure (for short SOP) in order to control the noise pollution. The Ministry of Environment and Forest Department, New Delhi vide its communication dated 26.04.2018 informed that the proposal of the State is under consideration. The Court was also informed that the ambient noise level has shown reduction in the month of April, 2018 in 15 cities out of the 21 cities, which were monitored after the order passed in the aforesaid PIL. It was also informed that the mobile application is under trial run and a project has been awarded to the IIT, Kanpur for carrying out feasibility study on implementation of measures for

measurement and mitigation of noise pollution.

42. The issue with regard to the noise pollution has been considered in the long line of the judgments of the Supreme Court and the other High Courts. For the first time the Supreme Court had occasion to deal with the case of **Churches of God (Full Gospel) In Vs. K.K.R. Magestice Colony Welfare, 2000 (7) SCC 282.**

43. In **NOISE POLLUTION (V), IN RE (Supra) and Farhd Wadia Vs. Union of India and Ors., 2005 (8) SCC 796,** the Supreme Court elaborately considered the implication of the noise pollution in day to day life of people of India as enshrined under Article 21 of the Constitution of India. During the course of hearing in the said case the Court enlarged the issue and considered the problems of the noise pollution and its different aspects with reference to the Article 21 of the Constitution of India, which guarantees the life and personal liberty to all persons. Referring its earlier judgments the Court observed that right to life enshrined under Article 21 is not of mere survival or existence but it guarantees a right of persons to life with human dignity and it includes person's life meaningful, complete and worth living. The Court observed that *"who wishes to live in peace, comfort and quite within his house has a right to prevent noise as pollutant reaching him. None can claim a right to create noise even in his own premises which would travel beyond his precincts and cause nuisance to neighbors or others."*

(Emphasis supplied)

44. The Court has turned down the submission that a person has fundamental right under Article 19(1) a) of the Constitution of India for freedom of speech and right to expression but the rights are not absolute. The Court has held that no one can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers.

45. The Court has considered various sources of noise pollution such as road traffic noise; aircraft noise; noise from railroads; construction noise; noise in industry; noise in buildings; noise from consumer products; noise from fireworks.

46. The Supreme Court has also referred methodology adopted in other countries for noise control and in this regard it has considered some of the legislation made in Japan, Noise Act, 1966 UK, Noise and Statutory Nuisance Act, 1993, U.S. Noise Pollution and Abatement Act, 1970, Law of the People's Republic of China and Prevention and Control of Pollution from Environmental Noise (adopted on 29.10.1996).

47. After considering the effect of the noise as nuisance the Court observed as under:

"17. In the modern day noise has become one of the major pollutants and it has serious effects on human health. Effects of noise depend upon the sound's pitch, its frequency and time pattern and length of exposure. Noise has both auditory and non-auditory effects depending upon the intensity and the duration of the noise level. It affects sleep, hearing, communication, mental and physical health. It may even lead to the madness of people.

18. However, noises, which are melodious, whether natural or man-made,

cannot always be considered as factors leading to pollution.

19. Noise can disturb our work, rest, sleep, and communication. It can damage our hearing and evoke other psychological, and possibly pathological reactions. However, because of complexity, variability and the interaction of noise with other environmental factors, the adverse health effects of noise do not lend themselves to a straightforward analysis.

(i) Hearing Loss

20. "Deafness, like poverty, stunts and deadens its victims."- says Helen Keller. Hearing loss can be either temporary or permanent. Noise-induced temporary threshold shift (NITTS) is a temporary loss of hearing acuity experienced after a relatively short exposure to excessive noise. Pre-exposure hearing is recovered fairly rapidly after cessation of the noise. Noise induced permanent threshold shift (NIPTS) is an irreversible loss of hearing that is caused by prolonged noise exposure. Both kinds of loss together with presbyacusis, the permanent hearing impairment that is attributable to the natural aging process, can be experienced simultaneously.

21. NIPTS occurs typically at high frequencies, usually with a maximum loss at around 4,000 Hz. It is now accepted that the risk of hearing loss is negligible at noise exposure levels of less than 75 dB(A) Leq (8-hr). Based on national judgments concerning acceptable risk, many countries have adopted industrial noise exposure limits of 85 dB(A)+5 dB(A) in their regulations and recommended practices.

(ii) Interference with Communication

22. The interference of noise with speech communication is a process in which one of two simultaneous sounds renders the other inaudible. An important aspect of communication interference in occupational situations is that the failure of workers to hear warning signals or shouts may lead to injury. In offices, schools and homes, speech interference is a major source of annoyance.

(iii) Disturbance of sleep.

23. Noise intrusion can cause difficulty in falling asleep and can awaken people who are asleep.

(iv) Annoyance

24. Noise annoyance may be defined as a feeling of displeasure evoked by noise. The annoyance- inducing capacity of a noise depends upon many of its physical characteristics and variations of these with time. However, annoyance reactions are sensitive to many non-acoustic factors of a social, psychological, or economic nature and there are considerable differences in individual reactions to the same noise.

(v) Effect on performance

25. Noise can change the state of alertness of an individual and may increase or decrease efficiency. Performance of tasks involving motor or monotonous activities is not always degraded by noise. At the other extreme, mental activities involving vigilance, information gathering and analytical processes appear to be particularly sensitive to noise.

(vi) Physiological Effects

26. It has been determined that noise has an explicit effect on the blood vessels, especially the smaller ones known as pre-capillaries. Overall, noise makes these blood vessels narrower. Noise causes the peripheral blood vessels in the toes, fingers, skin and abdominal organs to constrict, thereby decreasing the amount of blood normally supplied to these areas.

27. Possible clinical manifestations of stress concomitant with noise are : (i) galvanic skin response, (ii) increased activity related to ulcer formation, (iii) changes in intestinal motility, (iv) changes in skeletal muscle tension, (v) subjective response irritability perception of loudness, (vi) increased sugar, cholesterol & adrenaline, (vii) changes in heart rate, (viii) increased blood pressure, (ix) increased adrenal hormones, (x) vasoconstriction. Not only might there be harmful consequences to health during the state of alertness, but research also suggests effects may occur when the body is unaware or asleep.

28. The investigations have revealed that the blood vessels which feed the brain, dilate in the presence of noise. This is the reason why headaches result from listening to persistent high noise.

29. Field studies have also been conducted on various other groups such as people living near airports, and school children exposed to traffic noise, showing that there may be some risk for these people. In addition, laboratory studies on animals and humans have demonstrated a relationship between noise and high blood pressure. Other studies have shown that noise can induce heart attacks.

30. Prolonged chronic noise can also produce stomach ulcers as it may reduce the flow of gastric juice and change its acidity.

31. With what other stress effects can noise be associated? Stress can be manifested in any number of ways, including headaches, irritability, insomnia, digestive disorders, and psychological disorders. Workers who are exposed to excessive noise frequently complain that noise just makes them tired."

48. In **Farhd K. Wadia (Supra)** the Supreme Court has held 'interference by the Court in respect of the noise pollution is premised on "necessity of silence", "necessity of sleep", " process during the sleep and rest" which are biological necessities and essential for health. The Court further held "it is considered to be one of the human rights as noise is injurious to human health which is required to be preserved at any cost".

49. The Court has referred a judgement of Calcutta High Court in the matter of Noise Pollution:

50. The Calcutta High Court in several judgments and in particular in ***Om Birangana Religious Society v. State*** issued various directions, some of them being:

"(a) There will be complete ban on the use of horn type loudspeakers within city residential areas and also prohibition on the use of playback of pre-recorded music, etc. through such horn type loudspeakers unless used with sound limiter.

(b) In cultural functions which are live functions, use of such pre-recorded music should not be used excepting for the purpose of announcement and/or actual performance and placement of speaker boxes should be restricted within the area of performance facing the audience. No sound generating device should be placed outside the main area of performance.

(c) Cultural programmes in open air may be held excepting at least before three days of holding Board/Council Examinations to till examinations are completed in residential areas or areas where educational institutions are situated.

(d) The distance of holding such functions from the silence zones should be 100 metres and insofar as schools, colleges, universities, courts are concerned, they will be treated as silence zones till the end of the office hours and/or the teaching hours. Hospitals and some renowned and important nursing homes will be treated as silence zones round the clock."

51. The Supreme Court in the case of **Balwant Singh Vs. Commissioner Of Police And Others, (2015) 4 SCC 801** has again considered the issue relating to noise pollution and another forms of nuisance. The Court held that the disturbance created by the State officials/the police, violates the fundamental right guaranteed under Article 21 of the Constitution of India. The para 25 of the judgment reads as under:

"25. Now so far as the disturbance created by the police/state officials/people at large in the appellant's peaceful living in his house is concerned, in our considered view, they do result in adversely affecting the appellant's right guaranteed under Article 21 of the Constitution as held by this Court in Noise Pollution (5), In re, (2005) 5 SCC 733 and also in Ramlila Maidan Incident, In re (2012) 5 SCC 1. RSHRC and the writ court were therefore justified in entertaining the complaint under the Act and the writ petition under Article 226 of the Constitution of India and in consequence were justified in giving appropriate directions mentioned above while disposing the appellant's complaint/writ petition."

52. In the same judgment the Supreme Court has also considered that its earlier directions issued in the **NOISE POLLUTION (V), IN RE (supra)** has not been complied with in letter and spirit. The Court has observed that the direction of the Court under Article 141 of the Constitution is binding on all the authorities. Relevant part of the order reads as under:

"21. We note with concern that though the aforesaid directions were issued by this Court on 18-7-2005 [Noise Pollution (5), In re, (2005) 5 SCC 733] for ensuring compliance with all the States but it seems that these directions were not taken note of much less implemented, at least, by the State of Rajasthan in letter and spirit with the result that the residents of Jaipur City had to suffer the nuisance of noise pollution apart from other related peculiar issues mentioned above so far as the appellant's case is concerned.

22. Needless to reiterate that once this Court decides any question and declares the law and issues necessary directions then it is the duty of all concerned to follow the law laid down and comply with the directions issued in letter and spirit by virtue of mandate contained in Article 141 of the Constitution.

24. We, accordingly, direct the respondents to ensure strict compliance with the directions contained in paras 174 to 178 of the judgment of this Court in Noise Pollution (5), In re, (2005) 5 SCC 733 and for ensuring its compliance, whatever remedial steps are required to be taken by the State and their department(s) concerned, the same be taken at the earliest to prevent/check the noise pollution as directed in the aforesaid directions."

53. The Bombay High Court in a PIL of **Dr.Mahesh Vijay Bedekar Vs. The State of Maharashtra and Ors., (Public Interest Litigation No. 173 of**

2010) 2016 SCC OnLine Bom 9422 has elaborately considered the effect of the Noise Pollution and has issued several directions for strict compliance of its directions. It is apt to extract some directions which are material for our purpose.

"102.....
.....vi) Wide publicity shall be given to the grievance redress mechanism in the manner provided in clause (iv) above before every major festival religious or otherwise;

vii) In addition to the mechanism as provided above, a citizen shall be entitled to lodge oral complaint about the breach of Noise Pollution Rules or Loud Speaker Rules framed in exercise of powers under Section 33 of the said Act of 1951 on telephone number 100. Immediate action shall be taken by the Police on the basis of such oral complaints. The State Government shall direct that the identity of complainants shall not be disclosed to the wrong doers or any other person even if the identity could be established from the telephone number from which complaint is received. We make it clear that anonymous complaints shall be entertained on the telephone number 100. On receiving complaints, a police officer shall immediately visit the spot and shall forthwith stop illegal use of public address system or loudspeaker or a musical instrument;

viii) On receiving complaint in any form about the breach of Noise Pollution Rules, the Police Officer visiting the site shall record noise level by use of requisite meter which shall be recorded in a panchanama. Adequate number of Machines/equipment to measure noise level shall be always made available by the State. At present total 1853 meters shall be immediately provided. The meters shall be maintained properly and sufficient funds shall be allocated for repairs/maintenance of meters;

xiv) We direct the District Collectors of all the Districts in the State to constitute a team of Revenue Officers not below the rank of Tahsildars for each Municipal Corporation area. The members of the team shall regularly visit the areas within the limits of the Municipal Corporations for a period of 7 days before the date of commencement of the major religious festivals and during the festivals to ascertain whether any temporary booths/structures have been erected on public streets and foot-paths/ footways without obtaining permission of the Municipal Commissioners. Any such structure which does not display the permission and material details thereof shall be deemed to be illegal. The members of the team shall be under an obligation to immediately bring to the notice of the concerned Municipal officers/designated officers, the temporary booths erected on streets and foot-paths or footways without obtaining permission of the Commissioners or in breach of the conditions in permissions. The Municipal Authorities shall forthwith take action of removal on the basis of such information. Even the Municipal Corporations shall constitute a team of Officers who will carry out the same task which is entrusted to the Revenue Officers as above. These directions shall be implemented immediately;

xvi) If any such illegal activities involve public nuisance covered by section 133 of the Code of Criminal Procedure, 1973, necessary action shall be taken in accordance with law by all the concerned authorities;

xx) Before every major religious or cultural festivals, the State and the Municipal Corporations shall give

adequate publicity to the grievance redress mechanism available for filing Complaints regarding the breach of the Noise Pollution Rules and illegal pandals and booths on streets and footways. Adequate publicity shall be given to the availability of the grievance redress mechanism with all the particulars in leading daily news papers as well as on television channels. Detailed notices shall be put up as regards availability of the said mechanism in all police stations within the Corporation limits and in Ward Offices of the Municipal Corporations and in the offices of the Revenue Officers such as Divisional Commissioner, Collector, Additional Collector, Deputy Collector, Tahasildar etc."

54. The Bombay High Court has incorporated some directions issued by the Supreme Court in **NOISE POLLUTION (V), IN RE (supra).**

55. At this juncture, it is apposite to extract the directions issued by the Supreme Court to all the States and its functionaries for compliance of its directions to control the noise pollution in the country.

56. The Supreme Court in **NOISE POLLUTION (V), IN RE (supra)** has issued the following directions:

"(i) Firecrackers

174. 1. On a comparison of the two systems, i.e. the present system of evaluating firecrackers on the basis of noise levels, and the other where the firecrackers shall be evaluated on the basis of chemical composition, we feel that the latter method is more practical and workable in Indian circumstances. It shall be followed unless and until replaced by a better system.

2. The Department of Explosives (DOE) shall undertake necessary research activity for the purpose and come out with the chemical formulae for each type or category or class of firecrackers. The DOE shall specify the proportion/composition as well as the maximum permissible weight of every chemical used in manufacturing firecrackers.

3. The Department of Explosives may divide the firecrackers into two categories- (i) Sound emitting firecrackers, and (ii) Colour/light emitting firecrackers.

4. There shall be a complete ban on bursting sound emitting firecrackers between 10 pm and 6 am. It is not necessary to impose restrictions as to time on bursting of colour/light emitting firecrackers.

5. Every manufacturer shall on the box of each firecracker mention details of its chemical contents and that it satisfies the requirement as laid down by DOE. In case of a failure on the part of the manufacturer to mention the details or in cases where the contents of the box do not match the chemical formulae as stated on the box, the manufacturer may be held liable.

6. Firecrackers for the purpose of export may be manufactured bearing higher noise levels subject to the following conditions: (i) The manufacturer should be permitted to do so only when he has an export order with him and not otherwise;(ii) The noise levels for these firecrackers should conform to the noise standards prescribed in the country to which they are intended to be exported as per the export order; (iii) These firecrackers should have a different colour packing, from those intended to be sold in India; (iv) They must carry a declaration

printed thereon something like 'not for sale in India' or 'only for export to country AB' and so on.

II. Loudspeakers

175. 1. The noise level at the boundary of the public place, where loudspeaker or public address system or any other noise source is being used shall not exceed 10 dB(A) above the ambient noise standards for the area or 75 dB(A) whichever is lower.

2. No one shall beat a drum or tom-tom or blow a trumpet or beat or sound any instrument or use any sound amplifier at night (between 10. 00 p.m. and 6.a.m.) except in public emergencies.

3. The peripheral noise level of privately owned sound system shall not exceed by more than 5 dB(A) than the ambient air quality standard specified for the area in which it is used, at the boundary of the private place.

III. Vehicular Noise

176. No horn should be allowed to be used at night (between 10 p.m. and 6 a.m.) in residential area except in exceptional circumstances.

IV. Awareness

177. 1. There is a need for creating general awareness towards the hazardous effects of noise pollution. Suitable chapters may be added in the text-books which teach civic sense to the children and youth at the initial/early level of education. Special talks and lectures be organised in the schools to highlight the menace of noise pollution and the role of the children and younger generation in preventing it. Police and civil administration should be trained to understand the various methods to curb the problem and also the laws on the subject.

2. The State must play an active role in this process. Resident Welfare Associations, service clubs and societies engaged in preventing noise pollution as a part of their projects need to be encouraged and actively involved by the local administration.

3. Special public awareness campaigns in anticipation of festivals, events and ceremonial occasions whereat firecrackers are likely to be used, need to be carried out.

The abovesaid guidelines are issued in exercise of power conferred on this Court under Articles 141 and 142 of the Constitution of India. These would remain in force until modified by this Court or superseded by an appropriate legislation.

V Generally

178. 1. The States shall make provision for seizure and confiscation of loudspeakers, amplifiers and such other equipments as are found to be creating noise beyond the permissible limits.

2. Rule 3 of the Noise Pollution (Regulation and Control) Rules, 2000 makes provision for specifying ambient air quality standards in respect of noise for different areas/zones, categorization of the areas for the purpose of implementation of noise standards, authorizing the authorities for enforcement and achievement of laid down standards. The Central Government/State Governments shall take steps for laying down such standards and notifying the authorities where it has not already been done.

179. Though, the matters are closed consistently with the directions as issued above in public interest, there will be liberty of seeking further directions as and when required and in particular in the event of any difficulty arising in implementing the directions."

57. As can be seen these directions issued by the Supreme Court are binding

under Article141 of the Constitution all the courts and authorities as well. But we are constrained to observe that in this State the directions have been completely overlooked. It is indeed a great pity that authorities appears to have developed a tendency to wait a direction from the Government or the Courts to remind their duties cast upon them by the Statute. The Supreme Court in the case of **Delhi Airtech Services (P) Ltd V. State of U.P (2011)9 SCC 354** has held that-

"42. As far as this Court is concerned, being conscious of its constitutional obligation to protect the fundamental rights of the people, it has issued directions in various types of cases relating to the protection of environment and preventing pollution. For effective orders to be passed, so as to ensure that there can be protection of environment along with development, it becomes necessary for the court dealing with such issues to know about the local conditions. Such conditions in different parts of the country are supposed to be better known to the High Courts. The High Courts would be in a better position to ascertain facts and to ensure and examine the implementation of the anti-pollution laws where the allegations relate to the spreading of pollution or non-compliance of other legal provisions leading to the infringement of the anti-pollution laws. For a more effective control and monitoring of such laws, the High Courts have to shoulder greater responsibilities in tackling such issues which arise or pertain to the geographical areas within their respective States. Even in cases which have ramifications all over India, where general directions are issued by this Court, more effective implementation of the same can, in a number of cases, be effected, if the High Courts concerned assume the responsibility of seeing to the enforcement of the laws and examine the complaints, mostly made by the local inhabitants, about the infringement of the laws and spreading of pollution or degradation of ecology."

58. In view of the law laid down by the Supreme Court in above case, we deem it our duty to enforce the law laid down by the Supreme court in the case of Noise pollution and other directions issued by the Court from time to time.

59. In the ultimate analysis we are of the firm view that the law relating to Noise pollution need to be strictly complied with in larger public interest. Accordingly in addition to directions issued by the Supreme Court in **NOISE POLLUTION (V), IN RE (supra),** we issue the following directions:

(i) The District Magistrate shall give adequate publicity in leading newspapers regarding this direction and Rules, 2000. He shall notify the name of the authority under the Rules, 2000 and his contact number. Detailed notice shall be put up in the offices of Divisional Commissioners, District Magistrates, District Court Premises, Police Stations, Municipal Corporation Offices, Development Authorities Offices and prominent places of the city.

(ii) A toll free number shall be provided to the citizens to make the complaints. If a loudspeaker, public address system, DJ, a Musical Instrument, a sound amplifier or any sound producing instrument is used beyond the permissible limit of sound, a person can make a complaint on telephone number 100 to police or toll free number provided by the authorities. The concerned Police of the area will immediately visit the spot and

shall measure the noise level by the equipment (Noise meter application) supplied to it. If it is found that there is violation of Rules, 2000 it will stop the nuisance forthwith and shall inform the appropriate authority regarding complaint and action taken by it. The authority shall take action against offender in terms of Rule 7 of Rules, 2000. The name and identity of the complainant shall not be disclosed to the wrong doer or to any person. Under Rule 7 of Rules,2000 an oral complaint can be made. The facility shall also be made available to send the complaints by SMS, e-mail and WhatsApp. Anonymous complaint shall also be entertained. All the complaints received by the Police under Rule 7 of Rules, 2000 shall be maintained in a register and a copy thereof shall be forwarded to the competent authority. The action taken shall be recorded by the Police in the register.

(iii) Under the Rules, 2000, no permission for DJ shall be granted by the authority for the reason that noise generated by DJ is unpleasant and obnoxious level. Even if they are operated at the minimum level of the sound it is beyond permissible limits under the Schedule of the Rules, 2000. A DJ is made up of several amplifiers and joint sound emitted by them is more than thousand dB (A). They are serious threat to human health particularly children, senior citizens and patients admitted in the hospitals.

(iv) The team constituted by the District Magistrate shall make regular visit of their area particularly before commencement of any festival and apprise the organizers regarding compliance of the Rules, 2000 and the directions of Supreme Court and this Court.

(v) All places of the worship of all religion shall be bound by the provisions of the Rules, 2000 and directions issued by the Supreme Court and this Court. Any breach of the Rules, 2000 shall be treated to be violation of fundamental right of a citizen.

(vi) The District Magistrate/ Senior Superintendent of Police shall convene a meeting before commencement of festivals like Dussehera/ Durga Puja, Holi, Shab-e-barat, Muharram, Easter and Christmas festival with organizers and representatives of civil society, to impress upon them to observe the law strictly and in the event of failure the legal consequences that may follow.

(vii) Whoever fails to comply with or contravenes any of the provisions of Noise Pollution Rules shall be liable for a penalty in terms of section 15 of the Environment (Protection) Act, 1986. Non-compliance of the rules attracts the imprisonment for a term which may extend to five years and fine which may extend to Rs.1,00,000/-. It is the duty of the authorities of the State to ensure that the offences under Section 15 of the Environment Protection Act are duly registered.

(viii) The State Government is directed to categorize the areas in all the cities of State into industrial, commercial, residential or silence areas/zones for the purpose of implementation of the noise standard in terms of Rule 3 (2) of Rules, 2000. A fresh exercise be conducted in the light of definition provided under Rule 2 (e) and (f) of Rules, 2000. We find that in Prayagraj the zones have been made in breach of the above mentioned Rules.

(ix) The competent authority under the Rules, 2000 and the SHO /Inspector of concerned Police Station are charged personally with the duty of ensuring compliance of the order of the Supreme Court, extracted above, the Rules, 2000 and this order, failing which they shall

be answerable to this Court in contempt jurisdiction. We grant liberty to any aggrieved person to approach this court for appropriate order for compliance of the above order/directions.

60. A copy of this order be sent to the Chief Secretary, Government of Uttar Pradesh, Lucknow to issue necessary directions to the appropriate authorities accordingly. The compliance report shall be sent to the Registrar General of this Court, who shall place it on the record of this case.

61. The writ petition is allowed in the above terms.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ – C No. 627 of 2016

Ragho ...Petitioner
Versus
State of U.P. and Others ...Respondents

Counsel for the Petitioner:
Sri Gajala Srivastava, Sri Manish

Counsel for the Respondents:
C.S.C., Sri Bimla Prasad, Sri Manoj Kumar Kushwaha, Sri Vishal Kumar Upadhyay

A. Complaint before the Commission (Uttar Pradesh Scheduled Caste and Schedules Tribes Commission, Lucknow)- Complainant had no right to make complaint in question against the petitioner regarding eviction of the petitioner from his land. Moreover, the complaint before the Commission was not maintainable.

That once respondent no. 4 had already exhausted all remedial forum then he had no right to approach and make complaint in question against the petitioner regarding eviction of the petitioner from his land. Moreover, in the instant case the grievance which has been raised as complained by respondent no. 4 before the commission is not at all maintainable and the same is not within the ambit and scope of the Commission to proceed in the matter (Para-26). Order passed by the Uttar Pradesh Scheduled Caste and Scheduled Tribes Commission, Lucknow and consequential notice issued by the Deputy Collector, Sadar, Varanasi, cannot be sustained.

The writ petition allowed.

CHRONOLOGICAL LIST OF CASES CITED:

1: - All Indian Overseas Bank Vs. S.C. And S.T. Employees

2: - 1996(6) SCC 606, Welfare Association and others Vs. Union of India and others

3:- 2012(6) ADJ 42, U.P. State Handloom Corporation and another Vs. State of U.P. and another

4:- LPA No.280 of 2007,Professor Ramesh Chandra Vs. University of Delhi and another

5:- ILR 2008 KAR 2205, Karnataka Antibiotics and Another Vs National Commission for SC and ST and others

6:- (1978) 1 SCC 10, Union of India vs.Orient Engg. & Commercial Co. Ltd. and another

7:- 1998 All.L.J.134, Chitranjan Singh vs Chandra Bhushan Pandey

8:- 2010 AIR SCW 3277, Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. M/s Shukla and Brothers

9: - Writ C No.8490 of 2017, Shyam Lal and 14 others Vs. State of U.P. and 13 others(E-7)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondents no. 1 and 2, Sri Vishal Kumar Upadhyay, learned counsel for respondent no. 3 and Sri Bimla Prasad, learned counsel for respondent no. 4. With the consent of the learned counsel for the parties this petition is disposed of finally at the admission stage itself.

2. The petitioner has preferred the present writ petition challenging the order dated 1.12.2015 passed by the Uttar Pradesh Scheduled Caste and Schedules Tribes Commission, Lucknow-respondent no. 3 and consequential notice dated 31.12.2015 issued by the Deputy Collector, Sadar, Varanasi, copies of which are appended as Annexures 7 and 8 to the writ petition.

3. The facts in brief, as narrated in the writ petition are that the petitioner is the Bhumidhar of Plot No. 398/3 area 0.020 Hectare situated in Mauja Shivdaspur Pargana-Dehat Amanat, District Varanasi and is in possession over the aforesaid plot in question. The aforesaid plot was purchased by the petitioner from the erstwhile owner through a sale deed dated 21.11.1976. Subsequently, the petitioner constructed his house over plots no. 398/1 and 398/3 and the rest of the land was being used as Abadi.

4. The respondent no.4 viz. Ram Ji Das, also claiming himself to be the owner of aforesaid plot No. 398/1, area 278.3 Sq. Meter has filed an application under Section 145 of Criminal Procedure Code. On the aforesaid application a case was registered as Case No. 15/17 of 2013 (Ramji Das Versus Ragho Prasad). In the said case the petitioner has also filed his objection and after hearing both the parties Addl. City Magistrate-I Varanasi found that over the disputed plot house of the petitioner is constructed and rest of the land is being used as Abadi by the petitioner.

5. Thereafter a suit being Case No. 73 of 2000 was filed by Ram Vilas against Ragho Prasad and several other persons in respect of Plot No.398/1 for the relief that respondents may be directed not to obstruct him from using of the plot as Rasta. The aforesaid suit was dismissed in default on 15.4.2011 and the said order has become final.

6. Apart from the above, the petitioner has also filed a suit being Case No. 4 of 2016 (Ragho Prasad Singh Vs. Smt. Shanti Devi and another) for specific performance as well for permanent injunction in the court of Civil Judge (Jr. Division) Hawaii Varanasi. In the aforesaid suit Shanti Devi, wife of Ram Vilas as well as Ram Ji Das (respondent no. 4) were made parties.

7. It is contended by learned counsel for the petitioner that the dispute of title is involved between the parties and till date respondent no. 4 is not able to prove his title before the competent court. It is further contended that when respondent no. 4 was not able to prove his title over the land in question, only in order to harass the petitioner, he filed an application in the shape of a complaint before the Commission for the SC and ST, Lucknow-respondent no. 3. On the said application notices were issued by the Commission to the Collector and the S.S.P. Varanasi for eviction of the petitioner. Pursuant to the aforesaid directions issued by respondent no. 3, the

respondent no.2-Deputy Collector Sadar, Varanasi issued notice to the petitioner for his eviction over the plot in question, i.e., Plot No.398/1. At this point of time, challenging the decision taken by the respondent no. 3- Commission for the SC and ST, Lucknow dated 1.12.2015 and the order passed therein by the respondent no. 2-Deputy Collector Sadar, Varanasi vide its letter dated 31.12.2015 the petitioner has preferred the present writ petition.

8. It is contended by learned counsel for the petitioner that the respondents no. 3 and 2 have no jurisdiction to decide the title. It is further contended that the aforesaid respondents have absolutely no jurisdiction to pass any order to dispossess the petitioner. It is further contended that under Article 300-A of the Constitution protection of the property was granted. It is further contented that before passing the aforesaid order no notice or opportunity whatsoever has been given to the petitioner and since the orders passed are in complete violation of Principle of Natural Justice they are liable to be set aside.

9. When the writ petition was filed, by a detailed order passed by co-ordinate Bench of this Court the impugned orders dated 1.12.2015 and 31.12.2015 (Annexures- 7 and 8 of the writ petition) were kept in abeyance.

10. In the counter affidavit filed by respondent no. 4 it is contended that respondent no.3 is fully empowered to pass the order of eviction under the Uttar Pradesh Commission for Scheduled Caste and Scheduled Tribes Act, 1995. It is further contended that the orders were rightly passed by respondents no. 3 and 2 for eviction of the petitioner from the land in question.

11. Another counter affidavit was filed by respondent no. 3- Uttar Pradesh Commission for Scheduled Caste and Scheduled Tribes, Lucknow stating therein that the respondent Commission is fully empowered to issue notice to investigate the matter. It is contended that Section 12 of the Act gives power to the Commission to investigate the matter.

12. In the rejoinder affidavit the petitioner denied the facts contained in the counter affidavits. It is contended that powers provided under Section 11 of the Uttar Pradesh Commission for Scheduled Caste and Scheduled Tribes Act, 1995 confers only certain functions and powers upon the Commission. In support of above submission learned counsel for the petitioner placed reliance on a judgment dated 5.5.2017 given by co-ordinate Bench of this Court in Writ C No.8490 of 2017 (Shyam Lal and 14 others Vs. State of U.P. and 13 others) which is quoted below-

"The order dated 09.01.2017 passed by the U.P. Scheduled Caste and Scheduled Tribes (Commission) i.e. respondent No.2 requiring the District Magistrate, Varanasi to put the complainants, namely Sri Hari, Manhgoo and Manohar in possession of the property through S.D.M. with the help of Police force, is challenged on the ground that it is beyond its authority and Section 11 of the Uttar Pradesh Commission for the SC and ST Act, 1995 confers only certain functions and powers upon Commission, which is quoted as under:

"FUNCTIONS AND POWERS OF THE COMMISSION"

11. **Duties and functions of the commission.-**

(1) It shall be the duty of the Commission-

a) to investigate and monitor all matters relating to the safeguards, provided for the Scheduled Castes and Scheduled Tribes under the Constitution or under any other law, for the time being in force or under any order of the State Government and to evaluate the working of such safeguards;

(b) to enquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes and Scheduled Tribes;(c) to participate and advice on the planning process of Socioeconomic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development;

(d) to present to the State Government annually and at such other time as the Commission may deem first, reports upon the working of those safeguard;

(e) to make in such reports recommendations as to the measures that should be taken by the State Government for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes; and

(f) to discharge such other functions in relation to the protection, welfare, development and advancement of the scheduled Castes and Scheduled Tribes as may be referred to it by the State Government.

(2) The State Government shall cause the reports of the Commission to be laid before each House of the State Legislature along with a memorandum explaining the action taken or proposed to be taken on the recommendations and the reasons for the non-acceptance, if any, of any of such recommendations."

It is apparent from simple reading of the same that the commission cannot issue direction to the District Magistrate concerned to put the complainants in possession and forcefully evict the person in settled possession over the property in dispute with the help of Police. Eviction of even an unauthorized occupant can take place under as per the procedure prescribed by law.

We in full agreement with the view expressed therein and see no reason to take any different view. For all the aforesaid reasons, the order passed by the Commission cannot be sustained. It is hereby set aside.

The writ petition is hereby allowed."

13. It appears from the record of the case that criminal and civil litigation were filed by the parties in the competent court in order to prove their title. When respondent no. 4 was not able to obtain any favourable order in his favour he made a complaint before the Commission on 2.11.2015. On the said complaint order was passed by the Commission on 1.12.2015 directing the District Magistrate and Sr. Superintendent of Police, Varanasi to remove illegal possession of the petitioner from the land in question and provide possession of the said land to the complainant-respondent no. 4 in the present petition. After the aforesaid order a consequential order was passed by the Deputy Collector Sadar, Varanasi-respondent no. 2 on 31.12.2015 directing the petitioner to remove his possession over the land in question within a period of one week and handover

the peaceful possession of same to the complainant otherwise action will be taken against him.

14. Powers conferred upon the Commission under Section 11 of the Act of 1995. Section 11 of the Act of 1995 have already been quoted in the judgment of Shayam Lal (Supra). From perusal of the same it is clear that the commission cannot issue direction to the District Magistrate and Senior Superintendent of Police to forcefully evict the petitioner from his property in question.

15. The Commission is clothed with the power of summoning and enforcing the attendance of any person for a limited purpose as contained in Article 338 of the Constitution of India. By virtue of powers confer under Article 338 of the Constitution the Commission does not become Civil Court which does not have power to adjudicate the rights of the parties in order to issue any direction or injunction on merits.

16. It is clear from the record that the entire proceedings initiated by the Commission is wholly arbitrary, unjust and illegal and is in complete violation of the law laid down by the Apex Court in case of **All Indian Overseas Bank Vs. S.C. And S.T. Employees' Welfare Association and others Vs. Union of India and others, 1996(6) SCC 606** as well as **U.P. State Handloom Corporation and another Vs. State of U.P. and another, 2012(6) ADJ 42.**

17. In case of **All India Overseas Bank (Supra)** it was held by the Supreme Court that the Commission does not have any power to issue interim injunction. Relevant paragraphs 10 and 11 of the aforesaid judgment is quoted below-

10. Interestingly, here, in clause 8 of Article 338, the words used are "the Commission shall..... have all the powers of the Civil Court trying a suit." But the words "all the powers of a Civil Court" have to be exercised "while investigating any matter referred to in sub-clause (a) or inquiring into any complaint referred to in sub-clause (b) of clause 5". All the procedural powers of a Civil Court are given to the Commission for the purpose of investigating and inquiring into these matters and that too for that limited purpose only. The powers of a Civil Court of granting injunctions, temporary or permanent, do not inhere in the Commission nor can such a power be inferred or derived from a reading of clause 8 of Article 338 of the Constitution.

11. The Commission having not been specifically granted any power to issue interim injunctions, lacks the authority to issue an order of the type found in the letter dated March 4, 1993. The order itself being bad for want of jurisdiction, all other questions and considerations raised in the appeal are redundant. The High Court was justified in taking the view it did. The appeal is dismissed. No costs."

18. In the case of **U.P. State Handloom Corporation (Supra)** also the Division Bench of this Court had an occasion to consider the scope of powers of the Commission under Article 338 of the Constitution of India and held as under-

".....The powers to summoning or enforcing attendance of any person and examining him on oath; requiring the discovery and production of any document' receiving evidence on

affidavits' requisitioning any public record or copy thereof from any Court or office'; issuing commissions for the examination of witnesses and documents' and any other matter that may be prescribed by Section 12 of the State Act are for the purposes of facilitating investigation and enquiries. These powers are not for issuing any orders or decrees to be implemented by the public authorities. If, after making investigation and enquiry, the National Commission or State Commission for the Scheduled Castes and Scheduled Tribes comes to any conclusion with regard to atrocities committed, or for ensuring socio-economic upliftment of the members of the Scheduled Castes and Scheduled Tribes, the Commission can make a recommendation to the President /Governor, as the case may be, to give due consideration for the benefit of the members of the community."

19. The power to summon or enforce attendance of any person and examine him on oath, as available to the Commission under Article 338 (8), is the same as is available to a civil court while trying a suit, as such, the exercise of such power is to be guided by the provisions contained and principles enshrined under Order XVI of the Code of Civil Procedure especially Rule 1 & 14 thereof. Therefore, before summoning a person, the Commission is required to apply its mind as to the necessity thereof. Such summons for personal appearance should not be issued mechanically. The Commission has to examine the facts of each case and if it is found that such appearance of a person is necessary for the purpose of inquiry or investigation, only then the summons should be issued. It would be appropriate that the reasons and the purpose for issuance of such summons is mentioned. Under Order XVI Rule 1, the concerned party desirous of obtaining any summons for the attendance of any person is required to file an application stating therein the purpose for which the witness is proposed to be summoned.

20. A Division Bench of the Delhi High Court in the case of **Professor Ramesh Chandra Vs. University of Delhi and another** LPA No.280 of 2007 decided on 4.5.2007, was of the view that from the reading of Clause 6-8 of Article 338 of the Constitution of India it is clear that the reports made by the Commission are mandatory in nature and cannot equated with the decree passed by the civil court, which are binding on the parties. The relevant portion of the aforesaid judgement is reproduced hereinbelow:-

"6. It is not possible to agree with the learned senior counsel that the Commission under Article 338 of the Constitution of India is an adjudicatory body which can issue binding directions or injunction orders. ....

.....While conferring limited powers of a civil court for some purposes, Article 338 has not given the Commission, the power to adjudicate and pass binding and executable decrees like a civil court.

...It is clear from the reading of Clauses 6-8 that the reports made by the Commission are recommendatory in nature and cannot be equated with decrees/orders passed by Civil Courts which are binding on the parties and can be enforced and executed. It cannot be said that the reports of the said Commission are alternative to the hierarchical judicial system envisaged under the Constitution of India."

21. Karnataka High Court in **Karnataka Antibiotics and Another Vs National Commission for SC and ST and others, ILR 2008 KAR 2205** held that the Commission is not empowered under Article 228 of the Constitution either to set aside a concluded inquiry or the order of penalty or the order of Appellate Authority. The relevant portion of the aforesaid judgment reads as under-

"12. Article 338 of Constitution of India specifies for constitution of National Commission for Schedule Castes and Schedule Tribes. The Supreme Court in All India Indian Overseas Bank SC and ST employees' welfare association v. Union of India (Supra) held that 'all the procedural powers of civil court given to the National Commission for Schedule Caste and Schedule Tribe by Article 338(8) of the Constitution of India are for the limited purpose of investigating any matter under Article 338(5)(a) or inquiring into any complaint, under 338(5)(b). The powers of a civil court of granting injunctions, temporary or permanent, do not inhere in the Commission nor can such a power be inferred or derived from a reading of Clause (8) of Article 338 of the Constitution. The Commission having not been specifically granted any power to issue interim injunctions, lacks the authority to issue an order of the type found in the letter dated 4.3.1993 directing the Bank to stop the promotion process pending further investigation and final verdict in the matter'.

22. The Supreme Court in the case of the **Union of India vs. Orient Engg. & Commercial Co. Ltd. and another reported in [(1978) 1 SCC 10]** had the occasion to consider the requirements of Order XVI Rule 1 C.P.C. and it observed as under:

"3. In this case, a list of witnesses was furnished by the 1st respondent and the Registrar of the High Court, in the routine course, granted summons, perhaps not adverting as to why the arbitrator himself was being summoned. That was more or less mechanical is evident from the fact that the reason given for citing the arbitrator is the omnibus purpose of proving the case of the party-not the specific ground to be made out. We should expect application of the mind of the Registrar to the particular facts to be established by a witness before the coercive process of the court is used. It is seen that the learned Judge before whom objection was taken under s. 151 C.P.C. to the summons to the arbitrator dismissed the petition on the score that he saw no ground to refuse to summon the arbitrator as a witness. The approach should have been the other way round. When an arbitrator has given an award, if grounds justifying his being called as a witness are affirmatively made out, the court may exercise its power, otherwise not. It is not right that every one,who is included in the witness list is automatically summoned; but the true rule is that, if grounds are made out for summoning a witness he will be called; not if the demand is belated, vexatious or frivolous. Thus the court also has not approached the question from the proper perspective. If arbitrators are summoned mindlessly whenever applications for setting aside the award are enquired into, there will be few to undertake the job. The same principle holds good even if the prayer is for modification or for remission of the award. The short point is that the court must realise that its process should

be used sparingly and after careful deliberation, if the arbitrator should be brought into the witness box. In no case can he be summoned merely to show how he arrived at the conclusions he did. In the present case, we have been told that the arbitrator had gone wrong in his calculation and this had to be extracted from his mouth by being examined or cross-examined. We do not think that every Munsif and every Judge, every Commissioner and every arbitrator has to undergo a cross-examination before his judgment or award can be upheld by the appellate court. How vicious such an approach would be is apparent on the slightest reflection.

4. Of course, if a party has a case of mala fides and makes out prima facie that it is not a frivolous charge or has other reasonably relevant matters to be brought out the court may, in given circumstances, exercise its power to summon even an arbitrator, because nobody is beyond the reach of truth or trial by Court. In the present case, after having heard counsel on both sides, we are not satisfied that on the present material there is justification for the examination of the arbitrator."

23. A Division Bench of this Court in the case of **Chitranjan Singh vs Chandra Bhushan Pandey reported in 1998 All.L.J. 134** while dealing with a contempt proceeding considered the necessity of summoning a person for examination and after referring to the provisions of Order XVI Rule 14 C.P.C., held that a special case has to be made out even under Order XVI, Rule 14, C.P.C., for summoning witnesses as Court witnesses.

24. It is admitted situation that all remedial forum have been exhausted by the respondent no. 4 and without disclosing all these material facts, he proceeded to file a complaint before the Commission and the same was entertained and without giving any notice and opportunity to the petitioner, the commission issued directions to the District Magistrate and Senior Superintendent of Police to evict the petitioner forcefully from his land in question.

25. Apart from the same aforesaid order was passed by the Commission without providing any notice or opportunity to the petitioner. The Supreme Court in case of **Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. M/s Shukla and Brothers reported at 2010 AIR SCW 3277** dealt with the principles of law while exercising power of judicial review on administrative action. It was held by the Supreme Court in the aforesaid case that the doctrine of audi alteram partem has three basic essentials-

i) A person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard.

ii) The concerned authority should provide a fair and transparent procedure.

iii) The authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order.

Paragraph 9 of the aforesaid judgment is quoted below-

9. The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned inthe

justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad."

26. In view of the same,we are of the considered view that once respondent no. 4 had already exhausted all remedial forum then he had no right to approach and make complaint in question against the petitioner regarding eviction of the petitioner from his land. Moreover in the instant case the grievance which has been raised as complained by respondent no. 4 before the commission is not at all maintainable and the same is not within the ambit and scope of the Commission to proceed in the matter.

27. For all the aforesaid reasons, the order dated 1.12.2015 passed by the Uttar Pradesh Scheduled Caste and Scheduled Tribes Commission, Lucknow-respondent no. 3 and consequential notice dated 31.12.2015 issued by the Deputy Collector, Sadar, Varanasi, cannot be sustained. They are is hereby set aside.

28. The writ petition is hereby allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – C No. 1302 of 2018

U.P. Financial Corporation ...Petitioner
Versus
Appellate Authority Under Payment Of Gratuity Act and Others ...Respondents

Counsel for the Petitioner:
Sri Ateeq Ahmad Khan

Counsel for the Respondents:
C.S.C., Sri Ranjeet Kumar Mishra

A. Whether interim relief being paid to an employee immediately before his retirement would fall within the meaning of 'wages' defined under Section 25 of the Payment of Gratuity Act, 1972 for the purpose of calculation of his gratuity, under Section 4 (2)? (Para-1)

B. Whether a statutory right, as sacrosanct as that created under the Act in favour of an employeeto receive gratuity reckoned in accordance with the Act, can be excluded on the basis of a contract? (Para-12)

Once wages are defined to mean and include dearness allowance, there is absolutely no basis to exclude interim relief from the definition of wages, that is nothing but a temporary addition to the principal component of wages, until a revision of the dearness allowance or the basic pay itself. (Para-17)

Interim relief claimed by the employee to be part of his wages for the purpose of reckoning his wages last drawn at the time of voluntary retirement from service, would be indeed a

part of it. The scheme would be no more than a contract framed under a policy of the petitioners, and would, therefore, be subservient to the Act; and *a fortiori* to the rights of an employee to receive gratuity on the date he retires, calculated in accordance with the provisions of the Act. Even if the VRS were framed under an Act or had statutory flavor, the provisions of the Section 14 of the Act would still give it overriding effect, over anything said to the contrary in the scheme. The amount of gratuity deposited with the Controlling Authority be paid to the petitioner within 15 days of receipt of a certified copy of this order by the said Authority.

Writ Petition dismissed with costs.

CHRONOLOGICAL LIST OF CASES CITED:

1:- (2003) 5 SCC 163, A.K. Bindal & Another vs. Union of India& others

2:- 2019 SCC Online SC 462, Nagar Ayukt, Nagar Nigam, Kanpur vs. Mujib Ulla Khan and another (E-7)

(Delivered by Hon'ble J.J. Munir, J.)

1. The question involved in this writ petition is: whether interim relief being paid to an employee immediately before his retirement would fall within the meaning of 'wages' defined under Section 25 of the Payment of Gratuity Act, 1972 for the purpose of calculation of his gratuity, under Section 4 (2)?

2. The third respondent was employed with the petitioner-corporation in the month of December, 1972 and retired voluntarily from service in the month of July, 2005. He opted to retire under the Voluntary Retirement Scheme offered by the Corporation (for short the 'VRS'). At the time of his retirement in the month of July, 2005 respondent no.3 held the post of Assistant Manager (Finance) with the petitioner corporation.

3. The case of the petitioner in short is that at the time of his voluntary retirement, he was paid gratuity that was calculated taking into consideration his basic pay + dearness allowance. However, a sum of Rs. 800/- per month that he was in receipt of at that time, by way of interim relief, was not included in his wages last drawn for the purpose of calculation of his gratuity. Respondent no.3, admittedly rendered 32 years of service and taking the said respondent's wages last drawn to be his basic pay at the time, that is a sum of Rs. 3500/- per month + dearness allowance, that at the relevant time was at sum of Rs. 10,606/-, his wages last drawn were determined at a figure of Rs. 14,106/-. In whatever manner gratuity was calculated, the petitioner corporation reckoned the sum payable to the third respondent in gratuity at a figure of Rs. 2,22,222/-. This figure in whatever manner calculated by the petitioner according to their rules, and not in accordance with the Payment of Gratuity Act, 1972 (for short the 'Act'), did not take into reckoning a sum of Rs. 800/- per month, that respondent no.3 received by way of interim relief.

4. Aggrieved, the third respondent moved an application to the Controlling Authority, Payment of Gratuity Act (for short the 'Controlling Authority'), dated 10.05.2012, in substance claiming that he was entitled to receive gratuity in accordance with Section 4(2) of the Act, where the sum of interim relief that he was receiving as part of his wages last drawn, is required to be included while determining the gratuity payable. It was claimed that including the sum of interim

relief that the third respondent was in receipt of when he retired, gratuity payable to him would workout to a figure of Rs. 2,83,787/-. Thus, deducting the sum of Rs. 2,29,222/- paid to the third respondent at the time of his voluntary retirement in gratuity, a balance of Rs. 54,565/- is still outstanding, that he is entitled to receive from the petitioners under Section 4(2) of the Act.

5. The aforesaid application was registered before the Controlling Authority as PG Case No. 57 of 2012. A reply dated 05.12.2012, signed by the Chief Manager, Law Department, of the petitioner was filed in opposition to the third respondent's claim. A further reply dated 15.05.2013 was filed on behalf of the petitioner. A rejoinder was filed on behalf of the third respondent, reiterating his claim about entitlement to difference in the sum of gratuity payable to him, in accordance with Section 4(2) of the Act. The Controlling Authority allowed the petitioner's application vide order dated 18.01.2016, calculating the gratuity payable, by including the sum of interim relief for the purpose of reckoning wages last drawn by the third respondent and determining the same at a figure of Rs. 2,83,787/-, in accordance with the provisions of Section 4(2) of the Act, read with Rule 10(1) of the U.P. Payment of Gratuity Rules, 1975 (for short the 'Rules').

6. The petitioners preferred an appeal from the aforesaid order to the Appellate Authority under the Act, invoking the provisions of Section 7(7) and praying that the order of the Controlling Authority, dated 18.01.2016 be set aside. The aforesaid appeal was heard and dismissed by the Appellate Authority, vide its order dated 11.10.2017.

7. Aggrieved, the present writ petition has been filed.

8. Heard Sri Mohd. Saleem Khan, learned counsel for the petitioner, Sri Ranjeet Kumar Mishra, learned counsel appearing for respondent no.3, and Sri Sandeep Kumar, learned counsel appearing on behalf of respondent no.1.

9. A reading of the case as urged by the petitioners before the authorities below, shows that there is no issue about the fact that the Act is applicable to the petitioner's establishment. The thrust of the petitioner's submission is two fold. The first is that the petitioner having accepted the Voluntary Retirement Scheme, and accepted terminal benefits under the said scheme, he has no further right to claim any sum of money on any count whatsoever, including gratuity payable under the Act. Learned counsel for the petitioner submits that acceptance of retirement under a Voluntarily Retirement Scheme is a 'take it or a leave it' offer, where whatever is offered by the employer under the scheme, if accepted, bars all claims to pay revision or higher wages, which the employee may be otherwise entitled under the Rules. In this regard, learned counsel for the petitioner has relied upon the decision of the Supreme Court in **A.K. Bindal & Another vs. Union of India & others, (2003) 5 SCC 163,** where it has been held thus:-

34.This shows that a considerable amount is to be paid to an employee ex gratia besides the terminal benefits in case he opts for voluntary retirement under the Scheme and his option is accepted. The amount is paid not for doing any work or rendering any

service. It is paid in lieu of the employee himself leaving the services of the company or the industrial establishment and foregoing all his claims or rights in the same. It is a package deal of give and take. That is why in the business world it is known as "golden handshake". The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period. If the employee is still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he has opted for Voluntary Retirement Scheme and has accepted the amount paid to him, the whole purpose of introducing the Scheme would be totally frustrated.

10. Learned counsel for the petitioner submits that a reading of the aforesaid principle makes it clear that once an employee accepts to quit employment under the VRS, all that he is entitled to receive is whatever is part of that scheme. The VRS is a complete severance of all relationship and obligations between the employer and employee, and it comes subject to whatever is offered in remuneration as part of the VRS. He submits, therefore, that the petitioner is not entitled to rely upon the statutory fixation of gratuity under the Act, to which he would be entitled, in case he retired on attaining the age of superannuation. According to Sri Salim Ahmad Khan, learned counsel for the petitioner, reckoning of gratuity under the Act is an anathema to the concept of VRS, which is complete in all quantification of rights and obligations that are contracted by an employee, opting to retire under the said scheme.

11. Sri Sandeep Kumar Mishra has disputed the aforesaid proposition and submits that the liability of the employer to pay gratuity, governed by Section 4(2) of the Act cannot be defeated on the basis of attaching to the VRS an overshadowing effect, upon the statutory rights of the employee. He submits that the decision of their Lordships in **A.K. Bindal and Another** *(Supra)* is clearly distinguishable, as that did not relate to payment of gratuity.

12. This Court has considered the aforesaid submission with all the attention that it deserves. The VRS that may be an initiative in furtherance of a policy of the petitioner, is after all a scheme under which an employee is given an offer to retire, subject to benefits extended to him that are generally alluring enough for him/her to forsake the remainder of his tenure of service, in consideration of whatever he is to receive under the scheme. It is no doubt true that the scheme comes in standard form, where the condition of acceptance is "take it or leave it". But, the question that arises in that case is whether a statutory right, as sacrosanct as that created under the Act in favour of an employee to receive gratuity reckoned in accordance with the Act, can be excluded on the basis of a contract? The nature of the right to receive gratuity has been dealt with by their Lordships of the Supreme Court in a recent decision in **Nagar Ayukt, Nagar Nigam, Kanpur**

vs. Mujib Ulla Khan and another, 2019 SCC Online SC 462, where it has been held in paragraph 11 and 12 of the report as under:-

11. We find that the notification dated 08.01.1982 was not referred to before the High Court. Such notification makes it abundantly clear that the Act is applicable to the local bodies i.e., the Municipalities. Section 14 of the Act has given an overriding effect over any other inconsistent provision in any other enactment. The said provision reads as under:

"14. Act to override other enactments, etc. - ***The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."***

12. In view of ***Section 14 of the Act, the provision in the State Act contemplating payment of Gratuity will be inapplicable in respect of the employees of the local bodies."***
(Emphasis by Court)

13. No doubt this decision was rendered in the context of a local body, but that is besides the point, as it is nobody's case that the Act does not apply to the petitioner. If it does, Section 14 of the Act gives overriding effect to the Act, not only over any other enactment, but also over any other instrument or contract having effect by virtue of any enactment other than the Act. The language of Section 14, clearly spells this out. The VRS at best is a scheme that has been framed by the petitioners in furtherance of a policy, may be as their Lordships said in **A.K.Bindal and Another** *(Supra)* to reduce surplus staff and to bring about financial efficiency. But, the scheme would be no more than a contract framed under a policy of the petitioners, and would, therefore, be subservient to the Act; and a fortiori to the rights of an employee to receive gratuity on the date he retires, calculated in accordance with the provisions of the Act. Even if the VRS were framed under an Act or had statutory flavor, the provisions of the Section 14 of the Act would still give it overriding effect, over anything said to the contrary in the scheme.

14. So far as the decision of their Lordships in the case of **A.K.Bindal and Another***(Supra)* is concerned, the observations giving priority and finality to all emoluments received under the VRS is in relation to a claim for enhancement of pay-scale, for an earlier period of time, when the employee was in service. There the entire framework of rights is different because the right to receive emoluments or a certain pay scale, arises from the employer-employee relationship, and the entitlement is governed by the prevalent pay scale. In the nature of things that were involved in **A.K. Bindal and another***(Supra)* what the employee was enforcing was his right to a higher pay scale, in relation to a period of time prior to his retirement under the VRS. The right to receive emoluments or pay at a particular rate, being essentially a matter of contract between an employer and employee, may be governed or fixed by rules, would all sink behind a contract of voluntary retirement under the VRS, where in complete liquidation of all the employees' claims a lump sum is offered. In that case, however, there was no issue regarding payment of a statutory

entitlement like gratuity, governed by an Act that prescribes the rate thereof and has overriding effect over any other enactment, instrument or contract having force of law, by virtue of Section 14. Therefore, the right to receive other emoluments at a higher scale, after accepting retirement under the VRS, cannot be compared to the statutory entitlement to receive gratuity at the rate prescribed under the Act. In fact, this Court thinks that it would be in the best interest of both the employer and employee that calculation of gratuity, which forms part of the VRS be always done in accordance with the provisions of the Act, considering the overriding effect given to it, by Section 14. Thus, this Court finds no force in the submission of Sri Khan, learned counsel appearing for the petitioner on this count.

15. The next submission of Sri Khan, learned counsel for the petitioner is that gratuity payable to the 3rd respondent is to be worked out on basis that the rate of wages last drawn by the employee, for the purpose of Section 4(2) of the Act, is to be calculated on the basis of his basic pay + dearness allowance. He submits that the third respondent's claim that interim relief be added for the purpose of calculating wages last drawn, is patently fallacious. He submits that it is so, going by the definition of wages, under Section 2(s) of the Act, which reads as follows:-

*2. **Definitions:**-In this Act, unless the context otherwise requires,-*

(a) x x
(b) x x
(c) x x
(d) x x
(e) x x
(f) x x
(g) x x
(h) x x
(i) x x
(j) x x
(k) x x
(l) x x
(m) x x
(n) x x
(o) x x
(p) x x
(q) x x
(r) x x

(s) "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

16. Learned counsel for the petitioner has placed much emphasis on the fact that going by the definition of wages, read according to its plain meaning, it would include all emoluments that are earned by an employee while on duty or on permissible leave to which he is entitled, and also include dearness allowance. However, it excludes, according to learned counsel, bonus, commission, house rent allowance, overtime wages and any other allowance. He submits that interim relief paid to the petitioner would qualify under the category of "any other allowance", and, therefore, cannot be included in the wages last drawn by the employee, for the purposes of Section 4(2) of the Act. He, therefore, submits that the workman's claim asking Rs. 800/- to be added in determining his wages last drawn, on the basis of which his entitlement to gratuity

is to be worked out, is contrary to the provisions of Section 2(s) of the Act.

17. Sri Ranjeet Kumar Mishra, learned counsel for the petitioner disputes the above submission and says that by application of no principle, can interim relief be included in any of the specifically named allowances, under Section 2(s) of the Act, or other allowances mentioned there, that are not to form part of the wages. In the context of emoluments paid to an employee, interim relief is something like a prompt relief that is provided to an employee in the interregnum between time that dearness allowance is revised appropriately, to bring it in tune with the prevalent price index etc. It may be likened to the temporary grant of a particular percentage of higher emoluments, awaiting an impending revision of pay scale, or emoluments properly understood, like D.A. From what interim relief means in the context of emoluments payable to an employee, it is certainly part of wages, if not the basic scale, most certainly those periodical revisions that are made by way of accretions to the salary, called dearness allowance, in order to keep the real wages of the employee apace with the price index and the escalating cost of living. It is by no means an allowance akin to house rent allowance, city compensatory allowance, traveling allowance or bonus or overtime wages, that are generically different from the substantive wages payable to an employee. Once wages are defined to mean and include dearness allowance, there is absolutely no basis to exclude interim relief from the definition of wages, that is nothing but a temporary addition to the principal component of wages, until a revision of the dearness allowance or the basic pay itself.

18. This Court is, therefore, of opinion that interim relief claimed by the employee to be part of his wages for the purpose of reckoning his wages last drawn at the time of voluntary retirement from service, would be indeed a part of it. Seen, thus, in the clear opinion of this Court, the authorities below did not commit any manifest error of law in including interim relief to the figure of wages last drawn by the third respondent, while working out his entitlement to gratuity, at the time of his voluntary retirement.

19. There is another issue that the learned counsel for the petitioner has raised, and about it too, learned Counsel for parties were heard at length. He has raised this issue because it has figured in the decision of the Controlling Authority, regarding a decision taken by the petitioner's Board in view of some Judgment in the case of one Shyamnarayan Tripathi, where interim relief was directed to be made part of wages last drawn, in reckoning gratuity payable to an employee retiring under the VRS. A copy of the resolution of the Board aforesaid, in that regard was filed before this Court through the second supplementary affidavit dated 13.02.2018. The document is an extract of the minutes of the 526th meeting of the petitioner's Board, held on 8th June, 2010. The resolution was passed under item No. 5 of the agenda, and reads as follows:-

EXTRACTS OF THE MINUTES OF THE 526TH BOARD MEETING HLED ON TUESDAY 8TH JUNE 2010 AT 11.30 AM IN THE

BOARD METTING HALL, PICKUP BHAWAN, GOMTI NAGAR, LUCKNOW.

VOLUME-1

MATTER PUT BY ADMINISTRATION DEPARTMENT

NOTE ON ITEM NO. 5 OF THE AGENDA.

CONSIDERATION OF THE ORDERS DATED 22.07.2009 AND 28.07.2009 IN THE CASES OF S/SRI S.N. AWASTHY & K.K. SHUKLA EX EMPLOYEES OF THE CORPORATION RESPECTIVELY, PASSED BY THE CONSTROLLING AUTHORITY UNDER THE PAYMENT OF GRATUITY ACT 1972 AND REPRESENTATONS OF SOME OF THE OTHER RETIRED EMPLOYEES OF THE COROPORATION FOR PAYMENT OF DIFFERENCE IN AMOUNT OF GRATUITY W.E.F. 24.09.1997.

The Board considered the note dated 24.05.2010 of the Managing Director and decided that all those employees who have retired between 24.09.1997 to March 2005 shall be entitled for the payment of arrear of Gratuity on account of enhanced limit of Gratuity of Rs. 3.50 Lacs and also on account of Interim Relief granted by the Corporation.

The Board further decided that the employees who have retired after 01.04.2005 and have been paid the amount of Gratuity calculated on the basis of Basic + D.A. + A.D.A. Shall also be eligible for arrear on the amount of Interim Relief by treating it as part and parcel of wages.

20. It is argued by Sri Khan, learned counsel for the petitioner that the benefit of the aforesaid resolution will not go to the 3rd respondent, as the decision of the Board of Directors taken in their meeting held on 08.06.2010, sanctioning inclusion of interim relief for the purpose of payment of gratuity, has been made with regard to those employees who retire on attaining the age of superannuation. The benefit of this resolution would not go to the 3rd respondent or any other employee who retires under the VRS, that has its own terms. Admittedly, the petitioner retired availing VRS from the services of the petitioner on 31.07.2005, which is a date after 01.04.2005. According to the petitioner's resolution dated 8th June, 2010 he would be entitled to arrears of gratuity, calculated on the basis of basic pay + D.A. + Additional D.A., including interim relief, which shall be treated as part and parcel of wages. Going by the precise phraseology of the petitioner's resolution there is absolutely no basis to be found in the resolution or outside it for drawing this classification, as learned counsel for the petitioners submits, between employees who retire on attaining the age of superannuation and those who have accepted retirement under the V.R.S.

21. This distinction drawn appears to have no basis in the decision of the petitioner's board to include interim relief as part and parcel of wages, for the purpose of calculating gratuity payable to a retiring employee. It is of little significance whether the employee retires on superannuation or voluntarily, once in principle, the petitioners have accepted that retired employees too are entitled to receive arrears of gratuity, worked out on basis that interim relief would form part

of wages to reckon the gratuity payable. There is absolutely no reasonable classification between a superannuating employee and one retiring voluntarily, for the purpose of calculation of gratuity that is based on an intelligible differentia bearing a reasonable nexus with the object sought to be achieved by such a classification, between employees retiring from the petitioner's services. To make this kind of a classification would lead to promoting invidious and hostile discrimination, between two sets of similarly circumstanced employees, at least, as far as payment of gratuity is concerned.

22. This is, particularly, so as the right to receive gratuity, governed by the Act as it is, makes little distinction between retirement of an employee that comes about on superannuation or otherwise. Both kinds of retirements are treated at par under the Act, as would be evident from the provisions of Section 4(1) that are quoted below:-

4. Payment of gratuity.- *(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-*

(a) ***on his superannuation,*** *or*

(b) ***on his retirement or resignation,*** *or*

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :

[Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his ***nominee*** *or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]*

Explanation.-For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(Emphasis by Court)

23. A perusal of Clause (a) of sub-section (1) of Section 4 of the Act, and clause (b) of sub-section (1) aforesaid would show that for the purpose of entitlement of an employee to gratuity, the mode of termination of his employment after rendering five years or more of continuous service, that have been placed at par, are superannuation under Clause (a), and retirement or resignation under Clause (b). Retirement other than superannuation under clause (b), in the opinion of this Court, would clearly take within its fold, voluntary retirement.

24. Of course, the Act adds to it by Clause (b) of sub-section (1), resignation also as an contingency which after five years or more of continuous service, would entitle an employee to payment of gratuity under the Act. Considering that the Act has overriding effect over any other law, or any contract or instrument having force of law to the contrary by virtue of Section 14, the distinction between retirement on reaching the age of superannuation and retirement that is

voluntary under an option exercised availing the V.R.S., seems to be contrary to what the Act says. The resolution dated 08.06.2010 passed by the petitioner's Board, therefore, would equally apply to the third respondent's case, as it does in the case of a workman who retires on attaining the age of superannuation.

25. This Court, therefore, finds that the conclusions of the Controlling Authority and the Appellate Authority on this score, may be for different or added reasons, are right and unassailable.

26. In the result the writ petition fails and is **dismissed** with costs.

27. The amount of gratuity deposited with the Controlling Authority be paid to the petitioner within 15 days of receipt of a certified copy of this order by the said Authority.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ – C No. 11140 of 2019

Mahak Singh ...Petitioner
Versus
Appellate Authority/Deputy Labour Commissioner Payment of Gratuity ...Respondent

Counsel for the Petitioner:
Sri Dinesh Rai.

Counsel for the Respondent:
C.S.C., Sri Chandan Sharma

A. Whether the Additional Labour Commissioner/Prescribed Authority under the Timely Payment of Wages Act, 1978 had exceeded in its jurisdiction in issuing the recovery certificates while exercising power under Section 3 of the said Act.

B. Whether there was an illegal strike or valid closure of the factory and the denial on the part of the employer to pay wages to the workmen since 7.8.2001 was "default" on its part of the employer within the meaning of the Act, 1978 or there was a valid dispute with regard to entitlement of the workmen to wages which required adjudication by an industrial adjudicator.

Whether the settlement dated 14.1.2002 was binding on all the workmen or the union. (Para-44)

The enquiry conducted by the Labour Commissioner to record reasons while arriving at the conclusion of default on the part of the employer was well within the limited exercise of jurisdiction conferred on him under Section 3 of the Act, 1978. It cannot be said that the Labour Commissioner had acted beyond its jurisdiction in making enquiry to reach at the conclusion of genuineness of denial on the part of the workmen. In absence of legal lockout or illegal strike, the orders of recovery cannot be said to be wrongful exercise of power on the part of the Labour Commissioner (Para80). The petitioner had not been able to establish before the Labour Commissioner that there was a genuine dispute pertaining to strike or validity of settlement, which required adjudication by an industrial adjudicator, there was no question of relegating the workmen to approach the industrial adjudicator. (Para-94).

Such a settlement would not be binding on those who are not signatories to the same. (Para-96)

Writ Petitions dismissed

CHRONOLOGICAL LIST OF CASES CITED:
1:- 1994 SCC (1) 159, Modi Industries Ltd. vs. State Of U.P

2:- 2006 (5) SCC 442, Hotel and Restaurant Karamchari Sangh vs. Gulmarg Hotel and others

3:- AIR 1970 SC 150,A.K.Kraipak &Ors. Vs. Union of India &Ors.

4:- 2013 (5) AWC 4745, Silk and Kapda Karmchari Union, Varanasi vs. Deputy Labour Commissioner, Varanasi and others

5:- AIR 2000 SC 469, National Engineering Industries Ltd. vs. State of Rajasthan andothers

6:- 2013 (5) ADJ 544,Hawkins Cookers Mazdoor Union vs. Conciliation Officer

7:- 2000 (84) FLR 162,National Engineering Industries Limited vs. State of Rajasthan and others

8:- J.T. 2005 (9) SC 413,ANZ Grindlays Bank Ltd. vs. Union of India

9:- 2002 LLR 433, Tata Consulting Engineers and Associates Staff Union Vs. Tata Consulting Engineers and Another

10:- 1998 (1) UPLBEC 391,Posysha Industries Company Limited vs.Collector (E-7)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition under Article 226 of the Constitution has been brought by Mahak Singh, an employee of Cooperative Cane Development Limited, Railway Road, Deoband, Saharanpur through its Secretary, who are a Cane Cooperative Society registered under the U.P. Co-operative Societies Act, 1965. Admittedly, the petitioner was appointed as a seasonal clerk with respondent no. 3, last mentioned (for short the 'society') on 09.12.1975 and retired from service, as such, on 31.08.2014, upon attaining the age of superannuation. The petitioner rendered 39 years of service. At the time of retirement, the last salary drawn by the petitioner was Rs. 16,690/- per mensem. Upon retirement, the petitioner was paid a sum of Rs. 3,62,754/- in gratuity, calculating it at the rate of seven days wages for each season, multiplying it with the total number of seasons that were reckoned to be 37 by the Society. Thus calculated, the petitioner was paid gratuity in the sum of Rs. 3,62,754/-, in accordance with the provisions of the second proviso to sub-section (2) of Section 4 of the Payment of Gratuity Act, 1972 (for short the 'Act').

2. The petitioner claims that though employed as a seasonal clerk by the Society, he has admittedly worked for more than 240 days regularly, thus being employed throughout the year, and, upon that fact even if the Society are held to be a seasonable establishment, the petitioner is entitled to be paid gratuity @ 15 days wages based on the rate of wages last drawn for every completed year of service or part thereof in excess of six months in accordance with sub section (2) of Section 4 of the Act. Reckoned thus, the petitioner would be entitled to gratuity in the sum of Rs. 7,77,330/-, which after deducting the sum already paid to him on that account, short of his entitlement, the Society still owes to the petitioner a sum of Rs. 4,14,576/-.

3. It is also contended by the petitioner that apart from designating him a seasonable clerk, the Society are not entitled to rely on the second proviso to sub section (2) of Section 4 of the Act, inasmuch as, they are not at all a seasonal establishment. It is urged in the supplementary affidavit filed by the petitioner, in particular, that the Society are not a seasonal establishment within the meaning of the second proviso to Section 4(2) of the Act. He has relied on a specific certification tendered in answer

to information about the status of the society sought by one Suresh Pal Singh s/o Amar Singh from the District Cane Officer, Saharanpur, where it has been certified vide Memo No. 1297, amongst other things, that Cooperative Cane Societies are not seasonal establishments, but Cooperative Societies.

4. This petition has arisen from proceedings taken by the petitioner under the Act before the Controlling Authority and the Appellate Authority. The course of those proceedings and disposition of the petitioner's claim by those Authorities, is described hereinafter.

5. The petitioner approached the Controlling Authority under the Act seeking to enforce recovery of the balance of his gratuity from the Society. The Controlling Authority appointed under the Act for the District of Saharanpur vide an order dated 15.05.2017, rejected the petitioner's claim on application of a simple principle that the petitioner being a seasonal employee, he was entitled to gratuity calculated in accordance with the second proviso to sub section (2) of Section 4 of the Act. The said order was challenged in appeal to the Appellate Authority under Section 7(7) of the Act. The appeal aforesaid, registered as PGA Appeal No. 13 of 2017, was dismissed by the Appellate Authority vide order dated 30.07.2018, affirming the order of the Controlling Authority, dated 15.05.2017, refusing the petitioner's prayer as above detailed. The orders dated 15.05.2017 passed in PGA Appeal No. 13 of 2017 by the Controlling Authority and the Order dated 30.07.2018 passed by the Appellate Authority affirming the said order, wherever referred together are hereinafter referred are called the 'impugned orders'.

6. Aggrieved by the impugned orders rejecting the petitioner's claim, the present writ petition has been filed.

7. It may be mentioned here that this petition was filed on 22.03.2019. It came up before Court on 01.04.2019 when it was adjourned to 01.04.2019, in order to enable the learned counsel for the petitioner to serve a copy of the writ petition upon learned counsel appearing for the Society. On 02.04.2019, the matter was heard at the admission stage and learned counsel for the Society was required to seek instructions regarding the copy of a document enclosed as Annexure 1 to the writ petition, particularly, about the number of working days shown there by the petitioner from 1979 to 2014, for the specific purpose of verifying whether that was a correct statement of account about his working days. Since learned counsel for the Society also sought to raise some objections that the Payment of Gratuity Act would not apply to the Society, he was also required to disclose his stand on the issue. The matter was adjourned to 08.04.2019. On 08.04.2019, a supplementary affidavit, some of the contents whereof have been referred to hereinbefore, was filed by the petitioner after service upon learned counsel for the respondent no. 3. The matter was adjourned to 16.04.2019. The writ petition was taken up thereafter on 16.04.2019 and learned counsel for both parties desired that the matter be heard finally at the stage of admission with learned counsel for respondent no. 3 consenting to that course, without any affidavit being filed on behalf of the Society. The matter was, accordingly, heard on 16.04.2019. It was further heard on 22.04.2019, and finally on 25.04.2019, when judgment was reserved.

8. Heard Sri Dinesh Rai, learned counsel for the petitioner, Sri Chandan Sharma, learned counsel appearing on behalf of the Society (respondent no. 3) and Sri R.M. Vishwakarma, learned Standing Counsel appearing on behalf of the State.

9. The following questions arise for consideration in this petition:-

(a). Whether seasonal employees of Cane Cooperative Societies in Uttar Pradesh are governed in the matter of payment of gratuity by the Act or by the provisions of the U.P. Cooperative Act, 1965 read with U.P. Cane Cooperative Service Regulations, 1975?

(b). Whether a seasonal clerk employed by a Cane Cooperative Society who works for more than 240 days in a year is entitled to gratuity at the rate 15 days wages, worked out on the wages last drawn under Section 4(2) of the Act, or is entitled to seven days wages for each season under the second proviso to Section 4(2)?

10. The submission of Sri Chandan Sharma is that the Act does not apply *proprio vigore* to seasonal employees of Cane Cooperative Societies in U.P. He submits that the Act has been made applicable to such seasonal employees only to the extent of calculation and payment of gratuity in terms of a circular issued by the Cane Commissioner, Uttar Pradesh, in exercise of powers under Regulation 200 of the U.P. Cane Cooperative Service Regulations, 1975 (for short the 'Service Regulations of 1975'). Prior to the issue of the aforesaid circular dated 25.02.1997, employees of Cane Cooperative Societies like the petitioner were governed by the Service Regulations of 1975, even in the matter of calculation and payment of gratuity which was in accordance with the earlier order of the Cane Commissioner/Registrar, Cooperative Cane Societies, U.P., Lucknow, dated 05.01.1987. A clear formula for working out gratuity of an employee like the petitioner was detailed in the Cane Commissioner's Statutory order of 05.01.1987, issued under Rule 200 of the Service Regulations of 1975, which left no scope for calculation of gratuity to be made in accordance with the provisions of the Act.

11. Sri Chandan Sharma submits that the Cane Commissioner's order of 25.02.1997, has amended the earlier order of 05.01.1987, as already said to the extent of calculation of gratuity, by making the Act applicable to a seasonal employee like the petitioner. It is not that the Act has become applicable on its own force, and, as a whole. He submits that Authorities under the Act, have no jurisdiction to determine disputes relating to calculation or payment of gratuity to employees of a Cane Cooperative Society in U.P. All that has to be done by the Authorities under the Service Regulations of 1975 or the U.P. Cooperative Societies Act, 1965 (for short the 'Act of 1965').

12. Stressing his submission as to inapplicability of the Act, except to the limited extent of calculation and payment of gratuity, Sri Chandan Sharma has submitted that the Act is a General Law regulating payment of gratuity to all classes of employees, as indicated by Section 1 thereof, whereas the Act of 1965 and the Service Regulations of 1975 are a Special Act and Regulations framed under the Special Act, that make

provision for gratuity and the manner of redressal of grievances of an employee. The jurisdiction of the Authorities under the Act is, therefore, completely excluded. Shri Chandan Sharma has further emphasized that Chapter 16 of the Service Regulations of 1975, in particular, Regulations 141 to 149, provide for everything about gratuity to an employee of Cane Cooperative Societies like the petitioner. He submits that the Service Regulations of 1975 came into force on 18.10.1975, whereas the Act was brought into force on 31.08.1972. The Service Regulations of 1975 being a subsequent statutory regulation carrying specific provisions in relation to gratuity of employees of a Cane Cooperative Society, will prevail over a general statute like the Act in matters of payment of gratuity, except to the extent that the Act is made applicable. In accordance with the last part of his submission that the Act governs to the extent that it is made applicable by the Authorities acting under the Service Regulations of 1975 or the Act of 1965, it is pointed out by Sri Sharma that the Cane Commissioner's Order dated 25.02.1997 annexed to the supplementary affidavit filed by the petitioner shows, that the Act has been made applicable for the limited purpose of reckoning/calculation and payment of gratuity under it, and according to its provisions, from time to time in force. But the said Order makes it clear that except for the amendment, the earlier Statutory Order made by the Cane Commissioner dated 05.01.1987 will remain in force.

13. Sri Chandan Sharma has also urged that the Act of 1965 is a self contained statute and it excludes applicability of all other labour laws, like the U.P. Industrial Disputes Act, 1947 and the Payment of Gratuity Act, 1972. Sri Sharma has placed reliance in this context upon a decision of the Supreme Court in **Ghaziabad Zila Sahkari Bank Ltd. vs. Additional Labour Commissioner and others, 2007 (11) SCC 756.** In the said decision of their Lordships it has been held that on principle of statutory interpretation which provides that a General Act should yield to a Special Act, the Act of 1965 excludes the provisions of U.P. Industrial Disputes Act, in matters governing service conditions of employees of a cooperative society like the **Ghaziabad Zila Sahkari Bank Limited** *(supra)*. It was held that the Authorities under the Act of 1965 and the Service Regulations framed thereunder, alone would have jurisdiction to decide entitlement to ex gratia payment that was made the subject matter of dispute and taken to the Assistant Labour Commissioner under Section 6H(1) of the U.P. Industrial Disputes Act by the workman. He has, in particular, placed reliance on paragraphs 37,39, and 41 of the report in **Ghaziabad Zila Sahkari Bank Limited** *(Supra)* where it is held:-

37. It was then submitted that the U.P. Industrial Disputes Act is a special statute dealing with industrial disputes and therefore will exclude the application of the U.P. Cooperative Societies Act which is a general statute.

39. In the above Act, Section 70 provides for disputes which can be referred to arbitration of the Registrar. Sub-section (1) thereof provides that Section 70 applies to "any dispute relating to the constitution, management or the business of a cooperative society" (emphasis supplied). Sub-section (2) thereof provides for including in the above disputes any "claims for amounts due" but this is also for the

purposes of sub-section (1) and therefore would have to be read along with sub-section (1). This Court has specifically held that disputes arising out of terms and conditions of employment of the Society's employees do not fall within the phrase "any dispute relating to the constitution, management or the business of a cooperative society". Thus Registrar cannot decide such disputes regarding terms and conditions of employment. A number of decisions of this Court were cited on this point by the learned Senior Counsel, Deccan Merchants Coop. Bank Ltd. v. Dalichand Jugraj Jain [AIR 1969 SC 1320 : (1969) 1 SCR 887] ,Coop. Central Bank Ltd.v.Addl. Industrial Tribunal[(1969) 2 SCC 43] ,Allahabad District Coop. Ltd.v.Hanuman Dutt Tiwari[(1981) 4 SCC 431 : 1981 SCC (L&S) 649] andMorinda Coop. Sugar Mills Ltd. v. Workers' Union [(2006) 6 SCC 80 : JT (2006) 6 SC 374] .

41.This is further strengthened by Rule 130(2) which provides that if the resolution is not covered by Section 128 then it becomes operative immediately.

14. Sri Chandan Sharma has further relied upon a decision of this Court in **Brahmawarta Commercial Co-Operative Bank Ltd., Kanpur vs. Presiding Officer, Industrial Tribunal III, U.P. Kanpur, 2012 (10) ADJ 8,** where an employee of the Cooperative Bank concerned whose services were dispensed with, raised an industrial dispute under Section 4K of the U.P. Industrial Disputes Act. The petition was brought at an interlocutory stage to quash proceedings of the adjudication case on ground that the Tribunal does not have jurisdiction, in relation to service disputes of employees of a Cooperative Society. In the said case, and some of the connected matters disposed of by the same judgment, the issue was about some employees of Cooperative Banks who had received gratuity determined in accordance with the provisions of the Act, where the entitlement was higher than the provisions of the Act of 1965. About the issue of applicability of the Act vis-a-vis an employee of a Cooperative Society, governed by the Act of 1965, it was held by this Court, after considering the decision of their Lordships of the Supreme Court in **R.C. Tewari v. M.P. State Co-operative Marketing Federation Ltd. (1997) 5 SCC 125 and Ghaziabad Zila Sahkari Bank Limited** *(Supra)* that the provisions of the Act of 1965 would exclude the applicability of all Labour Laws, including the Act. In this connection, learned counsel for the society has placed particular reliance upon paragraphs 10,11,12,15,16,17,18,19,20,24 of the report in Brahmawarta*(supra)*, where it has been held:

10. Learned counsel for the respondent has submitted that in the case of Writ Petition Nos. 5860 of 2002; 5874 of 2002 and 5876 of 2002 the respondents/employees have already been paid their gratuity in terms of the relief sought by them in writ petition, as such in their cases no recovery in respect of the difference of sum under Payment of Gratuity Act, 1972 and under the provisions of 1965 Act and Regulations framed there under may not be recovered. However, learned counsel for the respondents have failed to dispute the principle of law which emerged from the judgments mentioned in forthcoming paragraphs of this order. He has not placed reliance on any judgment contrary to the law laid down in the judgments of the Supreme Court and of this Court mentioned in this judgment.

11. I have considered the rival submissions made by the learned counsels

for the respective parties. Indisputably the respondents in all the writ petitions are employees of the various Co-operative Banks who are the petitioner in the present writ petition and in the connected writ petitions. In all these matters the employees have either invoked the provisions of the U.P. Industrial Dispute Act, 1947 or under the Payment of Gratuity Act, 1972.

12. The Supreme Court in the case of R.C. Tewari *(supra)* has held that Co-operative Societies Act of M.P. Deals with the dispute relates to the term of employment, working conditions, disciplinary action taken by the society under Section 64 of the said Act. Registrar is empowered to decide the dispute and his decision shall be binding on the society and its employees.

15. Coming to the second set of case where the issue of gratuity is involved. Civil Misc. Writ Petition No. 5860 of 2002 has been filed through its Secretary/General Manager aggrieved by the order of the Additional Labour Commissioner/Controlling Authority under the Payment of Gratuity Act, 1972 dated 2.1.2002 and order passed by the Appellate Authority under the Payment of Gratuity Act, 1972 dated 22.5.2001.

16. In the said case the respondent No. 3 therein Surya Nath Pathak was the employee of the petitioner Bank, who was initially appointed on 23.7.1962 and attained the age of superannuation on 30.11.1998. The Bank paid him the amount of gratuity to the tune of Rs. 2,76,412.10 p. in terms of the Regulations 95 of the U.P. Employees Service Regulations, 1975. The said Regulation was framed under the provisions of the U.P. Cooperative Societies Act, 1965 and the Rules framed thereunder. The employees of the Co-operative Bank are governed by the said Regulations (for short 1975 Regulations). The 1975 Regulations were framed by the Institutional Board under Section 122 of the U.P. Co-operative Societies Act, 1965. The Regulations 95 deals with the gratuity, it provides that an employee is entitled to gratuity equivalent not more than 15 days salary for every completed year of service, if he has attained the age of superannuation. The Bank stand is that it has paid the gratuity to its above mentioned employee in terms of the said Regulations. However, after receiving the said amount the employee moved all application under the provisions of the Payment of Gratuity Act, 1972 and he claimed a higher amount of the gratuity. The Controlling Authority had his application registered as APGA case No. 9 of 1999. The Bank filed a detailed written statement refuting the claim of its employee inter alia on the ground that the Regulation 95 will override the provisions of any agreement arrived at between the parties.

17. The stand of the employees before the Controlling Authority was that there was an agreement between the U.P. Bank Employees Union and the management under the proviso 6-B(1) and the said settlement provides that the gratuity was payable at the rate of one months salary of each completed year of service. The Controlling Authority relying on the said settlement allowed the application of the employee and directed the Bank to pay gratuity amount to the tune of Rs. 4,97,880/- and also imposed 12% interest over the balance amount. Aggrieved by the order of the Controlling Authority the Bank filed an appeal under the provisions of the Gratuity Act, 1972. The appeal was also dismissed by the Appellate Authority respondent No. 1

herein, by order dated 22.5.2001 and 2.2.2001. The Bank aggrieved by the said orders dated 22.5.2001 and 2.1.2002 has filed the present writ petition.

18. Sri H.R. Mishra, learned counsel for the petitioner in this case has raised the same legal plea and has urged that common settlement which arrived at in the year 1966 which was registered under Section 6B(1) of the U.P. Industrial Dispute Act, 1947 was ineffective as its life was only one year in terms of the said sections. Further elaborating his argument he has submitted that the Bank vide its resolution No. 10 dated 11.1.1991 terminated the said settlement. The Regulations 95 which specifically deals with the gratuity has override effect over the provisions of the U.P. Industrial Dispute Act, 1947 as well as Gratuity Act, 1972. The said Regulations have been framed by the Institutional Board which has been constituted under Section 122 of the Act, 1965.

19. Sri Mishra has placed reliance on the judgment of this Court in case of Deo Raj Singh v. Fatehpur District Co-operative Bank Ltd. *(supra)*.

20. In the matter of Deo Raj Singh *(supra)* the dispute arose under the provisions of the Payment of Gratuity Act, 1972. The issue raised before this Court was whether the payment of gratuity shall be made on the basis of the calculation as provided under the Service Regulations of 1995 or under the provisions of the award/agreement, 1966. In the said case the employees had invoked the provisions of the Payment of Gratuity Act, 1972,- as under the said Act the gratuity was payable to the employee @ one month wages per year service or it was payable @ 15 days wages as per year of services as provided in the Payment of Gratuity Act, 1972. The employee in the said case raised the dispute under Section 4K of the Industrial Dispute Act and the matter was referred for adjudication to the Industrial Tribunal at Allahabad.

24. Having regards to the facts and circumstances of the case, I am of the view that from the aforesaid judgments what emerges is that the U.P. Co-operative Societies Act, 1965 is a self contained Act and it excludes the jurisdiction of all other labour law such as Industrial Dispute Act and the Gratuity Act etc.

15. Sri Chandan Sharma has also pressed into service a Division Bench decision of this Court in **Shobhai Ram vs. State of U.P., 2014 (142) FLR 457,** where in the context of applicability of the Act to an employee of a Cooperative Society, it has been held thus in paragraphs 2,3,4 and 5 of the report:-

2. The contention of the learned counsel for the petitioner is that the Payment of Gratuity Act being an Industrial Law is not applicable to the employees of the Cooperative Societies in view of the U.P. Cooperative Society Act as also the pronouncement of the Supreme Court in the case of Ghaziabad Zila Sahkari Bank Ltd. v. Additional Labour Commissioner and others, MANU/SC/7040/2007 : (2007) 11 SCC 756 and the judgment rendered in the case of Brahmawarta Commercial Co-Operative Bank Ltd., Kanpur v. Presiding Officer, Industrial Tribunal-III, U.P., Kanpur, MANU/UP/1821/2012 : 2012 (134) FLR 574.

3. Learned counsel for the petitioner further contends that in fact the gratuity is payable under Regulation 95 of the U.P. Cooperative Societies Employees Service Regulations 1975.

4. Sri K.N. Mishra appearing for the respondent bank very fairly submits that in fact the Gratuity Act is not applicable to the cooperative society and that it being an independent body the relevant Government orders issued by the State Government in pursuance of the recommendations of the 6th Pay Commission are also not applicable unless and until the respondent bank takes a decision adopting the same.

5. Be as it may, the fact remains that the impugned order has been passed only on the ground of applicability of the Gratuity Act 1972 which is clearly not applicable in view of the provisions of the U.P. Cooperative Societies as also the aforesaid judgments mentioned.

16. Sri Dinesh Rai rebutting the contention of Sri Chandan Sharma submits that the payment of gratuity Act is not a general law vis-a-vis the Act of 1965. It is a dedicated legislation that has for its object ensuring regulation of payment, including determination and realization of gratuity, to all classes of employees to which the Act applies. He submits that in matters of payment of gratuity, the Act of 1965 and the Service Regulations of 1975 cannot be said to be special statutes that would exclude the applicability of the Act. He submits that the decision of their Lordships in **Ghaziabad Zila Sahkari Bank Limited** *(supra)* excludes the operation of labour laws in general, like the Industrial Disputes Act to Cooperative Societies, governed by the Act of 1965. The principle there does not exclude the applicability of the Act, which is a special Act so far as payment of gratuity to an employee of any establishment is concerned. It is not even limited in its applicability to industrial workers or the employees of a commercial establishment. It applies to various classes of employees of different establishments, except employees of the Central or State Government who hold posts under such Government and are governed by any other Act or by any Rules, providing for the payment of gratuity. The Act applies to various kinds of establishments in the submission of Sri Rai, as envisaged under Section 1(3) of the Act, except those that are exempted under Section 5. In short, according to Sri Rai, the Act is not a general law vis-a-vis the Act of 1965 or the Service Regulations of the 1975 framed thereunder, in the sense that the concept of a general law is postulated for the Industrial Disputes Act in the decision of their Lordships in **Ghaziabad Zila Sahkari Bank Limited** *(supra)*.

17. Sri Dinesh Rai has placed particular reliance upon a recent decision of this Court in **General Manager Kisan Sahakari Chini Mills Ltd. vs. Appellate Authority Under Payment of Gratuity Act, 1972 and Ors., 2019 (160) FLR 691,** where this Court considered the question of applicability of the Act vis-a-vis Cooperative Sugar Mills governed by the Act of 1965 and the Service Regulations of 1975. It fell for consideration of this Court in the decision last mentioned as to whether the Act would apply to a Cooperative Sugar Mill and the Controlling Authority under the Act would have jurisdiction, given the provisions of the Act of 1965 and the Service Regulations of 1975. The question was examined on a consideration of the impact of their Lordships decision in **Ghaziabad Zila Sahkari Bank Limited** *(supra)*, threadbare by this Court. The issue aforesaid was posed and answered in **General Manager Kisan**

Sahakari Chini Mills Ltd.*(supra)* by this Court thus:-

10. The short question that arises for consideration before this Court is as to whether the employees of the Co-operative Sugar Mills would be covered by the Payment of Gratuity Act or whether the Controlling Authority under the Payment of Gratuity Act has jurisdiction to enter into the controversy.

11. To answer this question, the law laid down by the Apex Court in Ghaziabad Zila Sahakari Bank *(supra)* is required to be examined first. In the said case, the dispute was with regard to an order passed by the Assistant Labour Commissioner Ghaziabad, U.P. under Section 6H(1) of the U.P. Industrial Disputes Act' 1947. The appellant challenged the said order on the ground that the Assistant Labour Commissioner had no jurisdiction to pass such an order, in as much as, the UP Industrial Disputes Act had no application. The U.P. Co-operative Societies' Act' 1965 being a special enactment will prevail over the U.P. Industrial Disputes Act' 1947. The U.P. Co-operative Societies Employees Service Regulation' 1975 framed by the U.P. Cooperative Institutional Service Board, which has been approved by the Governor and published in the Official gazette under section 122 of the Act' 1965, provides a full fledged remedy and complete mechanism to the employees of the Co-operative Societies to agitate their grievances.

12. In view of the said remedy, the general Act namely the U.P. Industrial Disputes Act as a whole has no application.

14. The legal position regarding applicability of U.P. Industrial Disputes Act has been settled by the Apex Court on the general principle of interpretation of statutes that "the General Act should lead to the special Act". It was held that the U.P. Co-operative Societies Act being a complete code in itself as regards employment in cooperative societies and its machinery and provisions, the Assistant Labour Commissioner had wrongly invoked the jurisdiction under Section 6-H (1) of the UP Industrial Disputes Act. It was held that the exclusion of UP Industrial Disputes Act and the Industrial Disputes Act though has been specifically contemplated under section 135 of the Co-operative Societies Act but the fact that the said provision has not been enforced by the government would be of no implication as the said provisions (section 135) has been included in the Act' 1965 only by way of clarification and abundant caution.

15. The dispute in the instant case relates to the applicability of the Payment of Gratuity Act' 1972 which cannot be said to be a general enactment. A perusal of the object and reason of the said enactment indicates that it was enacted to bring a central legislation to regulate the payment of Gratuity to the industrial workers. The Act provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected or incidental thereto.

1. It extends to the whole of India.

2. It applies to every factory, mine, oilfield, plantation, port and railway company; time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

16. The only provision which excludes the applicability of the Act to the employees of any establishment is in the definition of word "employee" in section 2 (e) which excludes the employees of the Central Government and State Governments who are governed by any other act or by any rules providing for Payment of Gratuity.

17. Section 5 of the Act' 1972 confer powers on the appropriate government to exempt an establishment from the operation of the provisions of the Act, if in its opinion, the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

18. Section 14 of the Act' 1972 gives overriding effect to the Payment of Gratuity Act for any inconsistency contained in any other enactment or in any instrument or contract.

19. The Apex Court in the case of Municipal Corporation of Delhi vs. Dharam Prakash Sharma & another reported in MANU/SC/1136/1998 : 1998 (7) SCC 221 recognized the said import of the Payment of Gratuity Act to say that it is a special provision for payment of gratuity and unless there is any provision which exclude its applicability to an employee, it is not possible to hold that the said employee would not be entitled to the gratuity under the Payment of Gratuity Act.

20. Even in the light of the legal position as clarified by the Apex Court in Ghaziabad Sahkari Bank *(supra)*, it is not possible for this Court to hold that the Controlling Authority under the Payment of Gratuity Act had no jurisdiction.

21. In other words, in the light of the principle of interpretation of statute that the Special Act would prevail over General Act, as relied therein, the Payment of Gratuity being the special enactment would prevail over the general provisions relating to Payment of Gratuity provided under clause 29 of the Regulation' 2015 framed under Section 122 (2) of the Act' 1965. The overriding effect given to the Payment of Gratuity Act would further strengthen the case of the respondent that he is entitled for gratuity as payable under the Payment of Gratuity Act' 1972.

18. Sri Rai submits, therefore, that there is absolutely no question of exclusion of a special statute like the Act in the matter of payment of gratuity by the Society, banking on the principle that the Act of 1965 and the Service Regulations of 1975 are a special law, that would exclude the applicability of the Act. This Court has carefully considered this rather settled question, in the light of the decision of their Lordships in **Ghaziabad Zila Sahkari Bank Limited** *(supra)*.

19. It must be acknowledged at once that the decision of their Lordships in **Ghaziabad Zila Sahkari Bank Limited** *(supra)* expounds the principle that the provisions of the Act of 1965, together with the Service Regulations of 1975, would exclude the provisions of all other Labour Laws in matters of employment under the Cooperative Societies. The principle to the understanding of this Court does not go further. What is, therefore, to be seen in context of the question about an exclusion of the Act in the matters of payment of gratuity by the Act of 1965 is whether the Act would fall in the category of "all other labour laws" vis-a-vis the Act of 1965, as postulated by their Lordship's decision in **Ghaziabad Zila Sahkari Bank Limited** *(supra)*. The

object and purpose of the Act apparently is very different from other labour laws. It is not designed to safeguard industrial relations or to promote industrial peace, amongst workman. It is a dedicated central legislation brought by Parliament to regulate "payment of gratuity to employees engaged in factories, mines, oil fields, plantations, ports, railway companies, shops or other establishments, and for matters connected therewith or incidental thereto", to borrow the precise words of the object of the Act, as delineated in its preamble. The object of the Act, therefore, is clearly to secure payment of gratuity to employees of myriad establishments; not just industrial workers or workman. The way it applies by virtue of Section 1(3), it can and does take into its fold employees, even of statutory bodies, such as local bodies, educational establishments, subject only to the employer falling in one of the clauses of sub section (3) of Section 1 of the Act. The Act, therefore, is a special statute designed to secure payment of gratuity to employees transcending the character of the establishment or employers, except those to whom the Act does not apply or the employer/establishment that are exempted by notification under the Act. By no means, therefore, can the Act be said to be part of the corpus juris of labour laws in general or, for that matter, a General Act vis-a-vis the Act of 1965 to which it must yield. The special and overriding character of the Act in matters relating to payment of gratuity to employees, particularly, flows from the terms of Section 14 of the Act that read thus:-

14. Act to override other enactments etc.- The provisions of this Act or any rule made thereunder shall have effect **notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.**
(Emphasis by court)

20. The acknowledgment about the character of the Act being a special legislation that works to exclude other statutes governing regulation, reckoning, payment and enforcement of a claim to gratuity is to be found in the guidance of their Lordships in **Municipal Corporation of Delhi vs. Dharam Prakash Sharma and another, (1998) 7 SCC 221,** where in relation to the right of employees of the Municipal Corporation of Delhi to proceed under the Act in the matter of payment of their gratuity, in preference to the Gratuity Rules, enforced by the Corporation it was held:-

2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a

special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules.

21. Likewise, in the case of **Nagar Ayukt Nagar Nigam, Kanpur vs. Mujib Ullah Khan and another, (2019) 6 SCC 103,** in the context of the right of employees of the Nagar Nigam, Kanpur to reckon their entitlement and recover gratuity under the Act, it was held that the Act would work to the exclusion of what their entitlement to gratuity was under the U.P. Municipal Corporation Act, 1959 read with Retirement Benefit and General Provident Fund Regulation, 1962 framed under the Act, last mentioned. It was held thus:

11.We find that the Notification dated 8-1-1982 was not referred to before the High Court. Such notification makes it abundantly clear that the Act is applicable to the local bodies i.e. the Municipalities. Section 14 of the Act has given an overriding effect over any other inconsistent provision in any other enactment. The said provision reads as under:

"14.**Act to override other enactments, etc.-**The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

12. In view of Section 14 of the Act, **the provision in the State Act contemplating payment of gratuity will be inapplicable in respect of the employees of the local bodies.**
(Emphasis by Court)

22. The question would nevertheless arise whether a Cane Cooperative Society is an establishment within the meaning of Sub Section (3) of Section 1 of the Act to which the Act would apply. Though, no issue has been raised about this matter by the third respondent, but the applicability of the Act being a jurisdictional fact has nevertheless to be determined by this Court. The provisions of Section 1(3) of the Act reads thus:

1 - Short title, extent, application and commencement.

(1) x x

(2) x x

(3) It shall apply to-

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

1[(3A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.]

(4) x x

23. The question would be under which of the clauses (a), (b) or (c) of sub section (3) of Section 1 of the Act a Cooperative Society fall? Rightaway, clause (a) is not attracted. So far as clause (c) is concerned, it requires a notification to be issued by the Central Government, regarding any establishment or class of establishments, to be brought within the purview of the Act, employing 10 or more persons. There is no case of either party that any such notification relating to the Society or Cooperative Societies in general in Uttar Pradesh or Cane Cooperative Societies, in particular, as a class has been issued by the Central Government, notifying any of these to be establishments, to which the Act would apply. This spares clause (b) of sub Section (3) last mentioned, that may be explored to find out whether the Society would fall within the definition of an establishment under any law for the time being in force, in relation to establishments in the State, where 10 or more persons are employed. Again, though the precise numbers of persons employed has not been given out, it is not disputed by the Society, either before this Court or elsewhere, that the number of persons employed would far exceed ten. The question is whether a Cooperative Society which is not a shop, would still fall under the residual clause of establishment, within the meaning of any law for the time being in force, in relation to it in the State. Certainly, the law in relation to the Society, to make it qualify for an establishment as aforesaid is the Act of 1965, under which the Society is registered, regulated and functions. The Society performs basically commercial functions. Therefore, there would be no difficulty in considering it to be an establishment, within the meaning of Section 1(3)(b) of the Act.

24. The question as to what an establishment would mean within the

contemplation of Section 1(3)(b) of the Act, fell for consideration of their Lordships of the Supreme Court in **State of Punjab vs. Labour Court, Jalandhar (1980) 1 SCC 4.** In the aforesaid decision of their Lordships, the true scope of the establishment occurring in clause (b) of sub section (3) of Section 1 was delineated thus:-

3. .....According to the parties, it is clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the Payment of Wages Act, Section 2(ii)(g) of which defines an "industrial establishment" to mean any "establishment in which any work relating to the construction development or maintenance of buildings, roads, bridges or canals, relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on". It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by Section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a Central enactment and Section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State". There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. **But, it is contended, the law referred to under Section 1(3)(b) must be a law which relates to both shops and establishments, such as the Punjab Shops and Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in Section 1(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial.** The Punjab Shops and Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), **to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include**

an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it.
(Emphasis by Court)

25. The decision aforesaid makes it clear that the expression 'establishment' is not just confined to shops and commercial establishments or industrial establishments. It is wide enough to take within its fold any other establishment also, provided it is an establishment within the meaning of any law for the time being in force in the State. The Act of 1965 is certainly such a law and the Society is in the opinion of the Court, definitely an 'establishment', to which the Act would apply.

26. It also has to be seen if the petitioner is an employee within the meaning of Section 2(e) of the Act. Section 2(e) of the Act reads thus:-

> 2. Definitions.- (a) x x
> (b) x x
> (c) x x
> (d) x x
> (e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, **but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;.]**
> (Emphasis by Court)

27. The petitioner is not a person who holds a post under the Central or State Government and is governed by any other Act or by any rules providing for payment of gratuity. He may be governed by an Act and rules providing for payment of gratuity but is not a person who holds a post under the Central Government or a State Government. He is an employee of a Cooperative Society that cannot be even remotely construed to fall within the exclusionary category, as regards persons holding a post under the Central Government or a State Government. Thus, also the Act would be attracted in the petitioner's case.

28. In this context, reference may be made to the decision of the Supreme Court in **Sr. Superintendent of Post Offices vs. Gursewak Singh and others, 2019 SCC OnLine SC 399,** where the event went against the employee invoking the provisions of the Act on a different point, but the Act was held applicable to the Postal Department of the Government that was considered to an establishment, falling within that meaning, under Section 1(3)(b) of the Act. In this connection, paragraph 9.1 of the report may profitably be quoted:-

9.1. Section 1(3)(b) of the 1972 Act applies to every "establishment' within the meaning of "any law" for the time being in force.

This Court inState of Punjabv.Labour Court Jalandhar4has held that there is no reason for limiting the meaning of the expression "law' in Section 1(3)(b) of the 1972 Act.

The Postal Department is as an establishment under Section 2(k) of the Indian Post Office Act, 1898 which reads as under:

"2. Definitions.-

(k) the expression "Post Office" means the department, established for the purposes of carrying the provisions of this Act into effect and presided over by the Director General."
(emphasis supplied)

The Indian Post Office Act, 1898 would fall under the expression "law' in Section 1(3)(b). Consequently, the Post & Telegraphs Department would be an establishment under the 1972 Act.

29. The answer to question (a), therefore, is that seasonal employees of a Cane Cooperative Societies in U.P. would be governed by the provisions of the Act, to the exclusion of the Act of 1965 read with the Service Regulations of 1975.

30. The second question may now be considered. It is whether a seasonal clerk employed by a Cane Cooperative Society, who works for 240 days in a year, is entitled to gratuity @ of 15 days wages or to 7 days wages for each season, under the second proviso to section 4(2) of the Act. Section 4(2) of the Act that would be wholesomely relevant to the context, is quoted in extenso:-

4 - **Payment of gratuity.-** (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

(a) on his super annuating, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

1[Provided further that in the case of death of the employee, gratuity payable to hi m shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]

Explanation.-For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by hi m for a period of three months immediately preceding the termination of his employment, and, for

this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee **who is employed in a seasonal establishment** and **who is not so employed throughout the year,** the employer shall pay the gratuity at the rate of seven days' wages for each season.
(Emphasis by Court)

31. A reading of the second proviso to Section 4 (2) of the Act shows that an employee is not to be scaled down in his entitlement to receive gratuity, merely because his designation is seasonal, or he is retained as a seasonal employee. The rule engrafted in sub section (2) of Section 4 is reckoning of gratuity @ 15 days wages, based on the rate of wages last drawn by the employee, for every completed year of service, or part thereof in excess of six months. That is almost the precise language of the statute. This is the general rule by which the entitlement to gratuity of every employee, governed by the Act is to be calculated. The two provisos to sub section (2) carve out exceptions to this rule; one in case of peace rated employees, and the other, in case of an employee retained in a seasonal establishment. A proviso is always an exception to the rule, and it is a principle well known to law that one who pleads an exception in the determination of a right or liability, bears the burden to prove it. Thus, in the case of an employer who claims that his employee is engaged in a seasonal establishment, has to prove that fact. In addition, he has to prove that despite being employed in a seasonal establishment, he is not so employed throughout the year. In case, the employer successively proves both these facts, the superannuating or resigning employee would have his gratuity determined @ of 7 days wages for each season that he has worked.

32. The submission of Sri Chandan Sharma in this regard is to the effect that gratuity in the case of an employee who is employed in the seasonal establishment, and who is not so employed throughout the year, has to be worked out @ of 7 days wages for each season. He has urged that in paragraph 3 of the writ petition the petitioner has admitted that he has been a seasonal employee throughout, and, as such, gratuity payable to him is to be calculated as per the second proviso to Section 4(2) of the Act. Dwelling upon the meaning of the word 'season' that occurs in the context of the second proviso to Section 4(2), Shri Chandan Sharma submits that 'season' pre-supposes that the employee has not been employed in annual or regularly durated work, throughout the year, and, that the establishment was not functional throughout the course of the year. He submits that if it were so, the employment would not be seasonal. In order to define what seasonal employment would mean, Shri Chandan Sharma has placed reliance on the decision of the Supreme Court in **Aspinwall & Co., Kulshekar, Mangalore vs. Lalitha Padugady and Ors., (1995) 5 SCC 642**. He has drawn the attention of the Court to paragraph 7 of the report, where his submissions on the point above recorded, almost seems to paraphrase the principles laid down by their Lordships regarding what 'season' would mean in the context of the second proviso to sub section (2) of Section 4, and how seasons have to be reckoned, during each completed year of service. In **Aspinwall & Co., Kulshekar, Mangalore** *(supra)* it has been held thus:-

8.Explanation II to Section 2(c) plainly provides that an employee of a seasonal establishment shall be deemed to be in continuous service, if he has actually worked for not less than seventy-five per cent of the number of days on which the establishment was in operation during the year. Now what is that year. It obviously is the completed year of service of an employee, meaning thereby continuous service for one year. The provisions of Section 4 clearly reveal that before an employee can claim gratuity, he must have rendered continuous service for not less than five years. Further, for every completed year of service or part thereof in excess of six months, the employer is required to pay him gratuity at the rate of fifteen days' wages based on the rate of last drawn wages by the employee concerned. The first proviso relates to the right conferred under sub-section (2) to employees other than those employed in a seasonal establishment. The second proviso being so related prominently says that in case of an employee employed in a seasonal establishment, the employer shall pay gratuity at the rate of seven days' wages for each season. Now the word "season' herein presupposes that the employee has not been employed in annual or regularly durated work during the days in which the establishment was in operation during the year. Were it to be so, then the employment would not be seasonal. Here the unit of reckoning is by means of the afore-understood continuous service of one year containing a season or seasons. And being seasonal, the span of the period of such season can by the very nature of things be short or large for various reasons but referable yet to continuous service within the meaning of Section 2(c). Tying all these ends together, the conclusion is thus inescapable that when gratuity at the rate of seven days' wages for each season requires to be worked out, then one has to see the number of seasons in each completed year of service of the workman i.e. his continuous year of service not regulated by the calendar year. The second proviso would have to be read in a purposive way i.e. in the nature of an explanation tied and woven in Section 4. In working for each season thus the employee becomes entitled to gratuity at the rate of seven days' wages per season. Instantly no dispute had individually been raised in such manner with regard to identification of seasons on the basis of the count of the number of working days in each completed year of service pertaining to each workman.

33. Sri Chandan Sharma has further placed reliance on a decision of this Court in **Maliana Co-operative Cane Development Union Ltd. vs. Tej Ram Sharma and Ors. 2009 (123) FLR 393,** where the main issue appears to be whether the provisions of the Act apply to a Cooperative Cane Development Union. However, with regard to seasonal employees in the said decision, it has been held thus:-

5. Under the definition of employee given under Section 2(e) of the Act even workers of seasonal establishments are employees. Same is the position under Section 20A defining continuous service. The only difference is that by virtue of Section 4(2) second proviso, such employees are entitled to get gratuity at the rate of 7 days wages for each season (as against 15 days wages per year for other employees) and this is what has been done by the authorities below. The said proviso is quoted below:

provided further that in the case of an employee who is employed in a

seasonal establishment and is not so employed throughout the year the employer shall pay the gratuity at the rate of 7 days wages for each season.

In this regard reference may be made to Mangalore v. Lalitha Padugady MANU/SC/2011/1995 : AIR 1996 SC 580.

34. Sri Dinesh Rai, learned counsel for the respondent, however submits that by virtue of Section 2-A(2)(a)(ii) of the Act, 240 days of continuous work in a year would mean working throughout the year, within the meaning of the second proviso to Section 4(2). He submits that even if it is a seasonal establishment, an employee who works for 240 days in each year, would be entitled to wages not according to the second proviso to Section 4(2) but according to the main provision. He would thus be entitled to 15 days wages for each completed year of service calculated @ wages last drawn for all those years that he has worked throughout the year. He has drawn the attention of the Court to Annexure 1 to the writ petition that carries with it a chart of the total number of working days, in each year, put in by the petitioner from 1975, until his retirement in the year 2014.

35. Sri Chandan Sharma, on instructions received has stated that the duty chart annexed by the petitioner as Annexure 1 to the petition is accurate and correctly depicts the number of days of service, in each year, that he has put in with the Society. Those instructions received in writing by Sri Sharma from the Secretary of the Society are on record. A look at the chart to which Sri Dinesh Rai has drawn pointed attention of the Court, shows that except for the years 1975, 1976, 1987, 2000, 2002, 2005, 2009 and 2014, in all other years, the petitioner has put in 240 days of service; in many a year he has put in more than 300 days of service. But, decidedly, except for the years indicated, in every other year he has put in 240 days. In all the years that the petitioner has completed 240 days of service, it is Sri Rai's contention that he would be entitled to gratuity @15 days, under the provisions of Section 4(2) of the Act, which embodies the rule regarding entitlement to gratuity of a workman, and not under the exception carved out in the second proviso .

36. This Court has considered the matter. It is true that the second proviso engrafts a second exception to the Rule in Section 4(2) of the Act, about the rate at which gratuity is to be paid to an employee. Every employee is to be compensated in gratuity @ 15 days wages for every completed year of service or six months in excess of it. It is only in a case where an employee is employed in a seasonal establishment, and is not employed throughout the year, that the reduced rate of seven days wages of gratuity for each season would come into play. Here the petitioner has been designated as a seasonal employee, but it is not shown by any evidence by the Society that they are a seasonal establishment, or that though not a seasonal establishment, the petitioner is employed in a part of their establishment, that is seasonal. The burden to prove these facts so as to invoke the provisions of the second proviso to section 4(2) would certainly lie upon the Society and not the petitioner. The approach of the Society, as well as Authority below, appears to be that once the petitioner's designation is that of a seasonal clerk, the provisions of the second proviso to Section 4(2) of the

Act would automatically operate to reduce the petitioner's entitlement to gratuity, to seven days wages for each season. This does not appear to be the purport of the second proviso to Section 4(2) of the Act.

37. This Court is also of opinion that even if an employee is actually employed in a seasonal establishment but works throughout the year, he would be entitled to receive gratuity worked out under Section 4(2) of the Act, and not under the second proviso, at a reduced number of days season-wise. Since the phrase "being employed throughout the year" occurs in the second proviso to Section 4(2), it certainly has decisive importance in a case where an employee is claimed or proved to be in a seasonal establishment. It would be gainful to look to the definition of what a year would mean in the context of the Act. Section 2A(2)(a)(ii) which reads thus:-

Section 2A - Continuous service. - For the purposes of this Act,-

(1) an employee sh1all be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order2[***] treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2)wherean employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer-

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is' to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days, in the case of any employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) **two hundred and forty days, in any other case;**

(Emphasis by Court)

38. A reading of Section 2A(1) read with sub section 2A(2)(ii) together would show that even where an employee does not put in continuous service for the entire year within the meaning of sub section (1), but completes 240 days, working besides the excepted case under Section 2A(2)(ii), it would be recorded as a period of one year of continuous service. This definition read together with the terms of the second proviso to Section 4(2), would lead to the inevitable conclusion that if the Society were assumed to be a seasonal establishment, which they do not appear to be, for reasons to be shortly indicated, the number of working days put in by the petitioner is far more than 240 days, in 31 years of his service out of the total of 39 rendered. This clearly entitles the petitioner to be paid gratuity @ 15 days of wages last drawn, calculated by multiplying the same with the number of years that he has worked for more than

240 days. The said figure 31 years during which he completed more than 240 days of service, is admitted to the Society, in terms of the calculation chart appended as Annexure 1 to the petition. It may also be mentioned that the fact that the petitioners are not a seasonal establishment, has been raised before this Court through a document secured under the Right to Information Act, filed along with the supplementary affidavit, where the Cane Commissioner through his memo dated 23.05.2015 has certified generally that Cooperative Cane Societies are not seasonal establishments. The said fact brought through the supplementary affidavit, has not been disputed by the respondents by means of a counter affidavit, bringing on record any material to the contrary. But, since the said issue was not raised before the Authorities below, this Court does not wish to go into the same on account of the fact that under the law applicable, the Society have not discharged their burden that the petitioner was employed in a seasonal establishment, and admitting that he has worked, he has not worked throughout the year, so as to bring his case within the exception, envisaged under the second proviso to Section 4(2).

39. The question whether in a seasonal establishment where an employee works for more than 240 days a year he would be entitled to calculation of his gratuity @ 15 days in a year under the provisions of Section 4(2) of the Act was considered in **General Manager The Kisan Sahkari Chini Mills Ltd. vs. Appellate Authority/Deputy Labour Commissioner Payment of Gratuity and 2 others in Writ C No. 4031 of 2019**. In the aforesaid decision, this Court held thus:-

The fact that the respondent no. 3 had worked for 240 days in a year during the period from 01.03.1984 to 02.09.1996 has not been disputed by the petitioner establishment. Section 2-A(2)(ii) of the **Act contemplates a year to mean 240 days.**

Section 2-A(2)(ii) of the Act reads as under :

"2-A(2)(ii) - two hundred and forty days, in any other case;"

Therefore, in my opinion, the import of second proviso of sub-section (2) of Section 4 of the Act would be that if the employee has worked in an establishment, even if it is a seasonal establishment, for a year meaning thereby 240 days the proviso would not apply and the employee would be entitled to gratuity calculating the wages of 15 days in a year as per the provisions of sub-section (2) of Section 4 of the Act.
(Emphasis by Court)

40. A deeper analysis of the rights of a seasonal employee to be paid @ 15 days wages for every completed year of service was undertaken by the Kerala High Court in **M.P. Thressiamma vs. Appellate Authority under the Payment of Gratuity Act, ILR2007(1)Kerala658,** where it was held thus:-

7. The learned Counsel for the third respondent would submit that it is for the petitioners to prove that they have been working through out the year and therefore, they are entitled to full gratuity at the rate of 15 days' wages for every completed year of service. He would submit that they have not stated in their claim statement that they have been working so. I am not inclined to accept this contention. Under the Payment of Gratuity Act, pleadings have not much

importance, in so far as the Payment of Gratuity (Central) Rules, 1972 prescribed a form of application for gratuity as Form N. All what the petitioners have to do is to fill up that form and there arises no occasion for them to add anything to the same. Even otherwise, when the third respondent has all the evidence relating to the service particulars of the petitioners as the employer, they are is in a better position to prove the attendance particular of the petitioners than the petitioners. **Therefore, when it the 3rd respondent who has set up a case that theirs is a seasonal factory and the petitioners did not work through out the year, the burden of proof is on the third respondent to prove that theirs is a seasonal establishment/factory and the petitioners have actually worked only as non-seasonal workers as laid down in Uthaman's case (supra).** The third respondent has not even made any attempt to produce any proof in that regard, except to file a certificate to the effect that theirs is a seasonal factory. Going by the parts of evidence extracted in Ext.P1 order, the 1st petitioner had stated before the Controlling Authority that there would be 12 month's work in the company and that the company had never been closed for want of raw materials that the work in the factory is that of processing mango and pineapple fruits which are seasonal fruits and that during those seasons all of them would work and after the season it would become difficult to give work to all of them. At that time, work would be given to some of them. It is further stated that in respect of semi finished products for processing, the workers would be employed on rotation basis. As such, the evidence would indicate that the factory works throughout the year, but all the workers would not have work through out the year. Simply because some of the workers would be given work on rotation basis, that would not make the factory seasonal in character. The certificate produced by the 3rd respondent being of the year 1950, that cannot be relied on to decide the present day character of the factory in view of the sea change that has happened in all walks of life after 1950 over a period of 50 years. Even if it is assumed that it is a seasonal factory, it was for the third respondent to prove that the petitioners herein had in fact worked only during the season and not beyond the season, which would have been very easy for the third respondent because they possess all the records to prove the number of days the petitioners worked. Since the third respondent has not chosen to do so, I must draw an adverse inference against the third respondent especially since there, is nothing on record on conclusively to show that the petitioners had worked only during the season.
(Emphasis by Court)

41. The Society have not brought on record anything to show, either before this Court or before the Authorities below, that the petitioner has not worked throughout the year for 240 days in the specified years, claimed in accordance with the appended chart, which in any case they acknowledge to be true. If the petitioner has worked for more than 240 days during the specified number of years, assuming that the petitioner is employed in a seasonal establishment he is entitled to receive in gratuity for the relative years that he has put in more than 240 days, gratuity calculated in accordance with the Section 4(2) of the Act @ 15 days on the wages last drawn based on the last year where he has rendered continuous service of 240 days,

multiplied with the total number of years that he has worked for 240 days. The Society have not brought anything on record by way of evidence to show that they are indeed a seasonal establishment. To the contrary, the petitioner has brought on record a document dated 23rd May, 2015 issued by the District Cane Officer certifying that Cooperative Cane Societies are not seasonal establishments. The Controlling Authority would be free to go into that question, affording opportunity to the parties to lead evidence to establish whether the Societies are a seasonal establishment, or if not, they have a seasonal establishment wherein the petitioner is employed. This burden would primarily lie on the Society to be rebutted by the petitioner by relevant evidence. This inquiry regarding the Society being a seasonal establishment or the petitioner being employed in the seasonal establishment of the Society, not otherwise seasonal, would be limited for the purpose of determining the right to calculation of gratuity for those years during which the petitioner has not worked for 240 days continuously. Where he has worked for 240 days, the nature of the establishment being seasonal or otherwise would be of no consequence, and gratuity would be straightway calculated on the basis of 15 days for each such year.

42. Question (b) is, therefore answered in the manner that a seasonal clerk employed by a Cane Cooperative Society who works for more than 240 days in a year is entitled to gratuity @ 15 days wages, worked out on the wages last drawn during the last year that he has worked for 240 days, in accordance with Section 4(2) of the Act; and for all such years that a seasonal clerk has worked for more than 240 days in a year, even in a seasonal establishment, his gratuity cannot be worked out under the second proviso to Section 4(2) of the Act @ 7 days wages for each season.

43. Though, the petitioner has been held clearly entitled to receive in gratuity wages calculated @ 15 days wages last drawn during the years that he last worked for 240 days, multiplied by the total number of such years where he had worked for 240 days or more, and the figure of such years is admittedly 31 years, in accordance with the yearswise work chart enclosed with the petition which has been admitted to be true and correct by the Society before this Court, this Court does not find it fit to precisely liquidate the sum of money, to which the petitioner would be entitled in gratuity. This is so as there is an issue still to be determined by the Controlling Authority, about the petitioner's entitlement to gratuity, for the years that he has not worked continuously for 240 days.

45. In the result, the petition succeeds and is **allowed.** The impugned orders dated 30.07.2018 passed by the Appellate Authority, Payment of Wages Act, U.P., Saharanpur and the impugned order dated 15.05.2017 passed by the Controlling Authority, Payment of Wages Act, Saharanpur are hereby quashed. The Controlling Authority is directed to re-determine gratuity payable to the petitioner in accordance with the directions carried in this judgment and ensure recovery from the Society the difference between the sum of gratuity already paid to the petitioner, and that found due on a redetermination, in excess of it, in accordance with law; all to be done within a period of two months from the date of production of a certified copy of this order.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2019

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ – C No. 18798 of 2001

Ram Awadh Singh and Another ...Petitioners

Versus

The Addl. Commissioner Azamgarh and Others ...Respondents

Counsel for the Petitioners:
Sri Ram Niwas Singh, Sri Madan Ji Pandey, Sri V.K. Chadel

Counsel for the Respondents:
C.S.C., Sri Krishna Mohan Rai, Sri R.N. Singh

A. U.P.Z.A.&L.R. Act, 1950: -Whether the revenue courts under the provisions of the U.P. Zamindari Abolition and Land Reforms act, 1950 had the jurisdiction to recall a compromise decree recorded inter parties. (Para 1)

It would be open for a party to challenge the compromise by either filing a petition referable to the Proviso to Order XXIII Rule 3 or an appeal in light of the provisions of Order XLIII Rule 1A. (Para12)

Writ Petition allowed.

CHRONOLOGICAL LIST OF CASES CITED:

1:- (2012) 5 SCC 525, Horil Vs. Keshav

2:- (2014) 15 SCC 471, R. Rajanna Vs. Venkataswamy

3:- (2005) 6 SCC 300, Kishun Alias Ram Kishun (Dead) Through Lrs.Vs. Behari (Dead)

4:- (2006) 5 SCC 566, Pushpa Devi Bhagat v. Rajinder Singh

5:- (2006) 5 SCC 566, Pushpa Devi Bhagat v. Rajinder Singh

6:- (1993) 1 SCC 581, Banwari Lal v. Chando Devi (E-7)

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the parties.

2. The sole question which has been addressed on this petition is whether the respondents 1 and 2 acting as revenue courts under the provisions of the **U.P. Zamindari Abolition and Land Reforms Act, 19501** had the jurisdiction to recall a compromise decree recorded *inter partes*. The skeletal facts which merit notice are as follows.

3. The dispute relates to Khata No. 102 falling in Village Titlaukiya/Kishoreganj and Khata Nos. 65 and 78 falling in Village Mahendua, Tehsil Belthara Road in the District of Ballia. The petitioners filed suits referable to Section 229-B of the **1950 Act** claiming rights under Section 164 of that statute on the allegation that Maha Prasad, the defendant in that suit, had executed an agreement in their favour and on that basis they were inducted in possession. It is stated that during the pendency of that suit a compromise was entered into between the plaintiff petitioners and Maha Prasad and pursuant thereto, compromise terms were settled in writing and filed in the suit proceedings on 23 December 1987. The petitioners assert that the revenue court after verifying the compromise decreed the suits in terms thereof by a common judgment dated 3 May 1989. Six years after the aforesaid compromise decrees were passed, Maha Prasad filed restoration applications.

In those applications it was asserted that the compromise terms as framed and filed in Court were an act of fraud and that the plaintiff petitioners had taken advantage of the fact that he was an illiterate person. While these restoration applications were pending, Maha Prasad is stated to have died. According to the petitioners, no applications for substitution were filed and in view thereof, the restoration applications should have been dismissed as having abated. However, this issue need not be gone into in light of the principal legal question that has been raised and addressed. By a common judgment dated 6 December 1997, the Court of the Deputy Collector, the second respondent herein, allowed these applications and restored both the suits to their original numbers. Aggrieved by that decision the petitioners filed two revisions before the Commissioner Azamgarh Division which were ultimately transferred and placed for disposal before the first respondent here. These revisions have been dismissed by the order dated 31 March 2001 impugned herein. When the instant writ petition was entertained, a learned Judge of the Court granted stay of the impugned orders and further provided for stay of all proceedings taken pursuant to the judgments impugned herein.

4. Learned counsel for the petitioner has principally contended that once the compromise had been duly verified and the suits decreed in terms thereof, no application for restoration was maintainable. On a more fundamental plane, it was contended that the respondents 1 and 2 acting as revenue courts in any case did not have the jurisdiction or authority to either entertain the applications or to recall the compromise decree which came to be entered. Reliance in support of this submission was placed upon the decision rendered by the Supreme Court in **Horil Vs. Keshav2.**

5. Learned counsel for the respondent, on the other hand, submitted that the issue of whether the compromise had been lawfully entered into, made with the free consent of parties and not an outcome of fraud were questions and issues which necessarily had to be answered by the Court which had framed the decree itself. According to the learned counsel, in light of the bar placed by **Order XXIII Rule 3A, C.P.C**. since no suit could be maintained to set aside a decree on the ground that the compromise on which the decree was based was not lawful, the only remedy available to the respondents was to file the restoration applications. According to the learned counsel, the provisions as made in Section 151, C.P.C. sufficiently empowered the revenue courts to recall the compromise decree if it were established to have been made and obtained as an outcome of fraud. Learned counsel for the respondent has in support of his submissions placed reliance upon the decision of the Supreme Court rendered in **R. Rajanna Vs. Venkataswamy3.**

6. Before dealing with the rival submissions it would be apposite to briefly notice the statutory position as existing and laid in place by the Civil Procedure Code with respect to a challenge to compromise decrees. Section 96(3) provides that no appeal shall lie from a decree passed by the Court with the consent of parties. **Order XXIII Rule 3** deals with the subject of compromise of suits. The said provision is in the following terms:

"3. Compromise of suit.- Where it is proved to the satisfaction of

the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not "the subject-matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.]

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation.-An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]

Order XXIII Rule 3A reads thus: -

[3-A. Bar to suit.-No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

7. A careful reading of the provisions aforementioned establishes that where parties assert that a suit has been adjusted wholly or in part by virtue of a lawful agreement or compromise, the Court on being satisfied shall proceed to record the agreement, compromise or satisfaction and proceed to pass a decree in accordance therewith. The Court while recording its satisfaction with respect to the agreement or compromise stated to have been arrived at must also bear in mind that the terms of settlement are not void or voidable under the **Indian Contract Act, 1872.** This caveat stands placed in light of the Explanation appended to Rule 3. The Proviso to Rule 3 empowers the Court to decide the question of whether an adjustment or satisfaction has in fact been arrived at and reached. The Proviso comes into play where parties dispute an adjustment or satisfaction in fact having been reached. **Order XXIII Rule 3A** bars a suit to set aside a decree on the ground that the compromise on which it was based was not lawful.

8. **Order XLIII Rule 1(m)** as it stood prior to its deletion by the **Code of Civil Procedure (Amendment) Act, 19764** provided for an appeal against an order passed under **Order XXIII Rule 3** recording or refusing to record an agreement, compromise or satisfaction. The 1976 Amendment Act while spelling out the Objects and Reasons for the deletion of clause (m) noted that it was being omitted because an aggrieved party had the remedy of preferring an appeal against a decree where he could urge that the compromise ought not to or ought to have been recorded, as the case may be. The provision for an appeal against a compromise decree was introduced by the 1976 Amendment Act itself with the insertion of **Order XLIII Rule 1-A** which reads thus:

"1-A. Right to challenge non-appelable orders in appeal against decrees.-(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn

up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.]"

9. The statutory position which thus emerges is that firstly a bar operates against a separate suit being filed challenging a decree which came to be made on the basis of a compromise. This clearly appears to flow from the provisions made in **XXIII Rule 3A**. Although, Section 96(3) continues to exist in the statute book and bars a decree passed by a Court with the consent of parties being challenged by way of appeal, a specific provision for appeal against a decree passed either on compromise or refusing to record a compromise has now been made available in terms of the provisions made in **Order XLIII Rule 1A(2).** The provisions made in **Order XXIII Rule 3** and more particularly the Proviso appended thereto, empowers the Court itself to undertake an enquiry whether the compromise or settlement has in fact been arrived at. Even otherwise, the substantive provision made in **Order XXIII Rule 3** requires the Court concerned to satisfy itself whether a lawful agreement or compromise has in fact been arrived at.

10. Dealing with the issue of challenge to a compromise in suit proceedings, three learned Judge of the Supreme Court in **Kishun Alias Ram Kishun (Dead) Through Lrs. Vs. Behari (Dead) by Lrs.5** observed thus:

"That apart, we are of the view that the High Court was in error in holding that the appeal filed by Kishun against the decree of the trial court accepting a compromise which was disputed by him, was not maintainable. When on a dispute in that behalf being raised, an enquiry is made (now it has to be done in view of the proviso to Order XXIII Rule 3 of the Code added by Act 104 of 1976) and the suit is decreed on the basis of a compromise based on that enquiry, it could not be held to be a decree passed on consent within the meaning of Section 96(3) of the Code. Section 96(3) contemplates non-appellability of a decree passed by the court with the consent of parties. Obviously, when one of the parties sets up a compromise and the other disputes it and the court is forced to adjudicate on whether there was a compromise or not and to pass a decree, it could not be understood as a decree passed by the court with the consent of parties. As we have noticed earlier, no appeal is provided after 1.2.1977, against an order rejecting or accepting a compromise after an enquiry under the proviso to Order XXIII Rule 3, either by Section 104 or by Order XLIII Rule 1 of the Code. Only when the acceptance of the compromise receives the imprimatur of the court and it becomes a decree, or the court proceeds to pass a decree on merits rejecting the compromise set up, it becomes appealable, unless of course, the appeal is barred by Section 96(3) of the Code. We have already indicated that when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on

such a disputed compromise or on a rejection of the compromise set up."

11. As is evident from the recordal of facts in **Kishun**, the High Court had proceeded to dismiss the second appeal taking the view that it would not be maintainable in view of the bar placed by Section 96(3). The Supreme Court in **Kishun,** however, proceeded to hold that the bar placed by Section 96(3) would apply only in a case where the consent, settlement or agreement is not challenged by parties. Their Lordships held that where a dispute is raised with respect to the existence of the compromise itself and whether it was in fact lawfully entered into, the decree passed in terms of that alleged compromise cannot be understood to be one made with the consent of parties. The decision is an authority for the proposition that the bar placed by Section 96 (3) can have no application where the factum of a valid compromise having been arrived at is itself assailed. Although this decision does not specifically refer to the provisions made in **Order XLIII Rule 1A,** it essentially holds that the remedy of an appeal against a compromise decree would be available to an aggrieved party. In **R. Rajanna,** the decision which is relied upon by the learned counsel for the respondent, their Lordships framed the principal question to be whether the validity of a compromise decree could be challenged by way of a separate suit. Although, the High Court had found that such a right would exist, in **R. Rajanna** that view was overruled and the judgment of the High Court set aside. While doing so, the Supreme Court explained the legal position in the following terms:

"11. It is manifest from a plain reading of the above that in terms of the proviso to Order 23 Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order 23 Rule 3, the agreement or compromise shall not be deemed to be lawful within the meaning of the said Rule if the same is void or voidable under the Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order 23 Rule 3-A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone who can examine and determine that question. The court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order 23 Rule 3-A CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No. 5326 of 2005 to challenge the validity of the compromise decree, the court before whom the suit came up rejected the plaint under Order 7 Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order 23

Rule 3-A CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No. 5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher court.

12. The upshot of the above discussion is that the High Court fell in a palpable error in directing the plaintiff to take recourse to the remedy by way of a separate suit. The High Court in the process remained oblivious of the provisions of Order 23 Rules 3 and 3-A CPC as also orders passed by the City Civil Court rejecting the plaint in which the trial court had not only placed reliance upon Order 23 Rule 3-A but also the decision of the Court in *Pushpa Devi case* [*Pushpa Devi Bhagat v. Rajinder Singh*, (2006) 5 SCC 566] holding that a separate suit was not maintainable and that the only remedy available to the aggrieved party was to approach the Court which had passed the compromise decree. The following passage from the decision of*Pushpa Devi case [Pushpa Devi Bhagat v. Rajinder Singh,* (2006) 5 SCC 566] is, in this regard, apposite: (SCC p. 576, para 17)

"17. ... Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code."

We may also refer to the decision of this Court in *Banwari Lal v. Chando Devi [Banwari Lal v. Chando Devi,* (1993) 1 SCC 581] where also this Court had observed: (SCC p. 588, para 13)"

"13. ... As such a party challenging a compromise can file a petition under proviso to Order 23 Rule 3, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Order 43 Rule 1-A of the Code."

12. As is evident from the above extract of that decision, it was categorically held that while a separate suit would not be maintainable, it would be open for a party to challenge the compromise by either filing a petition referable to the Proviso to Order **XXIII Rule 3** or an appeal in light of the provisions of **Order XLIII Rule 1A.**

13. Having noticed the legal position as enunciated in the decisions aforenoted,

the Court then proceeds to consider whether the revenue courts in the facts of the present case were justified in entertaining the applications for restoration and whether they had the requisite jurisdiction and authority to do so. Insofar as the issue of jurisdiction is concerned, that question clearly stands answered against the respondents in light of the decision in **Horil**. Significantly, while the Supreme Court noticed the right of parties to challenge a compromise in accordance with the procedure laid in place in terms of the Proviso to **Order XXIII Rule 3 and Order XLIII Rule 1A,** it held that notwithstanding those provisions of the Civil Procedure Code applying to proceedings taken before a revenue court, these courts would not be competent to deal with these questions. Explaining the provisions of the Civil Procedure Code which stood attracted, the Supreme Court in **Horil** held:

"9. It is true that a compromise forming the basis of the decree can only be questioned before the same court that recorded the compromise and a fresh suit for setting aside a compromise decree is expressly barred under Order 23 Rule 3-A. It is equally true that the expression "not lawful" used in Order 23 Rule 3-A also covers a decree based on a fraudulent compromise hence, a challenge to a compromise decree on the ground that it was obtained by fraudulent means would also fall under the provisions of Order 23 Rule 3-A.

10. 10. In *Banwari Lal v. Chando Devi* [(1993) 1 SCC 581] this Court examined the provisions of Order 23 Rule 3-A in some detail and in the light of the amendments introduced in the Code and in para 7 of the judgment came to hold as follows: (SCC p. 585)

"7. By adding the proviso along with an Explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The Explanation made it clear that an agreement or a compromise which is void or voidable under the Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the Explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on the basis of a compromise saying:

''3-A.Bar to suit.-No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.'"

11. It was further held in *Banwari Lal* [(1993) 1 SCC 581] in paras 13 and 14 as follows: (SCC pp. 588-89)

"13. When the amending Act introduced a proviso along with an Explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, "the court shall decide the question', the court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the

Explanation to the proviso says that an agreement or compromise "which is void or voidable under the Contract Act ...' shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the Explanation, a court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code.

14. ... The court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the Explanation to the proviso to Rule 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the court could have recorded such agreement or compromise on 27-2-1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of Rule 3, there was no option left except to recall that order."

14. However the matter did not rest there since the Supreme Court proceeded to consider the question whether the power to assail and question a compromise decree as recognised to exist in civil courts, could also be exercised by revenue courts. Answering this issue, the Supreme Court held thus: -

12.In the light of the decision in*Banwari Lal*[(1993) 1 SCC 581] it would prima facie appear that the High Court was right in holding that the appellant's suit was hit by the provisions of Order 23 Rule 3-A and was not maintainable. But the significant distinguishing feature in this case is that the compromise decree which is alleged to be fraudulent and which is sought to be declared as nullity was passed not by a civil court but by a Revenue Court in a suit under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter "the Act").

13.Section 331 of the Act bars the jurisdiction of the civil court and provides that a suit under the Act can be entertained by no court other than that the courts specified in Schedule II to the Act. A reference to Schedule II would show that the court of original jurisdiction for a suit under Section 176 of the Act for division of a holding of a bhumidhar is the Assistant Collector, First Class and the courts of first appeal and second appeal are the Commissioner and the Board of Revenue respectively. Section 341 of the Act, of course, provides that unless otherwise expressly provided by or under the Act, the provisions of the Court Fees Act, 1870; the Code of Civil Procedure, 1908 and the Limitation Act, 1963, including Section 5 thereof would apply to the proceedings under the Act.

14.Though the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the Act but that would not make the authorities specified under Schedule II to the Act as "court" under the Code and those authorities shall continue to be "courts" of limited and restricted jurisdiction.

15.We are of the view that the Revenue Courts are neither equipped nor competent to effectively adjudicate on allegations of fraud that have overtones of criminality and the courts really skilled and experienced to try such issues are the courts constituted under the Code of Civil Procedure.

16.It is also well settled that under Section 9 of the Civil Procedure Code, the civil court has inherent jurisdiction to try all types of civil disputes unless its jurisdiction is barred expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority. We find nothing in Order 23 Rule 3-A to bar the institution of a suit before the civil court even in regard to decrees or orders passed in suits and/or proceedings under different statutes before a court, tribunal or authority of limited and restricted jurisdiction.

17.In our view in the facts of the case the provision of Order 23 shall not act as a bar against the suit filed by the appellant. We, accordingly set aside the order of the High Court. As a consequence, the suit will be restored before the Munsif who is directed to accord it priority having regard to the fact that for the last 31 years it is stuck up on the issue of maintainability. The trial court should try to dispose of the suit without any delay, and in any case, not later than one year from the date of receipt/production of a copy of this order.

15. **Horil** thus holds that in case a compromise decree has been made by a revenue court, an aggrieved party can maintain an independent suit before a regular civil court challenging that decree on the ground of fraud or other like grounds. While a reading of **Horil** to this extent may ostensibly appear to be discordant with the views expressed in **R. Rajanna and Kishun,** it is manifest that the remedy so evolved was principally guided and necessitated by the conclusion that revenue courts were neither equipped nor competent to effectively adjudicate upon allegations of fraud or to decide questions whether a compromise was in fact made the basis of a decree by way of misrepresentation or fraudulent action. In order to overcome such a situation where revenue courts were found to be ill equipped, the Supreme Court in **Horil** proceeded to recognize the right of an aggrieved party to challenge a compromise decree as rendered by such courts by way of a suit filed before the civil courts. In light of the above, it is manifest that the first and second respondents clearly lacked the jurisdiction and authority to try the restoration applications which sought to recall decrees made inter partes on the basis of a compromise. As a necessary corollary it must also be held that the said respondents could not have taken recourse or resorted to Section 151 of the Civil Procedure Code to entertain the applications as made by the respondents. In light of the aforesaid conclusions, this Court finds itself unable to sustain the orders impugned.

16. The writ petition is accordingly **allowed.** The impugned orders dated 6 December 1997 and 31 March 2001 shall consequently stand set aside.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ – C No. 24217 of 2019

M/s Kamal Kumar Shukla ...Petitioner
Versus
State of U.P. and Others ...Respondents

Counsel for the Petitioner:
Sri Suraj Singh, Sri Mukesh Prasad

Counsel for the Respondents:
C.S.C.

A. Rules 58 and 60 of the U.P. Mines Minerals (Concession) Rules, 1963:- No inspection of the spot and-no consideration of the application of the petitioner - no show-cause notice or opportunity of personal hearing-cancelling the lease of the petitioner-forfeiting the security amount and blacklisted the petitioner for a period of two years in exercise of power conferred under Rules 58 and 60 of the U.P. Mines Minerals (Concession) Rules, 1963.

The fundamental purpose behind the serving of show cause notice is to make the notice understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action. (Para-15)

B. Article 14, Constitution of India - speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts (Para-17)

Blacklisting has the affect of preventing a person from the privilege and advantage of name into relationship with the Government for purpose of aim. The fundamentals of fair play require that a person concerned should be given an opportunity to represent his case. There is a complete failure to follow due process,

Writ Petition allowed.

CHRONOLOGICAL LIST OF CASES CITED:

1:- (2014) 9 SCC 105 , Gorkha Security Services Vs. Government (NCT of Delhi) and others

2:- (1975) 1 SCC 70, Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal

3:- (1989) 1SCC 229, Raghunath Thakur Vs. State of Bihar

4:- (2012) 11 SCC 257, Patel Engg. Ltd. v. Union of India

5:- (1990) 3 SCC 752, M/s Mahabir Auto Stores &Ors. Vs. Indian Oil Corporation Ltd. (E-7)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Mukesh Prasad, learned Senior Advocate, assisted by Sri Suraj Singh, learned counsel for the petitioner and Smt. Archana Singh, learned Additional Chief Standing Counsel representing respondents-State.

2. The petitioner has preferred the present writ petition challenging the order passed by the District Magistrate Prayagraj dated 21.06.2019, copy of which is appended as Annexure 1 to the writ petition. A further prayer was also made to issue a mandamus directing the

respondents to adjust the security amount deposited by the petitioner and to refund the balance amount with interest after adjusting royalty on quantity of minerals excavated by the petitioner.

3. Facts in brief as contained in the writ petition are that as per New Government Policy-2017, a Government order for settlement of lease under Chapter-IV by e-tender/e-auction dated 14.8.2017 was issued and the Uttar Pradesh Miner Minerals (Concession) (43 amendment) Rules, 2017 (hereinafter referred to as "the Amended Rules, 2017") framed thereunder. Mining leases were to be granted as per the procedure prescribed under the statutory Rules and the Government Order dated 14.8.2017. In pursuance of the same, a notice dated 7.9.2017 was issued by the District Magistrate, Prayagraj for settlement of mining leases of sand and morrum under the Amended Rules, 2017 in the District Prayagraj for several mining blocks by e-tendering.

4. The petitioner after completing necessary formalities, submitted an application for the grant of mining lease for mining area in village-Garwa Nala (Khairagarh Quila) to Bhatauti, river Tons measuring five hectares for a quantity of 75,000/- cubic meters/year. In this regard, the petitioner has given a bid of Rs.212 per cubic meters against the reserve price of Rs.65/- which being the highest. The same was duly accepted by the District Magistrate, Prayagraj/respondent No.2 vide order dated 02.01.2018 and thereafter, a letter of intent dated 03.01.2018 was issued to the petitioner. After issuance of aforesaid letter of intent, he has deposited requisite amount namley security money and first installment of the annual lease amount. Subsequently, a lease deed was executed and registered in fvour of the petitoner on 19.02.2018 for a period of five years, i.e., from 19.02.2018 to 18.02.2023.

5. It is contended in paragraph 11 of the Writ Petition that after demarcation, when the petitioner entered in his mining area, he found most of the area submerged and only a small portion of the area about 1/4th was available for mining. In this regard, he also approached the senior mining officer Prayagraj and he informed the petitioner that after rainy season, the situation will improve and the entire mining area will be available for mining. Subsequently, the petitioner also deposited the second installment, i.e., Rs.39,75,000/- towards his lease amount on 27.06.2018.

6. In this regard, the petitioner also moved an application on 28.06.2018 before the Senior Mine Officer Prayagraj to get the spot inspection of the area allocated to the petitioner to verify that area of the petitioner is submerged and to cancel the lease deed and refund the amount deposited by him. It is further contended that after expiry of the rainy season, the petitioner went to his mining area to start mining operation but he found that the situation is the same and only about 25% of the mining area is available for mining. In this background, the petitioner again submitted an application dated 15.2.2019 addressed to the Senior Mines Officer, Prayagraj with a request to cancel the tender (lease of the petitioner), copy of the letter dated 15.02.2019 is appended as Annexure 6 to the writ petition.

7. It is further contended in paragraph 18 of the writ petition that surprisingly, instead of taking any action on the application of the petitioner and making the entire area available to the petitioner for carrying out mining

operation, the Senior Mines Officer, Prayagraj kept on issuing demand notices on 12.09.2018, 30.11.2018, 20.02.2019 and 26.04.2019 demanding installments of lease amount without addressing the issue of the petitioner regarding non-availability of the complete mining area allotted to the petitioner.

8. It is further contended that respondent No.2/District Magistrate, Prayagraj without inspecting the spot and without considering the application of the petitioner and giving any show-cause notice or opportunity of personal hearing, passed the impugned order dated 21.06.2019 cancelling the lease of the petitioner forfeiting the security amount and blacklisted the petitioner for a period of two years in exercise of power conferred under Rules 58 and 60 of the U.P. Mines Minerals (Concession) Rules, 1963.

8. It is contended by Sri Mukesh Prasad, learned Senior Counsel that the order impugned passed by the respondent No.2 is arbitrary, unjust, illegal and liable to be set aside by this Court due to following reasons :-

(i) No opportunity of personal hearing was given to the petitioner before passing the order impugned by which not only the lease of the petitioner was cancelled, security amount was forfeited but he has also been blacklisted for two years.

(ii) The show cause notice was issued to the petitioner by Senior Mines Officer but the order impugned has been passed by the District Magistrate.

(iii) Nothing has been stated in the show cause notice regarding blacklisting of the petitioner but in the impugned order, the petitioner was also blacklisted without giving any opportunity of hearing as such the order of blacklisting the petitioner is in complete violation of principles of natural justice.

9. On the other hand, it is contended by Smt.. Archana Singh, learned Additional Chief Standing Counsel, that since terms and conditions contained in the lease deed were violated by the petitioner, therefore, the action was rightly taken by the respondent No.2. It is further contended by her that the order impugned in the present writ petition is absolutely perfect and valid order does not warrant any interference specially under Article 226 of the Constitution of India.

10. Heard learned counsel for the parties and perused the record. With the consent of learned counsel for the parties, this writ petition is disposed of finally at the admission stage itself.

11. The petitioner has assailed the order dated 21.06.2019 passed by respondent No.2/District Magistrate by which reply submitted by the petitioner was rejected and an order was passed directing the petitioner to deposit a sum of Rs.1,66,95,000/- towards installments of lease amount apart from Rs.4,92,900/- T.C.S. and Rs.24,64,500/- as contribution to District Mineral Foundation Trust. It was further ordered that otherwise the same will be realized as per the provisions of the Land Revenue Act. Apart of the same, the petitioner was also blacklisted for a period of two years.

12. From perusal of the record it is clear that before passing the impugned order no opportunity of hearing was given

to the petitioner. It is also clear from perusal of the record that notices were issued by the Senior Mines Officer but the impugned order was passed by the respondent No.2, i.e. District Magistrate Prayagraj. Apart from the same, it is also clear that although nothing is contained in the show cause notice regarding factum of blacklisting of the petitioner but while passing the order impugned, the petitioner was also blacklisted for a period of two years.

13. The order impugned is in two parts:-

(i) recovery against the petitioner

(ii) blacklisting of the petitioner for two years.

14. Insofar as the first part is concerned, it is clear from the record that the notices were issued to the petitioner by the Senior Mines Officer, Prayagraj but the order was passed by District Magistrate Prayagraj, in this view of the matter, we are of the opinion that the order passed by the District Magistrate Prayagraj is in complete violation of principles of natural justice.

15. Insofar as the blacklisting of the petitioner is concerned, From perusal of the impugned order, we find that the respondents have proceeded on the basis of a show cause notice. Nothing has been stated in the show cause notice regarding blacklisting of the petitioner. Learned Standing Counsel has not been able to refute this fact on record. In our opinion, the issue which was not raised even in the show cause notice, therefore, could not be made the basis for blacklisting of the petitioner.

16. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action. In the case of ***Gorkha Security Services Vs. Government (NCT of Delhi) and others (2014) 9 SCC 105,*** the Supreme Court was pleased to hold that it is incumbent on the part of the department to state in show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to show cause against the same. Relevant paragraph namely paragraph 27 of the aforesaid judgement is quoted below:-

"27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can

be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter."

17. In the case of ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal (1975) 1 SCC 70,*** it was held by the Supreme Court that blacklisting has the affect of preventing a person from the privilege and advantage of name into relationship with the Government for purpose of aim. It was held by the Supreme Court in the aforesaid case that the fundamentals of fair play require that a person concerned should be given an opportunity to represent his case. Paragraphs 12 and 20 of the said judgment is quoted below :-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

18. Again in the case of ***Raghunath Thakur Vs. State of Bihar [(1989) 1 SCC 229]*** the aforesaid principles was reiterated in the following manner: (SCC p. 230, para 4).

"4. ..... But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the

matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law....."

20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]."

19. In the case of ***M/s Mahabir Auto Stores &Ors. Vs. Indian Oil Corporation Ltd. (1990) 3 SCC 752*** it was held by the Supreme Court that arbitrariness and discrimination in every matter is subject to judicial review. Paragraph 11 of the aforesaid judgement is quoted below :-

*"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in M/s Radha Krishna Agarwal &Ors. v. State of Bihar &Ors., [1977] 3 SCC 457.1t appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual par- ties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. M/s Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitu- tion in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether heating is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the(**1975) 1 SCC 70.** State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails*

to satisfy the test of reasonableness, the same would be unrea- sonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu &Anr., [1974] 4 SCC 3; Maneka Gandhi v. Union of India &Anr., [1976] 1 SCC 248; Ajay Hasia &Ors. v. Khalid Mujib Sehravardi &Ors., [1981] 1 SCC 722; R.D. Shetry v. InternationalAirport Authority of India &Ors., [1979] 3 SCC 1 and also Dwarkadas Marlaria and sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

20. Since in the facts of the present case, there is a complete failure to follow due process, we find ourselves unable to sustain the order dated 21.06 .2019 passed by the respondent No.2.

21. We accordingly allow the writ petition and quash the the order dated 21.06.2019. We further clarify that in case the respondents do choose to initiate fresh proceedings against the petitioner, we leave it open to them to do so subject to the observation that the proceedings if initiated shall be undertaken in accordance with law and the observations appearing herein above.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ-C No. 26661 of 2007 connected with Writ C No. 25993 of 2007

M/s Modi Rubber Ltd. ...Petitioner
Versus
State of U.P. And Others ...Respondents

Counsel for the Petitioner:
Sri Vijay Sinha, Sri Anurag Khanna, Sri Syed Fahim, Sri Syeed Fahim Ahmed, Sri V.B. Singh.

Counsel for the Respondents:
C.S.C., Sri C.K. Rai, Sri F. Rai, Ghazala Bano Quadri, Sri Rajendra Kumar Pandey, Sri Samir Sharma, Sri Swatashwa Agarwal, Sri Y.K. Sinha

A. Whether the Additional Labour Commissioner/Prescribed Authority under the Timely Payment of Wages Act, 1978 had exceeded in its jurisdiction in issuing the recovery certificates while exercising power under Section 3 of the said Act ?

B. Whether there was an illegal strike or valid closure of the factory and the denial on the part of the employer to pay wages to the workmen since 7.8.2001 was "default" on its part of the employer within the meaning of the Act, 1978 or there was a valid dispute with regard to entitlement of the workmen to wages which required adjudication by an industrial adjudicator ?

C. Whether the settlement dated 14.1.2002 was binding on all the workmen or the union ?

The enquiry conducted by the Labour Commissioner to record reasons while arriving

at the conclusion of default on the part of the employer was well within the limited exercise of jurisdiction conferred on him under Section 3 of the Act, 1978. It cannot be said that the Labour Commissioner had acted beyond its jurisdiction in making enquiry to reach at the conclusion of genuineness of denial on the part of the workmen. In absence of legal lockout or illegal strike, the orders of recovery cannot be said to be wrongful exercise of power on the part of the Labour Commissioner (Para80). The petitioner had not been able to establish before the Labour Commissioner that there was a genuine dispute pertaining to strike or validity of settlement, which required adjudication by an industrial adjudicator, there was no question of relegating the workmen to approach the industrial adjudicator (Para-94). Such a settlement would not be binding on those who are not signatories to the same (Para-96).

Writ Petitions dismissed.

CHRONOLOGICAL LIST OF CASES CITED:

1:- 1994 SCC (1) 159, Modi Industries Ltd. vs. State Of U.P

2:- 2006 (5) SCC 442, Hotel and Restaurant Karamchari Sangh vs. Gulmarg Hotel and others

3:- AIR 1970 SC 150,A.K.Kraipak &Ors. Vs. Union of India &Ors.

4:- 2013 (5) AWC 4745, Silk and Kapda Karmchari Union, Varanasi vs. Deputy Labour Commissioner, Varanasi and others

5:- AIR 2000 SC 469, National Engineering Industries Ltd. vs. State of Rajasthan andothers

6:- 2013 (5) ADJ 544,Hawkins Cookers Mazdoor Union vs. Conciliation Officer

7:- 2000 (84) FLR 162,National Engineering Industries Limited vs. State of Rajasthan and others

8:- J.T. 2005 (9) SC 413,ANZ Grindlays Bank Ltd. vs. Union of India

9:- 2002 LLR 433, Tata Consulting Engineers and Associates Staff Union Vs. Tata Consulting Engineers and Another

10:- 1998 (1) UPLBEC 391,Posysha Industries Company Limited vs.Collector (E-7)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Syed Fahim Ahmed learned counsel for the petitioner, Sri C.K. Rai for the respondent no. 8, Ms. Ghazala Bano Quadri for the respondent no. 9 and learned Standing Counsel on behalf of respondent nos. 1 to 7. No one appeared for the remaining respondent nos. 10 to 102 during the course of hearing.

2. Heard learned counsels for the parties at length and perused the record.

3. Two above noted writ petitions are directed against the recovery orders issued by the Additional Labour Commissioner, Ghaziabad/Prescribed Authority under the U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 (hereinafter referred to as "the Timely Payment of Wages Act" or "the Act, 1978"). Main contest is in writ petition filed by M/s Modi Rubber Ltd., the employer, as the connected writ petition is by the workmen who stood in support of the employer/management. The petitioner hereinafter, therefore, refers to the employer/management only.

4. The recovery orders are challenged on the ground that there was a dispute with regard to entitlement of the workmen to wages for different period mentioned therein. It is contended that on receipt of notice from the Presiding Officer, Timely Payment of Wages Act, 1978, a written statement was filed by the

employer/petitioner herein. It was submitted therein that the workmen had resorted to illegal strike in the factory w.e.f 7th August, 2001, which had resulted in stoppage of production. The act of illegal strike of the workmen was communicated to the Deputy Labour Commissioner, Meerut from time to time. With the efforts of management and few workers' representative, a settlement dated 14.1.2002 had been arrived, which was registered by the Assistant Labour Commissioner, Meerut vide registration certificate dated 30th January, 2002.

5. It was, inter alia, agreed in the settlement in Clause 7 that the management would strive to restart the production after arranging required funds and raw materials and other means w.e.f. 1st February, 2002 and the workers would not demand wages till when the production was not commenced or till the production was restarted. It was submitted that the fact of illegal strike and that the management had not been able to restart the production operations which continued to remain disrupted for the act of the workers was well within the knowledge of the Labour authorities. The settlement dated 14.1.2002 registered under Section 6-B of the U.P. Industrial Disputes Act readwith Rule 27 of the U.P. Industrial Disputes Rules, 1947 was binding upon the workmen having been signed by the office bearers of the then existing registered union. Another settlement had been arrived on 19.11.2003 and the workmen had admitted that they were not entitled to wages on the principle of "no work no pay" for the period of disruption of production in the factory.

6. It was further contended that the said dispute was beyond the purview of the Assistant Labour Commissioner who was manning the office of the Prescribed Authority, Timely Payment of Wages Act. The claim of the workers was required to be rejected outrightly.

7. Learned counsel for the petitioner placing the abovenoted averments in the written statement vehemently submits that enquiry under Section 3 of the Timely Payment of Wages Act, 1978 is limited in its scope. The power of the Prescribed Authority under the said Act extends only to find out whether the workmen had put in work for the period of demand of wages as per terms of their employment and they were entitled to wages for no default on their part or it has wrongly been withheld by the employer. The Prescribed Authority has no jurisdiction to act as an adjudicator if entitlement of the workmen to the wages is disputed. In the instant case, the liability of the employers to pay wages to the workmen was seriously disputed, it was, thus, incumbent on the Prescribed Authority to relegate the workmen to the labour court/industrial tribunal. The disposal of claim made under the provisions of Act, 1978 involved complicated questions of law and a decision on the binding effect of the settlement dated 14.1.2002 duly registered under Section 6-B of the U.P. Industrial Disputes Act, 1947 was required to be taken before issuance of the recovery certificates. The Prescribed Authority was also required to see the effect of the settlement dated 19.11.2003 signed between the workmen and management of the employer.

8. It is contended that out of total 1147 workmen on roll, 1103 workmen had individually signed the settlement. For the claim of remaining handful of workmen, the settlement with the majority workers was binding on them. The adjudication on the question of binding effect of settlement was beyond the

jurisdiction of the Prescribed Authority under the Timely Payment of Wages Act, 1978. In its limited jurisdiction, the claim of the workmen could not have been decided in a summary manner.

9. It was further contended that in view of the complete disruption of activities in Modipuram Plant since August, 2001, the company's network had been eroded. Hence the company had filed a reference with the Board for Industrial and Financial Reconstruction (in short "BIFR") on 4.2.2004 under Section 15(I) of Sick Industrial Companies (Special Provisions) Act, 1985. The reference had been registered as Case No. 153 of 2004. This fact was duly brought to the notice of the Prescribed Authority to assert that no recovery proceedings could not initiated against the company during the pendency of the reference before BIFR and hence the proceedings were required to be dropped.

10. It was contended that the workmen had not earned a single penny as the production activities in the factory of the employer had completely remained suspended since 7th August, 2001, subsequent to illegal strike by the workmen in the plant, their demand is, therefore, illegal.

11. As far as the bonus is concerned, it was contended that the workmen could not claim the minimum wages under the provision of Payment of Bonus Act, 1965 as their claim was not based on any existing right. There was, thus, no question of issuance of recovery for bonus for the period from 1st April, 2000 to 31st March, 2004.

12. It is further contended that during pendency of the present writ petition, another settlement dated 2nd September, 2007 was arrived whereunder remaining workmen had settled their dispute and pursuant thereto only handful of workmen (120 or 74) remained who are contesting their claim in the present writ petition.

13. It is, thus, vehemently contended that only the admitted wages can be recovered under Section 3 of the Timely Payment of Wages Act, 1978. The Assistant Labour Commissioner had no jurisdiction to adjudicate the issue.

14. Further, no inspection was done. The Labour authorities were well aware of the factum of strike resorted by the workmen and the intimations sent by the management were lying in their office. The record lying in the office of the labour authorities were required to be examined by the Prescribed Authority/Assistant Labour Commissioner before returning the finding that there was no illegal strike and that the production had commenced and the claimants were actually workmen of the company.

15. The submission is that the object of Timely Payment of Wages Act, 1978 is to maintain industrial peace and harmony. This Act is not only for the benefit of workmen. The denial of entitlement of workmen to wages by the employer took away the jurisdiction of the Assistant Labour Commissioner to adjudicate the issue. Even if, the claim of the workmen under Section 3 of the Timely Payment of Wages Act, 1978 was turned down, they were not remedyless as they would have remedy to approach the labour court/industrial tribunal. The binding effect of the settlement had been

completely ignored by the Assistant Labour Commissioner.

16. Lastly, it is contended that Timely Payment of Wages Act, 1978 has been framed for bigger establishment and it could not have been invoked in a small establishment like that of the petitioner. It does not provide remedy for payment of wages, evidence cannot be appreciated to decide the dispute. Enquiry under Section 3 is very limited being a summary enquiry in case of default in timely payment of wages in a case where wages is "admittedly due", the Prescribed Authority could not have issued recovery by conducting a trial to adjudicate on the disputed claim.

17. Sri C.K. Rai, learned Advocate for respondent no. 8 in rebuttal submits that the management had adopted unfair method and tactics to succumb the workmen to the wishes of the establishment. The act of management in stopping production had adversely affected the interest of the workmen. A false compromise against the interest of the workmen was fraudulently finalized on 3.8.2001 without any discussion with the workmen or their representation in the establishment. The settlement dated 14.1.2002 is an illegal settlement causing serious prejudice to the workmen who were total 1500 in number, without any discussion with their authorized representatives. The workmen and their representatives challenged the very said settlement dated 14.1.2002 by filing Writ Petition No. 7421 of 2002, wherein this Court in the judgment and order dated 20.3.2002 observed that the petitioners workmen therein who were not signatories to the settlement which had been registered under Section 6-B(3) of the U.P. Industrial Disputes Act, 1947, the terms of the settlement will not be binding upon them in accordance with Section 6-B(1) of the Industrial Disputes Act which provides that such a compromise is binding only on the parties to that compromise.

18. With the said observations, the petitioners therein were turned away to challenge the settlement entered into between the employer and other workmen who had no objection to the said compromise.

19. The submission is that in view of the aforesaid observations of this Court, it is not open for the petitioner to state that the settlement dated 14.1.2002 was binding on the workmen who had not signed and were agitating their claim of wages through respondent no. 8 namely the Secretary, Lal Hind Rubber Mazdoor Union, a registered union of M/s Modi Rubber Limited, Modipuram, Meerut.

20. It is contended that the recovery certificates issued by the Deputy Labour Commissioner in the month of April, 2002 could not be executed on account of the ex-parte interim order passed by this Court in a Writ Petition No. 36426 of 2002, wherein the employers in order to avoid the payment of wages to the workmen had set up the bank which had filed the said writ petition without impleading the workmen and their representatives. The impleadment application filed by the workmen was rejected on the ground that the workmen had remedy to approach the appropriate forum. Thereafter, several applications were filed by the workmen before the Prescribed Authority under the Timely Payment of Wages Act, 1978 and recovery certificates had been issued thereafter.

21. The aforesaid interim order was later on modified to the extent that the

same will not come in the way regarding payment of wages to the workmen. The respondent no. 8 filed an application on behalf of the workmen for releasing the wages found due towards the workmen. An amount of Rs. 55,50,000/- deposited before the Deputy Labour Commissioner was released by him and recovery certificates had been issued for the rest of the wages of the workmen who were on the roll of the establishment under the Timely Payment of Wages Act, 1978.

22. It is contended that the petitioners itself was responsible for the illegal closure of the factory/plant. The workmen or lack of electricity was not the ground of closure of the factory/plant. It was contended that even if a company is declared sick, the wages of its workmen could not be withheld and they are entitled to the wages regularly till employer-employee relationship exist. This is not the case of the employer that they had terminated the services of the agitating workmen or the employer-employee relationship had severed for any other reason.

23. The assertion that the workmen had resorted to illegal strike was made only to deny wages due to the workmen. The agitating workmen were demanding wages to which they were legally entitled to. The denial on the part of the employer was illegal as there was no illegal strike. The closure or illegal strike as set up by the employer in the written statement to deny wages to the workmen cannot be attributed to the workmen. The decision of the Prescribed Authority to grant wages to the workmen for the period of their entitlement, therefore, cannot be said to suffer from any error of law.

24. It is pertinent to note that respondent no. 10 namely Modi Rubber Shramik Sangh, Modi Puram, Meerut filed a counter affidavit which had been controverted by the petitioner in rejoinder with the assertion that the said Union had been derecognized by the Registrar, Trade Union, U.P., Kanpur by order dated 29.6.2007 by cancellation of its registration under Section 10 of the Trade Unions Act, if, therefore, has no locus to file counter affidavit.

25. In the said rejoinder affidavit, it is further contended that during pendency of the proceeding before this Court with the Corporation of the financial institutions, a new Management had come into existence which purchased the entire share holding of the financial institutions and Sri V.K. Modi became the Managing Director being the majority share holder in the company. The new management gave offer to all the workmen of Modi Rubber Ltd. who became jobless from August, 2001 due to halt of the manufacturing activities to regain their job as the factory was to resume its manufacturing activities under in the rehabilitation scheme. Accordingly, a registered settlement dated 2.9.2007 was drawn in the presence of the Deputy Labour Commissioner, Meerut who had signed the same alongwith representatives of the workers. The copy of the settlement has been appended as R.A.-'4' to the rejoinder affidavit dated 27.3.2008.

26. Under the said settlement the workmen had agreed that from 7.8.2001 till the date manufacturing activities remained suspended, they would not be paid wages and in lieu thereof, the Management had agreed to pay Rs. 1 lakh to each workmen as compensation. The above settlement had been implemented and first installment of Rs. 15,000/- had been paid individually to 1100 workmen.

27. Out of total 1269 workmen on the roll in August, 2001, 1100 workmen had signed the settlement after receipt of the first installment of Rs. 15,000/- each. The remaining 169 workmen either were not available or had left the unit to their native place or were not interest in the work at all. The management by letter dated 13.9.2007 as also the workers by writing letter dated 28.9.2007 had requested the Deputy Labour Commissioner, Meerut for withdrawal of recovery certificates in view of the aforesaid registered settlement. The Deputy Labour Commissioner, Meerut had, however, replied that the matter was still being proceeded.

28. A perusal of the reply of the Deputy Labour Commissioner dated 15.2.2008 indicates that he opined that the recovery with respect to the workmen who did not agree to the settlement had to be separated from those who had signed the settlement.

29. The contention of learned Advocate for the petitioner in rejoinder is that the workers cannot demand wages for the period for which the manufacturing activities were put to halt in preparation of rehabilitation scheme by BIFR. Only remedy before the workmen was to lay their claim before BIFR. The recovery orders had become redundant due to subsequent developments narrated in the rejoinder affidavit.

30. The workmen are bound by the settlement dated 14.1.2002 and another settlement dated 2.9.2007 which was arrived after the recovery orders were passed.

31. Learned counsel for the petitioner, thus, vehemently argued that the manufacturing activities of the unit was put to halt on account of illegal strike of the workers.

32. As noted above, the respondent nos. 11 to 102 were impleaded in the present writ petition on an impleadment application filed by them but no one appeared on their behalf to contest the matter.

33. A supplementary affidavit dated 28.5.2018 had been filed by the petitioner to bring on record the registered settlement dated 2.9.2007 arrived at with 1100 workmen with the details of name and address of the workmen who had signed the same. With reference to the list of 169 workmen who did not sign the settlement, it is contended that their numbers has been reduced to 74 as others had settled and accepted payments in terms of the aforesaid settlement, rest of 717 workmen had either resigned, retired or had died and had settled their full and final account with the company during the period from 2001 to 2008, their list is also appended with the supplementary affidavit. The photo copy of the registration certificate of the settlement dated 2.9.2007 has also been brought on record.

34. It is stated therein that two unions namely Modi Rubber Shramik Sangh and Modi Tyre Karamchari Union had been de-registered by the Registrar, Trade Unions, U.P., Kanpur in the year 2007 and 2000; respectively.

35. So far as respondent no. 8 namely Lal Hind Rubber Mazdoor Union is concerned, it is averred that the said union has no concern with the affairs of the company and has wrongly been arrayed as party. As the workers personally are not impleaded and none of

them came forward to show any interest to contest the writ petition, their claim cannot be considered.

36. Counter affidavit to the said supplementary affidavit had been filed on behalf of both respondent nos. 8 and 9.

37. In the supplementary counter affidavit of respondent no. 8, the registration certificate under the Trade Unions Act issued by the Registrar of Trade Unions, U.P., Kanpur has been appended to assert that the respondent no. 8 is a registered Trade Union and its certificate is still valid. It is contended that the petitioner/M/s Modi Rubber Ltd. with a new name M/s Modi Tyre Company Pvt. Ltd., Modipuram, Meerut had started production activity. The respondent no. 8 on behalf of 121 workmen had submitted an application on 9.9.2009 before the Deputy Labour Commissioner, Meerut Region, Meerut to direct the employer to give joining to the workmen without any condition and pay their balance wages in full. A letter was, accordingly, issued to the employer by the Deputy Labour Commissioner asking them to appear before him on 14.9.2009. The employer, however, did not appear before the Deputy Labour Commissioner.

38. In rejoinder to the supplementary counter affidavit filed on behalf of respondent no. 8, the assertions in paragraph '3' thereof that Lal Hind Rubber Mazdoor Union, Meerut is a registered union under the Trade Unions Act and its certificate is valid till date, is not denied. Only this much is submitted that respondent no. 8/Union is being managed by handful of workmen for litigating and raising unnecessary demands as the majority of workmen had settled their dispute with the employer. It is further contended that 94% of the workmen had joined their duties and started contributing in the production, rest who did not turn up were asked in writing by sending letters to come and join the duties, but to no avail. Other two Unions set by the employer had caused serious injury to the workmen and were de-registered accordingly, vide order dated 29.6.2007 and 25.1.2000.

39. In the counter affidavit filed on behalf of respondent no. 9, though it is contended that the management had filed fabricated documents with wrong details of employees but nothing could be said on the stand of the petitioner and respondent no. 8 that respondent no. 9 namely the Modi Tyre Karamchari Union had been de-registered by the Registrar, Trade Union in the year 2007.

40. Another supplementary counter affidavit has been filed on behalf of respondent no. 9 to assert that respondent no. 8 had no concern with the affairs of the workmen and is not functional. It is then contended that the deponent union itself have no concern with the present case as this matter relates to 93 employees only.

41. In view of the said stand of the respondent no. 9, other submissions of learned Advocate appearing on its behalf are not required to be considered.

42. As noted above, learned counsel for the petitioner had insisted on the fact that manufacturing activities of the Union was put to halt on account of illegal strike observed by the workmen w.e.f. 7.8.2001. On the said submission, time was granted to the counsel for the petitioner to bring on record the documents filed by the petitioner before the Prescribed Authority

in this proceeding under Section 3 of the Timely Payment of Wages Act, 1978 .

43. Pursuant thereto, a supplementary affidavit dated 26.2.2019 has been filed, few averments of which are relevant to be noted hereunder:-

Paragraph '6' of the said affidavit states that the tyre industry was passing through a very low phase and demand of tyres had declined from the company due to various competitors, who came up in the market example MRF, JK, Appollo etc. Only way for the petitioner company to survive was to reduce its expenses. The management, therefore, issued an office order dated 4.8.2001 proposing that the employees would get wages/monthly salary (including all allowances) linked to the production of truck tyres actually achived i.e. proportionate to the production. The said decision was put on the notice board of the Union on 7.8.2001 in the first shift (6.00 A.M. to 2.00 P.M.). Since thereafter, the workers had stopped working on the machines and came out and stopped production in the second shift. An appeal was made by the management on the notice board requesting workmen to start production. It is contended that another notice was pasted on 7.8.2001 on the notice board at about 11:45 P.M. The management sent letters to the Deputy Labour Commissioner intimating him about the illegal strike resorted by the workmen on 8.8.2001 and 9.8.2001. On 11.8.2001 and 13.8.2001 letters were written to the District Magistrate informing him about continuation of illegal strike. On 13.8.2001, a meeting was conducted with the workmen and 22 workmen were chosen to represent all the workmen to enter into a settlement with the management. The decision of the workmen to remain on strike was intimated to the Labour Commissioner, Kanpur on 14.8.2001. On 13.8.2001, a settlement was arrived between the company and the workmen which was modified on 15.8.2001. On 16.8.2001, a notice was put on the notice board informing workmen about settlement dated 15.8.2001 and requesting them to join duties. The workmen continued on strike and intimation was given to the district and Labour authorities. Various notices were given to the workmen to resume the work intimating them that if they continue on strike, disciplinary action will be taken against them coupled with deduction of wages on the principle of "no work no pay". With the efforts of BIFR and the promoters manufacturing operations in the unit at Modipuram had commenced on 13.6.2009. Second installment of Rs. 35,000/- under the settlement dated 2.9.2007 was paid to the workers in the year 2009 and third and final installment of Rs. 50,000/- was paid in August, 2001 to all those workers who had signed the aforesaid settlement.

44. The stand of respondent no. 8 in counter to the said affidavit is that the workers did not observe strike rather the employer had stopped production in the company w.e.f. 8.8.2001. The alleged notices dated 7.8.2001 are illegal act of employer in order to avoid its liability towards workmen. The documents appended with the supplementary affidavit dated 26.2.2019 with false facts had neither been filed nor pleaded in the proceedings before the Prescribed Authority under the Timely Payment of Wages Act, 1978 and as such cannot be considered.

45. Sri C.K. Rai, learned counsel, however, has put in appearance on behalf of respondent no. 7/Lal Hind Rubber Mazdoor Union, Delhi, Ms. Ghazala Bano Quadri is representing respondent no.

8/Modi Tyre Karamchari Union, Ghaziabad and Sri Syed Fahim Ahmed, learned Advocate has appeared for the respondent no. 9/Modi Rubber Ltd., in the connected petition.

46. In this factual background, the following questions arise for consideration:-

(i) whether the Additional Labour Commissioner/Prescribed Authority under the Timely Payment of Wages Act, 1978 had exceeded in its jurisdiction in issuing the recovery certificates while exercising power under Section 3 of the said Act.

(ii) whether there was an illegal strike or valid closure of the factory and the denial on the part of the employer to pay wages to the workmen since 7.8.2001 was "default" on its part of the employer within the meaning of the Act, 1978 or there was a valid dispute with regard to entitlement of the workmen to wages which required adjudication by an industrial adjudicator.

(iii) whether the settlement dated 14.1.2002 was binding on all the workmen or the union.

47. Answer to these questions take the Court to first examine the scope of the Timely Payment of Wages Act, 1978 itself.

48. As the title of the Act itself states, it has been enacted to secure industrial peace by ensuring timely payment of wages to the workmen. The preamble of the Act states that it is an Act to provide for "in the interests of maintenance of industrial peace, for timely payment of wages in bigger industrial establishments and for matters connected therein".

49. The statement of objects and reasons of the Act states that delay in payment of wages to workmen lead to simmering discontent among them. Sometimes a grave threat to law and order is also posed on this account. The provisions of the Payment of wages Act, 1936 have been found to be inadequate to ensure timely payment of wages. The incidence of disturbance of industrial peace being greater in comparatively bigger establishments, it was considered necessary to provide that if the wage bill in default exceeds Rs. 50,000/-, the amount should be recoverable as arrears of land revenue. Further, in order to curb the tendency of the employees to keep large amounts of wages in arrears, it was also necessary to make it a penal offence to be in default of a wage bill exceeding rupees one lakh.

50. Section 2(a) of the Act defines "Industrial establishment" to mean any factory, workshop or other establishment in which articles are produced, processed, adopted or manufactured with a view to their use, transport or sale.

51. "Wages bill" is defined by Section 2(d) of the Act to mean "the total amount of wages payable by an industrial establishment to its workmen".

52. Section 2(g) provides that "default" of payment of wages would be deemed when an occupier of an industrial establishment has not been paid wages within time as provided in Section 5 of the Payment of Wages Act, 1936.

53. A reading of the provisions of this Section clearly reveals that this Act has been enacted to supplement the Payment of Wages Act in the limited area viz whether the establishment as stated above; (i) produces,

processes, adopts or manufactures some article; (ii) whether there is default in the wage bill of the entire establishment; (iii) whether such wage bill exceeds Rs. 50,000/-; (iv) the time period as provided under Section 5 of the Payment of Wages Act has not been adhered to by the occupier of the such establishment.

54. The object of the Act as stated is to prevent industrial unrest and disturbance of industrial peace on account of the default on the part of the establishment in making payment of wages to their workforce as a whole.

55. On comparison of the provisions of Timely Payment of Wages Act, 1978 and Payment of Wages Act, 1936, it has been observed by the Apex Court in **Modi Industries Ltd. vs. State Of U.P1** that the former does not supplant or substitute the latter but supplements the said Act in the limited area as noted above. It was observed therein that the Timely Payment of Wages Act, 1978 was enacted as many establishments had a tendency to delay the payment of wages to their workmen and were playing with the lives of the workmen with impunity. This led to a widespread disturbance of industrial peace in the State. Hence the legislature felt the need for enacting a statute to ensure timely payment of wages to the workmen of industrial establishment by making summary enquiry by the Labour Commissioner contemplated under Section 3 of the Act, 1978.

56. As to the scope of enquiry made by the Labour Commissioner under Section 3 of the Timely Payment of Wages Act, 1978, Section 3(1) states that where the Labour Commissioner is satisfied that the occupier of an industrial establishment is in default of payment of wages and that the wage bill in respect of which such occupier is in default exceeds fifty thousand rupees, he may, without prejudice to the provisions of Sections 5 and 6, forward to the Collector, a certificate under his signature specifying the amount of wages due from the industrial establishment concerned.

57. Section 3(2) of the Act states that upon receipt of the said certificate, the Collector shall proceed to realise, the amount specified therein from the occupier as arrears of land revenue. Section 3(4) of the Act provides where the amount so realised falls short of the wages bill in respect of which the occupier has been in default, the Labour Commissioner may arrange for disbursement of such proportion or respective proportions of the wages due to various categories of workmen as he may think fit.

58. Section 4 of the Act specifies the power of Labour Commissioner for the purpose of ascertaining the wage bill of establishment in respect of which default has been committed. It states that the Labour Commissioner shall have the power of a Civil Court while trying a suit under the Court of Civil Procedure, 1908 in respect of enforcing the attendance of witness and examining them on oath compelling production of documents. Penalties for default of a wage bill exceeding rupees one lakh is provided under Section 5 of the Act. The Court therein has been given power to impose a sentence of imprisonment for a term of less than three months which may extend to three years and fine.

59. As has been held in **Modi Industries** (supra) looking to the object

and purpose of the Act, the nature of enquiry by the Labour Commissioner contemplated under Section 3 of the Act is very limited, the scope of which is to see whether the establishment has made a default in Timely Payment of Wages to all its workmen as a whole and there is no dispute as to the entitlement of the workmen to wages. In its limited power, the Labour Commissioner shall have to find out whether the workmen who have put in the work were paid their wages as per the terms of their employment and within time stipulated by such terms. If the Labour Commissioner is satisfied that the workmen though have worked and are, therefore, entitled to their wages, but are not paid the same within time, he has further to satisfy himself that the arrears of wages so due exceed to Rs. 50,000/-. It is only if he is satisfied on both counts that he can issue the certificate in question. It is held therein that under the Act, the Labour Commissioner acts to assist the workmen to recover their wages which are admittedly due to them but are withheld for no fault on their behalf. He does not act as an adjudicator if the entitlement of the workmen to the wages is disputed otherwise than on frivolous or prima facie untenable grounds. (emphasis supplied). When the liability to pay the wages is under dispute which involves investigation of the questions of fact and/or law, he has to refer the parties to the appropriate forum as it is not the function of the Labour Commissioner to adjudicate the same.

60. The power conferred on the Labour Commissioner under Section 3 of the Act is to prevent apprehended or present breach of industrial peace. This is why the enquiry contemplated is of a summary nature. Moreover, the exercise of power by the Labour Commissioner under the Act, 1978 does not prevent either party from approaching the regular forum for the redressal of its grievances.

61. In **Hotel and Restaurant Karamchari Sangh vs. Gulmarg Hotel and others2** the Apex Court has emphasized that the enquiry by the Labour Commissioner contemplated under Section 3 of the Act, 1978 is of a very limited nature to find out whether the workmen have not been paid wages for no default on their part.

62. Relevant paragraphs '7' and '8' of **Modi Industries** (supra) are quoted hereunder:-

7. It will thus be clear from the preamble, the statement of objects and reasons and the provisions of the Act that, firstly the Act has been placed on the statute book to ensure timely payment of wages by the bigger establishments, the incidence of disturbance of industrial peace being greater in such establishments on account of the default in payment of wages. Secondly, the Act deals with defaults in payment of the wage- bill of all the workmen in the establishment. It is not meant to provide a remedy for the default in payment of wages of individual workmen. That can be taken care of by the provisions of the Wages Act which provisions are found inadequate to ensure timely payment of wages of the whole complement of workmen in an establishment. Thirdly, it is not in respect of the default in payment of every wage-bill; but only if a wage-bill exceeds Rs.50,000/- the Labour Commissioner can be approached under the Act for redressal of the grievance. Fourthly, the Act is not applicable to all

establishments but only those establishments which produce, process, adopt or manufacture some articles. It will, therefore, be evident that the Act does not supplant or substitute the Wages Act but supplements the said Act, in the limited area, viz., where the establishment, as stated above, (i) produces, processes, adopts or manufactures some articles, (ii) where there is a default in the wage-bill of the entire such establishment and (iii) where such wage-bill exceeds Rs.50,000/-. The object of the Act as stated above is not so much to secure payment of wages to individual workmen but to prevent industrial unrest and disturbance of industrial peace on account of the default on the part of the establishment in making payment of wages to their workforce as a whole. It appears that many establishments had a tendency to delay the payment of wages to their workmen and were playing with the lives of the workmen with impunity. This naturally led to a widespread disturbance of industrial peace in the State. Hence the legislature felt the need for enacting the present statute. This being the case, the inquiry by the Labour Commissioner contemplated under Section 3 of the Act is of a very limited nature, viz., whether the establishment has made a default in timely payment of wages to its workmen as a whole when there is no dispute that the workmen are entitled to them.

8. The inquiry under Section 3 being thus limited in its scope, the Labour Commissioner's powers extend only to finding out whether the workmen who have put in the work were paid their wages as per the terms of their employment and within the time stipulated by such terms. If the Labour Commissioner is satisfied that the workmen, though they have worked and were entitled to their wages, had not been paid the same within time, he has further to satisfy himself that the arrears of wages so due exceed Rs.50,000/-. It is only if he is satisfied on both counts that he can issue the certificate in question. Under the Act, the Labour Commissioner acts to assist the workmen to recover their wages which are admittedly due to them but are withheld for no fault on their behalf. He does not act as an adjudicator if the entitlement of the workmen to the wages is disputed otherwise than on frivolous or prima facie untenable grounds.When the liability to pay the wages is under dispute which involves investigation of the questions of fact and/or law, it is not the function of the Labour Commissioner to adjudicate the same. In such cases, he has to refer the parties to the appropriate forum."

63. Having gone through the provisions of the Act and the legal position clarified by the Apex Court regarding the scope of enquiry, it is to be noted that the Labour Commissioner acting as a quasi judicial authority while exercising power under Section 3 of the Act, 1978, is required to give hearing to the occupier of the industrial establishment and consider the pleas raised by the occupier in defence to find out whether there is any default within the meaning of the Act. Further, the Labour Commissioner is required to give reasons while issuing the certificate of recovery on the facts of each case. It is, thus, clear that even in its limited scope of summary enquiry, the Labour Commissioner can examine whether the denial of wages to the workmen on the part of the employer is genuine and the dispute raised before him requires adjudication by an industrial

adjudicator. It is not so that even when the employer's denial is simply to get away from the rigors of the provisions by taking frivolous plea, the Labour Commissioner will wash his hands off and simply relegate the workmen to approach the industrial adjudicator.

64. The Labour Court is not a mere Recovery Officer. While Recovery Officer acts on a claim which is already crystallised in some order, the Labour Commissioner has to ascertained himself whether and to what extent, the workmen are entitled to the wages and then issue or refuse to issue the certificate. Only then the enquiry by the Labour Commissioner in its quasi-judicial power is complete.

65. It is observed in **Modi Industries Ltd** (supra) that Section 3 itself provides that on receipt of the claim or complaint of the workmen, the Labour Commissioner has to satisfy himself that the occupier of the industrial establishment concerned is in default of payment of wages and that the wage bill in respect of which the default is complained of exceeds Rs 50,000/-. He cannot satisfy himself without hearing the occupier of the industrial establishment on the claim made.

66. The extent of enquiry as is permitted under Section 4, however, is only for the purpose of ascertaining the wage bill in respect of which default has been committed.

67. It is, thus, clear that on receipt of complaint of the workmen, (i) the Labour Commissioner shall issue notice to the occupier to know whether there is a default on his part, (ii) he will then proceed to examine the plea/defence of the employer and deal with them giving reasons for accepting or not accepting them, (iii) in case, he is satisfied that the occupier is in default and the denial on its part is frivolous, he will proceed to make an enquiry into the extent of default for the purpose of ascertaining the wage bill in respect of which default has been committed, and (iv) the power of Labour Commissioner to enforce attendance of the witness, to examine them on oath or compelling production of documents can be invoked at the second stage.

68. The Labour Commissioner is not empowered to invoke Section 4 of the Act, 1978 to examine the plea of denial of default on the part of employer as an industrial adjudicator by enforcing attendance of witnesses or production of documents. He, however, is empowered to examine the plea of the employer on the face of it and give reason whether the said plea is frivolous or genuine. In case, it reaches at a conclusion for the reasoning recorded in the order itself that the dispute is genuine and the denial on the part of the employer is not frivolous, he shall relegate the parties to avail remedy before the industrial adjudicator.

69. The enquiry by the Labour Commissioner in its quasi judicial power to issue certificate of recovery would depend upon the facts of each case.

70. It is well settled by a series of decision beginning with **A.K. Kraipak &Ors. Vs. Union of India &Ors.3** that even administrative decisions must bear reasons for some of them had more wide consequences on the rights of the parties than even the judicial decision. It, therefore, cannot be said that the Labour Commissioner is not required to make any

enquiry to give reasons for his orders wherever employer raises a dispute regarding their liability to wages.

71. A Division Bench of this Court in **Silk and Kapda Karmchari Union, Varanasi vs. Deputy Labour Commissioner, Varanasi and others4** has held that looking to the nature of jurisdiction and power exercised by the Labour Commissioner under the 1978, Act, particularly Section 3 thereof, it is clear that it has been entrusted with inherent judicial power of the State to deal with the questions/disputes between the parties, to the extent indicated in the provisions of the said Act and that the Labour Commissioner has to act judiciously whenever this power is invoked.

72. It would not be out of place to note here that whether the certificate under the Act, 1978 is issued or not, the remedy available to the parties to approach the appropriate forum for the adjudication of their claim is not taken away. They can still approach the regular forum established for the resolution of the dispute.

73. In the instant case, applications seeking recovery of wages were moved by the then Union M/s Modi Tyre Karmchari Union and few individual workmen for the wages due for the period ranging from November, 2001 to March, 2004. The Act, 1978 has been defined as an emergency provision for exercise of power in a situation where all pre-conditions for invoking such jurisdiction exist. The Court is, therefore, required to look at first as to whether there was such emergent situation which had warranted invocation of the provisions of the statute by the Labour Commissioner.

74. The answer to this question lies in the facts of the case itself which can be culled out at the risk of repetition to the following pertinent points:-

(i) The employer put notice of the order dated 4.8.2007 on the notice board of the Union in the first shift on 7.8.2001, altering the wage conditions of the workmen unilaterally providing therein that monthly wages shall be linked to the production of truck tyres actually achieved.

(ii) Aggrieved by the alteration of conditions of their employment, agreed by the employer at the time of their engagement, all the workmen had stopped working in the second shift on 7.8.2001 opposing the condition of linking wages to actual production.

(iii) The factory was closed. Both employer and employees started making rival allegations on each other, shifting burden for closure of the factory.

75. Looking to this emergent situation, the argument of learned counsel for the petitioner that the workmen should have individually availed their remedy under the Payment of Wages Act and their applications could not have entertained by the Labour Commissioner under the Timely Payment of Wages Act, 1978, is not acceptable.

76. In view of the admitted incidence of disturbance of industrial peace in the establishment and non-payment of wages to all the workmen since 7.8.2001, the Labour Commissioner could not have closed its door to the workmen, relegating them to approach the competent authority under the Payment of Wages Act. The act of entertaining applications under the Timely Payment of

Wages Act, 1978 by the Labour Commissioner cannot be said to be wrong invocation of power.

77. The question is now about the validity of the order passed by the Labour Commissioner. The defence of the employer was that the production was put to halt w.e.f. 7th August, 2001 on account of illegal strike of the workmen in the plant and could not be re-started despite best efforts made by the employer for a long time. One more defence was taken by the employer that the settlement dated 14th January, 2002 had been entered between the management and the workers at large and was registered under Section 6-B of the U.P. Industrial Disputes Act, 1947. The said settlement having been signed by the representatives of the workmen accepting the condition that for the period of strike the workmen will not entitled for wages on the principle of "no work no pay" and that they will demand wages only from the date when production would restart, was binding on all other workmen and the order of recovery is, therefore, illegal.

78. As noted above, the trigger of the dispute was the notice put by the employer intimating their decision to alter wage conditions of the workmen unilaterally without any consultation with the representatives of the workmen or intervention of the Labour Authorities or Industrial adjudictor. The reason given for the said decision in the order dated 4th August, 2001 is that the company was facing huge losses due to shortage of working capital funds and unable to procure raw materials and other required inputs to manufacture at full capacity and the decision to alter wage conditions of the workmen was taken to reduce their expenses. When this notice was put on the notice board of the Union in the first shift on 7.8.2001, the workmen had came out to raise their demand against such oppression. The factory was closed. The plea of the employer that the workmen were resorting to illegal strike as such the employer was forced to stop production is, thus, not borne out from the record. There is nothing on record which would even indicate that the employer had taken steps to resolve the situation. The terms of settlement dated 14.1.2002 also indicate that there was persistent denial on the part of the employer to pay wages to the workmen for the period of closure of factory on the plea of "no work no pay". The workers were, thus, forced to forgo their claim before joining their duties.

79. It was not a case of valid "lay off" complying the conditions of the U.P. Industrial Disputes Act, 1947. No material had been brought before the Labour Commissioner to substantiate that the workmen had resorted to illegal strike. The unilateral act of the employer in denying wages to the workmen shifting the burden of closure of factory on them was illegal. As there was no "legal lockout" or "illegal strike", the principle of "no work no pay" would not be applicable.

80. The facts as borne out from the record are that the industrial peace was disturbed, the then Union of workmen approached the Labour Commissioner, the employer contested denying default on their part on the plea of illegal strike and having reached at the settlement dated 14.1.1992 with the representatives of the workmen. Crucial is the fact that the said settlement had been entered with a handful of workmen who had signed and settled

with the employer. Since this settlement was not entered in a conciliation proceeding and was registered under Section 6-B of the Act, 1947, it cannot be said to be binding on those who refused to sign the same. The stand of the employer that the said settlement was signed by the representatives of the then Union is found false from the reading of the settlement itself.

81. For these reasons, the Labour Commissioner had turned down the defence of the employer and concluded that they were in default.

82. For ready reference, the reasons assigned in some of the orders of recovery are extracted hereunder:-

उपरोक्त से स्पष्ट हुआ कि सेवायोजकों द्वारा अपने लिखित कथन में उठाई गई आपत्तियों के संबंध में कोई विधिक, मान्य प्रमाण/अभिलेख प्रस्तुत नहीं लिये गये हैं और मैं उनके द्वारा उठाई गई आपत्तियों में कोई बल नहीं पाता हूँ। श्रमिकगण दावा प्रार्थना पत्र मे अंकित माह अप्रैल 02 से अगस्त 02 तक के वेतन पाने के अधिकारी है। क्लेम की गई धनराशि के संबंध में सेवायोजक पक्ष द्वारा दिनांक 03.09.03 को सुनवाई के दौरान रू0 1,02,58,538/–(रूपया एक करोड़ दो लाख अट्ठावन हजार पांच सौ अडतीस मात्र) को उक्त अवधि के लिये संबंधित श्रमिको को देय धनराशि भुगतान योग्य स्वीकार की गई जिसे वादी/श्रमिक पक्ष द्वारा भी स्वीकार किया गया, जिससे मैं संतुष्ट हूँ। साथ ही साथ यह भी उल्लेखनीय है कि माह नवम्बर 01 से दिसम्बर 01 के वेतन एवं जनवरी 02 से मार्च 02 तक के वेतन के संबंध में श्रमिकों से पूर्व में प्राप्त प्रार्थना पत्रों पर आवश्यक सुनवाई के उपरान्त क्रमशः रू0 23.95 लाख एवं 88.90 लाख के वसूली प्रमाण पत्र पूर्व में ही निर्गत हो चुके है। अतएव कोई कारण नहीं है कि आगामी मासों के अवशेष वेतन के संबंध में वसूली प्रमाण पत्र निर्गत न किया जाये। सेवायोजकों द्वारा जो भी कथन प्रस्तुत किये गये हैं वे विधिक रूप से अनुरक्षणीय नहीं है।

छः मैंने इस संबंध में प्रस्तुत सभी तथ्यों पर गम्भीरतापूर्वक विचार किया। सेवायोजकों द्वारा मुख्यरूप से यह कहा गया है कि प्रतिष्ठान में आलोच्य अवधि में कोई उत्पादन कार्य नहीं हुआ है और फलस्वरूप श्रमिक आलोच्य अवधि के वेतन पाने के अधिकारी नहीं है। उनकी ओर से यह भी कहा गया है कि प्रतिष्ठान में 18.12.2001 के उपरान्त कोई उत्पादन कार्य नहीं हुआ है और श्रमिको के साथ एक समझौता 5, 6 व 10 जनवरी 2004 को सम्पन्न हुआ है जिसके अनुसार श्रमिकों ने स्वयं यह सहमति दी है कि उत्पादन तथा अन्य प्रक्रियाओं के नियमन की तिथि से कार्य पुनः प्रारम्भ होने की तिथि तक के अवशेष वेतन की मांग नहीं की जायेगी और इसके एवज में एकमुश्त रू0 पच्चीस हजार का भुगतान उत्पादन प्रारम्भ होने के उपरान्त श्रमिकों को किया जायेगा। समझौते में पूर्व से निर्गत वसूली प्रमाण पत्रों को वापस लिये जाने का भी उल्लेख है। परन्तु जो तथ्य मेरे समक्ष प्रस्तुत हुए हैं उनके अवलोकन से यह भी स्पष्ट है कि इस समझौते/सहमति के अनुसार न तो रू0 पच्चीस हजार प्रति श्रमिक को भुगतान हुआ है और न ही पूर्व से निर्गत वसूली प्रमाण पत्रों को श्रमिकों द्वारा वापस लिया गया है। वस्तुतः स्थिति यह है कि बिना अधिनियम के प्राविधानों का अनुसरण किये हुए उत्पादन प्रक्रिया को सेवायोजकों द्वारा बन्द कर दिया गया, न तो बन्दी की अनुमति ली गई है, न ही छुटनी की और न ही बैठकी की। अपनी सेवा शर्तो के अनुरूप श्रमिक अपने कार्य पर उपस्थित होते रहे है और सेवायोजकों द्वारा अपनी स्वेच्छा से उन्हें कार्य उपलब्ध नही कराया जा रहा है। अतः श्रमिक स्पष्टतः आलोच्य अवधि के वेतन पाने के अधिकारी नहीं है क्योंकि उल्लिखित स्थितियों में उनका वेतन स्पष्टतया देय है।

पक्षों द्वारा दाखिल किये गये लिखित कथन, आपत्तियों, उत्तर, प्रतिउत्तर एवं दिये गये विवरणों के अवलोकन के उपरान्त यह स्पष्ट है कि सेवायोजकों द्वारा माह नवम्बर 2001 में रूपया 1066438 की धनराशि वास्तविक रूप से भुगतान हेतु दर्शायी है। सेवायोजकों का यह कथन स्वीकार किये जाने योग्य है कि दिनांक 18.12.2001 से कारखाने में उत्पादन बन्द कर दिये जाने के कारण श्रमिक वेतन पाने के अधिकारी नहीं हैं क्योंकि सेवायोजकों द्वारा श्रमिकों से काम लेने अथवा न लेने का पूरा अधिकार है परन्तु यदि श्रमिक बिना किसी वैधानिक रोक के कार्य पर उपस्थित होता है तो वह वेतन पाने का अधिकारी होता है। अतः श्रमिकों के माह नवम्बर एवं दिसम्बर 2001 के अर्जित वेतन की धनराशि रूपया 2395296 होती है जिससे मैं सन्तुष्ट हूँ।

83. In the light of the aforesaid, in the opinion of the Court, the enquiry conducted by the Labour Commissioner to record reasons while arriving at the conclusion of default on the part of the employer was well within the limited exercise of jurisdiction conferred on him under Section 3 of the Act, 1978. It cannot be said that the Labour Commissioner had acted beyond its jurisdiction in making enquiry to reach at the conclusion of genuineness of denial on the part of the workmen. In absence of legal lockout or illegal strike, the orders of recovery cannot be said to be wrongful exercise of power on the part of the Labour Commissioner.

84. Learned counsel for the petitioner vehemently argued that another settlement was entered with the workmen in the year 2007 and majority of the workers had accepted the terms of the said settlement over the period of years and their dues had been settled. Only few are left and, therefore, they cannot be allowed to agitate their claim. In view of the said subsequent developments, the recovery certificates cannot be pressed against the employer, even for those workmen, who are still agitating their claim.

85. This submission is found misconceived.

86. The reason being that the settlement dated 2.9.2007, which was registered on 27.9.2007 under Section 6-B of the Act, 1947 was signed by only one worker, which is evident from the copy of the settlement appended with the rejoinder affidavit filed on behalf of the respondent nos. 11 to 102.

87. The copy appended with the rejoinder affidavit of the petitioners dated 27th March, 2008 is not the copy of the settlement rather it is a copy of registration of the same.

88. It appears that after the said settlement was signed on 2.9.2007, few other workers had also signed the same before presentation of it for registration. The settlement being entered with the individual workmen and registered under Section 6-B(1) of the Act, 1947, is not binding on those who refused to sign the same and as such has no bearing on the claim of the agitating workmen.

89. For the facts noted above, it is evident that the employer resorted to illegal and unfair means to deny wages to the workmen. The situation had turned so explosive that the State Government had to intervene by issuing notification dated 18.1.2002 for prohibiting strike/lockout in the factory for a period of 180 days. The employer filed a writ petition challenging the said notification with the plea that they had entered into a settlement with the workmen to resolve the situation. While staying the operation and enforcement of the notification dated 18.1.2002, the petitioner employer was directed to run the factory so that the employees who were in service may not suffer.

90. Despite this direction issued by this Court in the order dated 8.2.2002, admittedly, the factory remained closed. There is not even a whisper that the employer took steps to re-start the factory.

91. The contention of the employer that the factory could not be re-started due to non-availability of workers is absolutely false and contemptuous.

92. The proceedings before BIFR has no relevance to the claim of the workmen as they were entitled to wages

for the period of wrongful closure of the factory. The employer-employee relationship had not been severed, neither the workmen were retrenched nor terminated. The denial for entitlement of wages to the workmen by the employer is, thus, found a frivolous plea.

93. Reference to the judgment of the Apex Court in **National Engineering Industries Ltd. vs. State of Rajasthan and others5** is, therefore, misplaced. The ratio of paragraph '25' of the said judgment is not attracted in the facts of the present case, inasmuch as, here both the settlements dated 14.1.2002 and 2.9.2007 were entered with a handful of workers and not with the members of unions or majority of workers.

94. As the petitioner had not been able to establish before the Labour Commissioner that there was a genuine dispute pertaining to strike or validity of settlement, which required adjudication by an industrial adjudicator, there was no question of relegating the workmen to approach the industrial adjudicator.

95. Moreover, it was open for the Labour Commissioner to examine the reasons for denial and form his opinion with regard to the genuineness of dispute raised and denial of entitlement of the workmen made, by the employer.

96. At this stage, it would be relevant to note that in **Hawkins Cookers Mazdoor Union vs. Conciliation Officer6,** it has been held by this Court that the settlement arrived at outside the conciliation proceedings between the management and its workers who may not be members of the union does not curtail the collective bargaining power of the trade union and shall be binding only on those workers who were signatories to the same. The existence of the recognized union in the establishment would not take away the right of a workman or a group of workers enter into any settlement with the management. However, such a settlement would not be binding on those who are not signatories to the same.

97. This view is settled by a catena of decisions in **National Engineering Industries Limited vs. State of Rajasthan and others7**(supra), **ANZ Grindlays Bank Ltd. vs. Union of India8 and Tata Consulting Engineers and Associates Staff Union Vs. Tata Consulting Engineers and Another9.**

98. In **Posysha Industries Company Limited vs. Collector10,** it has been held by this Court that where no case has been made out of a valid lay off or lockout or retrenchment or closure, so long as relationship of master and servant between the company and its workmen continues, the employer is bound to pay wages to the workmen. Even if, the employer for some reason does not feel inclined to get actually the work done by the workmen. The employer cannot dispute its liability because of the sickness of the unit or pendency of the scheme for rehabilitation before BIFR. The proceeding for recovery of wages under the Timely Payment of Wages Act, 1978 cannot be interfered on the plea of sickness of the unit.

99. For the above discussion, it is held that the recovery certificates cannot be held illegal on the aforesaid pleas of the employer. The claim of the workmen in respect of wages was not a disputed claim. The relationship of master and servant continues till employee is retrenched or terminated. The workers who are not signatories to the two settlements dated 14.1.2002 and 2.9.2007 are entitled to pursue the recovery certificates issued in their favour,

subject matter of challenge in the present petition. However, those who had signed the aforesaid settlements and settled their dues with the employer have survived with no further claim.

100. In view of the above, no interference is warranted in the impugned orders of issuance of recovery passed by the Labour Commissioner under Section 3(1) of the U.P. Industrial Peace (Timely Payment of Wages) Act, 1978.

101. Both the writ petitions are, accordingly, **dismissed**. There will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2019

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

INCOME TAX APPEAL No.2 of 2011

Chandrabhan ...Appellant
Versus
Commissioner of Income Tax -I,Agra ...Respondent

Counsel for the Appellant:
Sri S.K. Garg, Sri Ashish Bansal.

Counsel for the Respondent:
C.S.C., / Income Tax, Sri Manu Ghildyal, Sri R.K.Upadhyaya. Sri S. Chopra.

A. Income Tax Act, 1961: Sections 132, 132A, 143(2), 158BC, 260A. Issuance of notice under Section 143(2) is mandatory for making assessment under Section 158 BC.

The returns of income had been filed after search. Income was held to be undisclosed income and was included in the assessment of undisclosed income for the block period. Appeal dismissed by CIT (A). Tribunal partly allowed the appeal but turned down the ground raised on issuance of notice u/s 143(2). Allowing the present appeal, the High Court. The issuance of notice under Section 143(2) is mandatory for making assessment under Section 158 BC of the Income Tax Act and non-service thereof is fatal (Para 11, 13).

Precedent followed: -

1.Assistant Commissioner of Income Tax and another Vs. Hotel Blue Moon(Para 7, 11, 12, 13)

2.Virendra Dev Dixit Vs. Assistant Commissioner of Income-Tax,(Para 8, 11) (E-4)

(Delivered by Hon'ble Rohit Ranjan Agarwal J.)

1. This appeal under Section 260-A of the Income Tax Act has been filed by the assessee challenging order dated 13.10.2005 passed by Income Tax Appellate Tribunal, Agra Bench, Agra (hereinafter called as 'Tribunal').

2. This appeal was admitted on 11.01.2011 on the following question of law:-

"(I) Whether on a true and correct interpretation of the provisions of section 143(2), the Tribunal was legally correct in holding that non-issuance/ non-service of notice thereunder, had no bearing on the validity of Block assessment order dated 28.04.2000 as had been passed by the Assessing Officer under Section 158BC read with section 143(3) of the Act?

(ii) Whether the "Tribunal" was legally correct in holding that the provisions related to service of notice under section 143(2) stood dispensed with, after the assessee was given an opportunity of being heard by issue of

notice under various other sections, from time to time, which the assessee had availed by his participation?"

3. Brief facts of the case are that assessee was intercepted by police and was found to be carrying silver jewellery in a Maruti van weighing 242.507 kg. As the assessee could not explain source of acquisition of silver ornaments, warrant of authorisation for requisition of the same was issued under Section 132 A of the Income Tax Act (hereinafter called as 'Act') on 29.04.1998 by Commissioner of Income Tax, Agra. Assessing Officer issued and served notice under Section 158BC on the assessee on 08.10.1998. Assessee filed return in Form 2B for the block period on 23.07.1999. During course of block assessment proceedings, assessee initially surrendered 54 kg of silver ornament for taxation, the same was revised to 75 kg and finally to 100 kg. Assessing Officer treated 102.54 kg of silver ornament as unexplained and the balance as explained. The value of unexplained silver jewellery ornaments was determined at Rs.4,33,907/-. The said amount was taxed in the assessment year 1999-2000.

4. Assessee had never filed return of income till action under Section 132 A was taken on 29.04.1998. Assessee, thereafter, filed return of income on 18.05.1998 for assessment year 1994-95 to 1997-98, while return for assessment year 1998-99 was filed on 31.10.1998. The assessee in all these return had disclosed income from business of silver ornament on labour basis. As the returns of income had been filed after the search, Assessing Officer, therefore, held that this income was undisclosed income of the assessee and included the same in assessment of undisclosed income for the block period. Aggrieved by assessment order, the assessee filed appeal which was partly allowed by Commissioner Income Tax (Appeals)- II, Agra on 11.12.2001. The assessee challenged order of the CIT (A) before Tribunal, which was partly allowed on 13.10.2005 and the ground raised by assessee that the Assessing Officer not having issued any notice under Section 143(2) of the Act in block assessment which was mandatory, was turned down, and thus, the present appeal.

5. Before proceeding, it would be necessary to have a glance of provisions of Section 143(2) and Section 158BC of the Act.

*"**143.** (1).....*

(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer or the prescribed income-tax authority, as the case may be, if, considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:

***Provided** that no notice under this sub-section shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]*

(3).....

***158BC**. Where any search has been conducted under section 132 or*

books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then,-

(a) the Assessing Officer shall-

(i) .....

(ii) .....

(b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143, [section 144 and section 145] shall, so far as may be, apply;

(c) .....

(d) ....."

6. Counsel for the assessee submitted that Tribunal had wrongly held that full opportunity was afforded to assessee to substantiate his claim, thus, the want of issue of notice under Section 143(2) of the Act on the part of Assessing Officer was only a procedural error to be cured by suitable directions, and no prejudice was caused to the assessee.

7. He further submitted that the notice under Section 143(2) of the Act was mandatory in block assessment proceedings held under Section 158BC of the Act and non-issuance of such notice goes to root of the case. He relied upon a decision of the Apex Court in ***Assistant Commissioner of Income-Tax and another vs. Hotel Blue Moon, [2010] 321 ITR 362 (SC)***. Relevant portion relied upon is extracted below:-

"We may now revert back to section 158BC(b) which is the material provision which requires our consideration. Section 158BC(b) provides for enquiry and assessment. The said provision reads "that the assessing officer shall proceed to determine the undisclosed income of the block period in the manner laid down in Section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143, section 144 and section 145 shall, so far as may be, apply." An analysis of this sub-section indicates that, after the return is filed, this clause enables the Assessing Officer to complete the assessment by following the procedure like issue of notice under Sections 143(2)/142 and complete the assessment under Section 143(3). This section does not provide for accepting the return as provided under Section 143(1)(a). The Assessing Officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under Sections 143(2)/142, the Assessing Officer is authorized to complete the assessment ex parte under Section 144. Clause (b) of Section 158BC by referring to Section 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with section 158BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under Section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with. The other important feature that requires to be noticed is that the Section 158BC(b) specifically refers to some of the provisions of the Act which requires to be followed by the

Assessing Officer while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This section even speaks of sub-sections which are to be followed by the Assessing Officer. Had the intention of the Legislature been to exclude the provisions of Chapter XIV of the Act, the Legislature would have or could have indicated that also. A reading of the provision would clearly indicate, in our opinion, if the Assessing Officer, if for any reason, repudiates the return filed by the assessee in response to notice under Section 158BC(a), the Assessing Officer must necessarily issue notice under Section 143(2) of the Act within the time prescribed in the proviso to Section 143(2) of the Act. Where the Legislature intended to exclude certain provisions from the ambit of section 158BC(b) it has done so specifically. Thus, when section 158BC(b) specifically refers to applicability of the proviso thereto it cannot be excluded. We may also notice here itself that the clarification given by Central Board of Direct Taxes in its circular No.717 dated August 14, 1995, has a binding effect on the Department, but not on the court. This circular clarifies the requirement of law in respect of service of notice under sub-section (2) of section 143 of the Act. Accordingly, we conclude that even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of section 158BC, the provisions of Section 142 and sub-sections (2) and (3) of section 143 are applicable and no assessment could be made without issuing notice under Section 143(2) of the Act."

8. He further relied upon a decision of Division Bench of this Court in case of ***Virendra Dev Dixit vs. Assistant Commissioner of Income-Tax (2010) 41 DTR (All.) 43.***

9. Per contra, counsel for the Revenue submitted that in proceedings under Section 158BC, there is no requirement of a notice to be issued under Section 143(2), as issuance of notice in block assessment under Section 158BC is separately prescribed. He also submitted that in case of search and seizure under Section 132 and in case of requisition of books of accounts under Section 132-A, the Assessing Officer is left with no discretion but to proceed with block assessment and procedure has been prescribed in Chapter XIV-B of the Act, while in ordinary assessment proceedings as envisaged under Chapter XIV of the Act, the notice under Section 143(2) is essential for production of material by the assessee.

10. We have heard Sri Ashish Bansal, learned counsel for the appellant-assessee and Sri Manu Ghildyal, learned counsel for the Revenue and perused the material on record.

11. The question under consideration is as to whether issuance of notice under Section 143(2) is mandatory for making assessment under Section 158BC. The issue involved is no more res-integra and is covered by the decision of Apex Court in case of ***Assistant Commissioner of Income-Tax and another vs. Hotel Blue Moon (***supra), which has been followed by Division Bench of this Court in case of Virendra Dev Dixit (supra).

12. Counsel for the Revenue very fairly conceded that the matter stands covered by the decision of Apex Court in case of ***Hotel Blue Moon*** (supra).

13. After having considered the case and perusal of record, we are of the view that the case of the assessee is covered by the decision of the Apex Court in case of ***Assistant Commissioner of Income-Tax***

and another vs. Hotel Blue Moon (supra), as Assessing Officer did not issue notice as contemplated under Section 143(2) of the Act in block assessment proceedings under Section 158BC, which was mandatory and non service thereof is fatal.

14. The order of the Tribunal dated 13.10.2005 as far as non-issuance of notice under Section 143(2) of the Act is set aside.

15. The appeal is ***allowed***. The question of law, therefore, is answered in favour of the assessee and against the Revenue.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2017

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No. 1964 OF 1983

Harish Chandra ...Appellant (In Jail)
Versus
State ...Respondent

Counsel for the Appellant:
Sri A.D. Giri, Sri Dharmendra Singhal, Sri Pankaj Kr. Tyagi, Sri Pankaj Singh, Sri R.S. Sengar.

Counsel for the Respondent:
D.G.A., Sri Vinai Singh.

A. Authenticity of the Delay Dying Declaration and suspicion (Dying Declaration under Section 32 (1) Indian Evidence Act.

In dying declaration was recorded by the doctor in dying declaration deceased indicate name of accused- appellant. But unfortunately another report typed out and sent to the police station by registered post (Para 27). The dying declaration was not recorded before the Magistrate, although the deceased had remained alive for about 10 days after being shot and there was ample time for doctor who claims to have recorded the dying declaration of the deceased to have called the Magistrate rather than recording the same himself without there being any evidence on record showing that the deceased's condition at the time of recording of her alleged dying declaration was so serious that there was no time to call the Magistrate for recording her dying declaration(Para 37). If the deceased had actually identified accused-appellant she would have certainly disclosed his name to informant. (Para 39)

Criminal Appeal allowed. (E-2)

(Delivered by Hon'ble Bala Krishna Narayana, J.
& Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Pankaj Tyagi, learned counsel for the appellant, Sri Anil Pathak, A.G.A. 1st, assisted by Sri J.K. Upadhyay and Km. Meena, learned A.G.As. appearing on behalf of the State.

2. This appeal has been preferred by the accused-appellant Harish Chandra against the judgment dated 20.08.1983 and order dated 22.08.1983 passed by Shri S.K. Srivastava-II Additional Sessions Judge, Muzaffarnagar in Sessions Trial No. 330 of 1982 (State Vs. Harish Chandra) arising out of Case Crime No. 40 of 1982 at Police Station Thana Bhawan, District Muzaffarnagar by which the appellant has been convicted and sentenced to imprisonment for life under Section 302 I.P.C.

3. The prosecution case as emerging out from the material on record is as follows :

(i) Written report Ext. Ka1 with regard to an incident which had taken place on 21.3.1982 at 6;30 A.M. in which one Smt. Kiran Devi had received gunshot injuries, which was scribed by one Veer Singh son of Chhotey Singh on the dictation of P. W. 1 Mahabir Singh son of Himanchal Singh was given at Police Station Thana Bhawan, District Muzaffarnagar on 21.3.1982 at about 6:30 A.M. was registered at Case Crime No. 40 of 1982, under Section 308 I.P.C., chek F.I.R. Ext. Ka7 and corresponding G.D. entry was recorded at serial number 10 Ext. Ka8, copy is on record.

4. After lodging the report, the informant came back to the P.H.C. Thana Bhawan where Dr. Akhtar Ali P. W. 4 examined the injuries of Smt. Kiran Devi at 7:00 A.M. Dr. Akhtar Ali found following injuries on the person of Smt. Kiran Devi.

Gun shot wound 3 x 2 cm on left side of back just lateral to vertebral column at the level of 3rd thoracic spine. The wound was side to side. The edges were inverted reddish. It was a inlet wound outlet not present. Pallets are inside. Blood around the wound was present. No blackening or tattooing present around the wound.

Gun shot wound 2 cm in diameter on right side of back just lateral to vertebral column 2 cm right to injury no. 1. Edges were inverted. No blackening was seen. Blood clot was present. Advised x-ray.

5. In the opinion of P. W. 4 Dr. Akhtar Ali, the injuries were serious in nature and caused by firearm from a distance of about 3 feet and were fresh at the time of the medical examination. P. W. 4 Dr. Akhtar Ali prepared injury report of Smt. Kiran Devi which is on record as Ext. Ka3.

6. P. W. 4 Dr. Akhtar Ali sent the injured Smt. Kiran Devi to the district hospital, Muzaffarnagar from where she was allegedly taken to Medical College Meerut (hereinafter referred to as the " Medical College") for necessary treatment where she reached on the same day and was admitted in the Medical College. P. W. 8 Dr. O. P. Nagpal who was on duty in the emergency ward at that time admitted Smt. Kiran Devi for treatment. On 22.3.1982 Smt. Kiran Devi was transferred from the emergency ward to the orthopedic department of the College where she was treated and an operation was also performed and she was kept there for further treatment.

7. On 23.3.1982 Dr. Nagpal was informed by the orthopedic department that the dying declaration of Smt. Kiran Devi was to be recorded. P.W. 8 Dr. O. P. Nagpal sent information to the police station for making necessary arrangements for recording the dying declaration of Smt. Kiran Devi. However, the police failed to make any arrangement and procure the service of a Magistrate for that purpose and therefore, P. W. 8 Dr. O.P. Nagpal himself recorded the dying declaration of Smt. Kiran Devi on 23.3.1982 at 10:30 A.M. The dying declaration recorded by him is Ext. Ka12 on record. In the dying declaration Smt. Kiran Devi named her brother-in-law (Bahnoi) Harish Chandra as her assailant. When the informant Mahabir Singh came to know that Smt. Kiran Devi had named her brother-in-law Harish Chandra as her assailant, he got another report Ext. Ka2 typed out and sent it to the Station Officer P. S. Thana Bhawan by registered post

and it appears that this second report reached P. S. Thana Bhawan on 24.3.1982 and was handed over by the S.O. P. S. Thana Bhawan to P. W. 7 S.I. Jai Pal Singh to whom the investigation of the case had been entrusted.

8. Smt. Kiran Devi was discharged from the Medical College on 27.3.1982 and was then brought by Mahabir Singh to her residence in Village Harar, district Fatehpur.

9. When the F.I.R. of this case was lodged at the Police Station Thana Bhawan on 21.03.1982 at about 6:35 A.M. S.I. Jai Pal Singh was present and the investigation of the case was handed over to him. He immediately went to P.H.C. Thana Bhawan where he recorded the statement of Mahabir Singh. It is stated that Mahabir Singh and Investigating Officer of the case went to the scene of occurrence and inspected the same. He collected bloodstained earth and kept it in a box and sealed it. He also collected plain earth from the vicinity of the scene of occurrence and kept it in another box and sealed it and prepared Fard Ext. Ka5. The said boxes were marked as material Exts. Ka1 and Ka2. After inspecting the scene of occurrence he prepared it's site plan Ext. Ka6. Thereafter he recorded the statement of Km. Anjana Rani and then came back to the police station. The injury report of Smt. Kiran Devi was prepared by P. W. 4 Dr. Akhtar Ali.

10. On 28.3.1982, Investigating Officer of the case went to the Medical College Meerut and contacted Sri Rajendra Nath In-Charge of the Orthopedic Department who informed him that Smt. Kiran Devi had been discharged a day earlier i.e. on 27.03.1982.

11. He did not do anything thereafter and on 31.03.1982 P. W. 9 Sri Babu Ram, the then S.O. P.S. Thana Bhawan took over the charge and started investigation himself. On the same day, he recorded the statement of Smt. Kiran Devi Ext. Ka23, informant Mahabir Singh and witnesses Richpal, Isam Pal Raj Pal, Krishna Pal, Satya Bhan Singh and Lala Jai Prakash.

12. He started searching accused-appellant Harish Chandra but he was untraceable. On 16.04.1982 he raided the house of accused-appellant Harish Chandra but he was not present there. The S.O. then got the case under Section 308 I.P.C. converted to one under Section 307 I.P.C. The Investigating Officer obtained proclamation and warrant under Sections 82 and 83 Cr.P.C. Ext. Ka21 and Ext. Ka22.

13. On 3.5.1982, Smt. Kiran Devi died at about 9:00 P.M. and it is alleged that she died on account of the injuries caused to her by accused-appellant Harish Chandra in the aforesaid occurrence. The informant Mahabir Singh then went to the police station Thana Bhawan at 9:45 P.M. and informed the police about the death of Smt. Kiran Devi. The case was then converted to one under Section 302 I.P.C. and necessary entry in the G. D. was made, carpon copy of which is on record as Ext. Ka10.

14. The I.O./S.I. Babu Ram along with Constable Munshi Ram and Home Guard Sohan Lal went to the house of the informant on the same night and after appointing Panchs, conducted inquest on the body of the deceased and prepared inquest report Ext. Ka14, Sketch of the dead body Ext. Ka15, Challan lash Ext. Ka18, letter addressed to C.M.O. Muzaffarnagar for postmortem examination Ext. Ka16 and letter to the R.I. Police Lines, Muzaffarnagar, Ext. Ka17. The dead body was then sealed and handed over

to Constable Banshi Ram and Home Guard Sohan Lal along with necessary papers.

15. Constable Banshi Ram and Home Guard Sohan Lal brought the dead body of Smt. Kiran Devi to Muzaffarnagar and handed it over to Dr. S.K. Sharma on 4.5.1982. Dr. S.K. Sharma performed the postmortem examination on the dead body of Smt. Kiran Devi on the same day at about 1:00 P.M. He found that the deceased was aged about 22 years and she had died about 3/4th day before the postmortem examination. Rigor Mortis was present over inferior extremities and was going from superior extremities. He found the following ante-mortem injuries on the dead body of Smt. Kiran Devi :

Suppurated wound 2" x 1" x bone over thoracic spine upper part more towards left side. There were stitches still in the wound. Surgical dressing applied.

Suppurated wound 1/2" x 1/2" x bone over right inter scapular region.

Three suppurated wounds in an area of 3" x 2" over right side back upper third. Size varying from 1" x 1/2" x muscle to 1/2" x 1/2" x skin.

Suppurated wound 2 (1/2)" x 1" x skin over 1-umber spine.

Large suppurated wound 13" x 5" x bone over sacrum and adjacent parts of both gluten move on right side.

Suppurated wound 5 (1/2)" x 5" x muscle over left hip lateral half.

Multiple suppurated wounds over both legs and heels. Size varying from 1" x 1/2" x skin to 4" x 2" x muscle.

16. On internal examination, he recovered 2 metallic pallets under the skin of left side of neck and recovered three metallic pallets from C-6 to T-4 level in the body. In his opinion, the cause of death was prolonged suppuration and toxemia. He prepared the postmortem report Ext. Ka4.

17. The accused-appellant Harish Chandra surrendered in the court on 11.5.1982 and was put up for identification on 24.6.1982 where Rich Pal and Isam Singh came for his identification but both of them failed to identify him. The Investigating Officer then concluded the investigation and submitted charge-sheet Ext. Ka19 against the accused-appellant Harish Chandra.

18. The prosecution in order to prove it's case against the accused-appellant Harish Chandra examined as many as 10 witnesses of whom P. W. 1 Mahabir Singh, P. W. 2 Kishan Pal and P. W. 3 Satya Bhan were examined as witnesses of one fact or the other connected with the crime while P. W. 4 Dr. Akhtar Ali, P. W. 5 Dr. S.K. Sharma, P. W. 6 S.I. Jaipal Singh, P. W. 7 Head Constable Hari Singh, P. W. 8 O. P. Nagpal, P. W. 9 Babu Ram and P. W. 10 Banshi Ram were produced as formal witnesses. The prosecution also adduced documentary evidence to which we shall refer as and when the context so requires.

19. The accused-appellant Harish Chandra in his statement recorded under Section 313 Cr.P.C. stated that there was a rumor that the informant's son Brij Raj Kishore husband of Smt. Kiran Devi committed the murder of Smt. Kiran Devi and when he got this information, he alongwith his brother-in-law (saala) namely Ram Bhul Singh, i.e. brother of Smt. Kiran Devi, went to Medical College on 22.3.1982. At the

College Ram Bhul Singh told the informant Mahabir Singh that Smt. Kiran Devi had been shot by Brij Raj Kishore. The informant Mahabir Singh however did not allow him as well as Ram Bhul Singh to meet Smt. Kiran Devi. He added that Smt. Kiran Devi was the third wife of the aforesaid Brij Raj Kishore. The first wife was divorced by Brij Raj Kishore and the second wife was killed by him and then he had arranged the marriage of his sister-in-law Smt. Kiran Devi with the aforesaid Brij Raj Kishore because the informant Mahabir Singh had requested him to get his son Brij Raj Kishore married. According to him, since he was himself searching the assailant of Smt. Kiran Devi he was falsely implicated in this case by Mahabir Singh to save his own son Brij Raj Kishore.

20. The learned IInd Additional Sessions Judge, Muzaffarnagar after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, convicted the accused-appellant Harish Chandra under Section 302 I.P.C. and awarded sentence of life imprisonment to him.

21. Hence this appeal.

22. It is submitted by the learned counsel for the appellant that the appellant was not named in the FIR which was lodged by the P. W. 1 Mahabir Singh on 21.3.1982. However after due deliberations and consultations he gave another report on 24.3.1982 stating therein that since the deceased Kiran Devi had remained unconscious after being shot, P. W. 1 in the FIR of the incident lodged by him had not named anyone as accused. However on regaining consciousness Smt. Kiran Devi informed him that she had been shot by the accused-appellant Harish Chandra, although the written report of the incident Ext. Ka1 does not contain any recital that the deceased Kiran Devi had become unconscious after being shot. He next submitted that it is proved from the facts and circumstances of the case that it was Brij Kishore, the husband of the deceased and the son of the first informant who had shot the deceased, with the object of saving his son, the informant had nominated the applicant who is the brother-in-law (jeeja) of the deceased as accused in the application dated 21.3.1982. He further submitted that the so called dying declaration of the deceased recorded on 23.3.1982 in which the deceased Kiran Devi had accused the appellant of causing firearm injury to her is a fabricated document and the same does not inspire any confidence in view of the fact that the same does not contain any certification of the doctor who had recorded her dying declaration that the deceased was at the time of the recording of her dying declaration conscious and in a fit mental condition to give her dying declaration. He further submitted that the first dying declaration allegedly made by the deceased before P. W. 1 Mahabir Singh is wholly unreliable and unworthy of credence. He lastly submitted that there being no legally admissible evidence on record to sustain the recorded conviction of the appellant and the sentence of life imprisonment awarded to him by the trial court cannot be sustained and are liable to be set aside.

23. Per contra Sri Saghir Ahmad, learned A.G.A. appearing for the state submitted that the prosecution has succeeded in proving by cogent and

reliable evidence that the murder of Smt. Kiran Devi was committed by the accused-appellant Harish Chandra by causing firearm injury to her. The complicity of the accused-applicant in the commission of the murder of Smt. Kiran Devi stands fully proved from the evidence of P. W. 1 Mahabir Singh and the facts stated by deceased Smt. Kiran Devi in her dying declaration Ext. Ka2. The medical evidence on record fully corroborates the prosecution story. The impugned judgment and order do not suffer from any illegality or infirmity warranting any interference by this Court. This appeal lacks merit and is liable to be dismissed.

24. We have very carefully considered the submissions made by learned counsel for the parties before us and perused the entire lower court record. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove it's case against the accused-appellant Harish Chandra beyond all reasonable doubts or not ?

25. Record shows that the prosecution in order to prove it's case against the accused-appellant had examined as many as 10 witnesses of whom P. W. 1 informant Mahabir Singh, P. W. 2 Kishan Pal and P. W. 3 Satya Bhan were examined as witnesses of fact while the remaining witnesses were formal witnesses.

26. We first proceed to discuss the evidence of all the three witnesses of fact P. W. 1 Mahabir Singh, P. W. 2 Kishan Pal and P. W. 3 Satya Bhan produced by the prosecution during the trial.

27. The informant P. W. 1 Mahabir Singh stated that on 21.3.1982 at about 5:45 - 6:00 AM, he along with his daughter Km. Anjana and daughter-in-law Smt. Kiran Devi was proceeding towards the Asthan of Johan Singh Devta where his daughter-in-law was going for worship and at that time Smt. Kiran Devi was in family way. While going to the Asthan of Johan Singh Devta he was ahead of all of them and his daughter-in-law was behind him and his grand daughter Km. Anjana and when he reached near the tubewell of Baljeet Singh, grand father of the accused-appellant Harish Chandra, he heard a sound of gunshot and when he turned his back, he saw a person running away towards the village Abadi and his daughter-in-law Smt. Kiran Devi criying out that she had received firearm injury, she fell on the ground and when he came near his daughter-in-law, he found her lying on the ground unconscious with firearm injuries. He also stated that his eye sight was weak therefore he was unable to recognize the man from a distance of 3-4 paces and therefore, he could not identify the person who had shot her and run away from the scene of the occurrence towards the village Abadi. He further stated that he took his daughter-in-law Smt. Kiran Devi to the P.H.C. Thana Bhawan where he dictated a report of the occurrence to Veer Singh Ext. Ka1 and then delivered the same at the police station Thana Bhawan in the morning and thereafter when he came back from the police station, the medical examination of his daughter-in-law Smt. Kiran Devi took place. He also stated that his daughter Km. Anjana lives with her maternal grand mother in Haryana. According to him, after the medical examination of Smt. Kiran Devi at P.H.C. Thana Bhawan he took her to the District Hospital, Muzaffarnagar and from there

he took her to Medical College Meerut where she regained consciousness on 23.3.1982 and then her dying declaration was recorded by P. W. 8 Dr. O.P. Nagpal at the College. In the dying declaration, his daughter-in-law named the accused-appellant Harish Chandra as her assailant and when he came to know about it, he got another report typed out and sent to the police station Thana Bhawan by registered post. He also stated that his daughter-in-law Smt. Kiran Devi was discharged from the College on 27.3.1982 and then he brought her back to the village where despite proper care she died on 3.5.1982 on account of the injuries sustained by her in the aforesaid occurrence which took place on 21.3.1982. He gave information about the death of Smt. Kiran Devi to the police. He also stated that Rich Pal, Isam Singh, Raj Pal and Krishan Pal had also told him about the occurrence. He also stated that almost about a month before the occurrence his daughter-in-law Smt. Kiran Devi had started going to the Asthan of Johan Singh Devta for worship every week either on saturday or sunday mostly on sunday and seldom on saturday. He denied that the spot inspection was done by the I.O. in his presence. He in his cross-examination further stated that on 31.3.1982 after the I.O. recorded the statement of Smt. Kiran Devi in the village and went away then Raj Pal, Sat Bhan and Krishan Pal came there and told him that on 21.3.1982 they had seen accused-appellant Harish Chandra running towards village Abadi from the crime scene of the occurrence with a firearm and then he took them to the police station where their statements were recorded.

28. P. W. 2 Krishan Pal stated that on 21.3.1982 at about 6:00 A.M. he alongwith Raj Pal and Satya Bhan was going to ease himself and when they took a turn on the road leading to village Nojal he as well as Raj Pal and Satya Bhan saw the accused-appellant Harish Chandra running from the Nojal side towards the Village Abadi with a Katta in his hand. Raj Pal enquired from Harish Chandra as to what had happened but Harish Chandra did not not reply. He then went upto the side of the tubewell of Baljeet which is adjacent to the road leading to village Nojal. He saw Smt. Kiran Devi lying unconscious in injured condition and bleeding near the tubewell of Baljit Singh and then Mahabir Singh who was present there arranged a cot and took her towards his house. He in his cross-examination admitted that several persons of the village had collected there but neither he nor his two companions Raj Pal and Satya Bhan told anybody that they had seen the accused-appellant Harish Chandra running away with a pistol from the place of occurrence.

29. P. W. 3 Satya Bhan made almost similar statement as P. W. 2 Krishan Pal. Over and above he also added that on 31.3.1982 at about 6:15 P.M. he was going to ease himself and when he passed in front of the house of P. W. 1 Mahabir Singh he saw a police vehicle standing and he enquired as to what was the matter, he was told that the accused-appellant Harish Chandra had fired at Smt. Kiran Devi. On receiving the aforesaid information, it flashed in his memory that he had seen the accused-appellant Harish Chandra running on 21.3.1982 with a pistol and it was possible that he might have shot at Smt. Kiran Devi and then he told about it to P. W. 1 Mahabir Singh. He in his cross-examination he admitted that he is the real nephew of the informant Mahabir Singh P. W. 1 and when he asked from him as to why he did not tell Mahabir Singh or others who were present at the scene of

occurrence on 21.3.1982 that he had seen Harish Chandra running towards village Abadi with a pistol in his hand, he said that at that time he never thought that Harish Chandra who was the real brother-in-law (Bahnoi) of Smt. Kiran Devi could have shot her and that is why he did not tell anything either to Mahabir Singh or others.

30. The dying declaration Ext. Ka12 of the deceased- Smt. Kiran Devi recorded by P. W. 8 Dr. O.P. Nagpal is as follows :

"Mai Itwar Kee Subha 6:00 Bajay Devta Par Ja Rahi Thee. Mere Baray Jija Sri Harish Chandra Jo apnay tubewell par kharay thay, rastay mai parta hai, Mainay Pahchan Liya. Mere Jija mere Pichchay Pichchay Aaye aur mainay Poocha mere pichchay pichchay Que Aa rahay Ho. Mujhsay Kucch Nahi Bolay. Mujhsay Teen Saal pahlay unhonay kaha tha kee tumhay goli maar doonga. Tumhara Rista mere Gair Raazi say hua hai.

Mujhay enhonay Pichchay say gooli maar dee aur bhaag gaye aur mai Baihosh hokar gir pari.

Uprokt bayan mujhay Pathkar sunaya gaya."

31. It is undisputed that Smt. Kiran Devi had received firearm injury on 21.3.1982 in the early hours and she died on 3.5.1982 in her husband's house.

32. The question of primary importance in this case is that whether the prosecution has been able to link the appellant with the crime in question by leading any cogent and reliable evidence or not.

33. Record shows that the prosecution in order to prove its case against the accused-appellant examined P. W. 1 Mahabir Singh, P. W. 2 Krishan Pal and P. W. 3 Satya Bhan as witnesses of fact and apart from the oral and documentary evidence on record, there is dying declaration of the deceased which has already been reproduced hereinabove.

34. As far as the evidence of P. W. 1 Mahabir Singh is concerned, there is no doubt about the fact that he neither witnessed the incident nor recognized the assailants. P. W. 2 Krishan Pal and P. W. 3 Satya Bhan have also not deposed that they had seen the appellant firing at the deceased, they have merely deposed that on the date of incident they had seen the appellant running from the Najel side towards the village Abadi with a Katta in his hand and then they saw Kiran Devi bleeding and lying unconscious in an injured condition near the tubewell of Baljeet Singh. The evidence of P. W. 2 Krishan Pal and P. W. 3 Satya Bhan has been castigated by the learned counsel for the appellant on the ground that they had not stated the same to the Investigating Officer, S.I. Jaipal Singh on 21.3.1982, the date of incident and hence they by deposing before the trial court that they had seen the appellant on the date of occurrence, they made material improvements in their evidence and hence no reliance can be placed on the same.

35. It emerges from the record that these witnesses had not given any such statement to the Investigating Officer on 21.3.1982 when he had come to the village in connection with the investigation of the case. There is another very material aspect of the matter which shrewd their evidence with suspicion is that although admittedly the deceased was known to P. W. 2 Krishna Pal and P. W. 3

Satya Bhan, P. W. 3 Satya Bhan being the nephew of the informant but no explanation is coming forth from them for their failure to tell P. W. 1 Mahabir Singh that they had seen the appellant running with a Katta in his hand. Otherwise the said fact would have certainly found mention in the F.I.R. and P. W. 2 Krishna Pal and P. W. 3 Satya Bhan would have been nominated as witnesses therein.

36. Thus, we are of the view that the evidence of P. W. 2 Krishna Pal and P. W. 3 Satya Bhan is not wholly reliable and nothing turns upon the evidence of P. W. 1 Mahabir Singh.

37. Now we are left with the dying declaration of the deceased which is on record as Ext. Ka2. The authenticity of the dying declaration of the deceased has been assailed by the learned counsel for the appellant on the ground that the same was not recorded before Magistrate, although the deceased had remained alive for about 10 days after being shot and there was ample time for P. W. 8 Dr. O.P. Nagpal who claims to have recorded the dying declaration of the deceased to have called the Magistrate rather than recording the same himself without there being any evidence on record showing that the deceased's condition at the time of recording of her alleged dying declaration was so serious that there was no time to call the Magistrate for recording her dying declaration.

38. Another ground on which the learned counsel for the appellant has assailed the dying declaration of the deceased is that if the deceased had recognized the appellant as the person who had shot her, she would have disclosed his name to her father-in-law, P. W. 1 Mahabir Singh who was accompanying her at the time of the incident and to whom as is apparent from the F.I.R. she told that she had been shot and thereafter she had fallen on the ground. Since she was conscious after being shot, in the normal course of human conduct the first thing which she would have told her father-in-law was that it was the appellant who had shot him but she did not.

39. Upon perusal of the F.I.R. Ext. Ka7 and the facts stated by P. W. 1 Mahabir Singh in his examination-in-chief, we find that there is force in the submissions made by the learned counsel for the appellant. If the deceased had actually identified her assailants she would have certainly disclosed his name to her father-in-law who had lodged the F.I.R. of the incident and in that case the appellant would have been named as an accused therein.

40. Thus, in view of the foregoing discussion, we find that the prosecution has failed to prove its case against the appellant beyond all reasonable doubts, hence the appellant is entitled to benefit of doubt. Neither the recorded conviction of the appellant nor the sentence of life imprisonment awarded to him can be sustained. Accordingly the impugned judgment and order are hereby set aside. The appeal succeeds and is allowed. The appellant is on bail. He need not surrender. His bail bonds are cancelled and the sureties are discharged. The appellant shall however comply with the mandatory provisions of Section 437-A of the Cr.P.C.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2019

BEFORE
THE HON'BLE R.S.R. (MAURYA), J.
THE HON'BLE UMESH KUMAR, J.

CRIMINAL APPEAL No. 3609 OF 2015
Connected With

CRIMINAL APPEAL No. 1807 OF 2015

Prakash ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Mangala Prasad Rai, Sri Rajiv Lochan Shukla, Sri Sharangpani Vikramdhar Dw, Sri Brijesh Sahai, Sri Bhavya Sahai.

Counsel for the Opposite Party:
A.G.A., Sri Avanish Kumar singh, Sri Krishna Kumar Singh.

A. The Court may classify the oral testimony into three categories, namely (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable, nor wholly unreliable(Para 19). It will be necessary for the Court to scrutinise the testimony more particularly keeping in consideration the deficiencies, drawbacks and infirmities pointed out in the evidence and to evaluate the same to arrive at a conclusion. (Para 20)

Criminal Appeal allowed.

Chronological list of Cases Cited:-

1. Manjeet Singh Khera Versus State of Maharashtra, SPECIAL LEAVE PETITION (CRIMINAL) NO.5897 OF 2013.

2. V.K. Sasikala v. State Represented by Superintendent of Police (2012) 9 SCC 771 (E-2)

(Delivered by Hon'ble Umesh Kumar, J.)

1. These two criminal appeals have been filed challenging the judgment and order dated 30.04.2015 passed by Additional Sessions Judge, Court No.3, Fatehpur in S.T. No. 1185 of 2001 (State Vs. Ravi Karan and others) by which the appellants have been convicted and sentenced for life imprisonment and a fine of Rs. 20,000/- each under Sections 302 read with Section 34 IPC and in default to undergo 2 years R.I., and under Section 307 read with Section 34 IPC, to undergo 7 years R.I. and fine of Rs. 10,000/- each; and in default to further undergo one year R.I. All the sentences are directed to run concurrently. The accused-Bhola died during trial.

2. P.W.1 Shiv Prasad-informant has given a written report at Police Station Kishanpur district, Fatehpur alleging that in the evening on 16.2.1992 at about 6.00 P.M. some altercation took place between Moti Lal with Pitai Kumhar of his village; his son Hira Lal and Awadesh intervened and brought Moti Lal to the house. Soon thereafter, Ravi Karan son of Ram Naresh having Rifle, Prakash armed with DBBL gun and Bhola having lathi in his hand came abusing in front of the door of Moti Lal; Moti Lal asked them not to abuse, upon hearing the noise, the informant, his son Suresh Chandra, sister-in-law (wife of Babu Lal), wife of Moti Lal, and Chiya daughter of Moti Lal and Awadhesh arrived and forbade them not to abuse, on which, accused Bhola exhorted saying kill them as their bullying has increased and now they have started teasing their own persons; in the meantime, accused Prakash and Ravi Karan having Rifle and gun in their hands fired on Moti Lal which hit on his stomach; the wife of Moti Lal-Sarla, his daughter Chiya and informant's son Suresh Chandra and his

sister-in-law received injuries. The accused appellants ran away from the spot abusing and they could not be caught hold due to fear. The injured were sent to hospital for treatment along with villagers and he has come to lodge first information report.

3. On the basis of the said information, chick FIR (Ex.Ka-2) was prepared and a case under Sections 307/504 IPC at Case Crime No. 30 of 1992 was registered against the accused namely Ravi Karan, Prakash and Bhola and relevant entry was made in the G.D., but the GD and the said FIR is not available on record. Subsequently, after death of injured-Moti Lal on 17.2.1992, the offence under Section 307/504 IPC was converted into Section 302 IPC and relevant entry in the GD regarding conversion of the case was entered at GD No. 21 at 5.30 P.M. Dated 17.2.1992.

4. Investigation of case was made by P.W.6 S.I. Ravi Chandra Mishra. He recorded the statements of witnesses under Section 161 Cr.P.C., inspected the spot, prepared site plan, sent dead body for post mortem to the District Hospital, Fatehpur and after completing investigation submitted charge sheet under Section 302, 307, 504 IPC.

5. Learned Trial Court framed charges against the accused-appellants. Accused-Bhola was charged under Section 302/34 and section 307/34 IPC. The accused Ravi Karan and Prakash were charged under Sections 302/307 IPC. The accused-appellants denied their guilt and claimed to be tried.

6. The prosecution in support of its case has examined 8 witnesses. P.W.1 Shiv Prasad is the informant, P.W.2 Sarla Devi-injured witness, P.W.3 Jhallu Prasad Misra-Head Constable, P.W.4 Dr. Bharat Namdeo who conducted post mortem, P.W.5 Dr. Devendra Kumar who examined and prepared injuries reports of Chiya, Suresh and Phulmati w/o Babu Lal, P.W.6 Ravindra Mishra, I.O., P.W.7 Subhash Chandra Singh-Pharmacist and P.W.8 Chiya.

7. Here, it is note worthy that entire prosecution documents were lost before committal of the case and was re-constructed under the orders of the then District Judge, Fatehpur. After re-construction of the documents such as nakal tahrir (Ex.Ka.2), G.D (Ex.Ka.3), post mortem report (Ex.Ka.4), injury reports of Phulmati (Ex.Ka.5), injury report of Chiya (Ex.Ka.6) and Suresh (Ex.Ka.7), the case was committed to the Court of Sessions on 20.12.2001 by Judicial Magistrate, Khaga, Fatehpur which was registered as S.T. No. 1185 of 2001(State Vs. Ravi Karan and others)

8. Statements of accused-appellants under Section 313 Cr.P.C. was recorded thrice; Firstly on 4.11.2009, after the examination of prosecution witnesses 1 to 6. They denied the prosecution allegation and stated that evidence against them have been led on the basis of forged document; they have been falsely implicated. The accused Ravi Karan has further stated that under the influence of enemies, entire prosecution story has been concocted and false evidence has been led in the case. He has also taken plea of alibi. The prosecution on 20.7.2013 again produced P.W.7 and P.W.8. The accused Prakash denied the evidence against him and claimed to be innocent; he asserted that unknown dacoits during course of

commission of dacoity have caused death of Moti Lal and he has been falsely implicated in the case in collusion with local police. Simultaneously, accused Ravi Karan has also made similar statement. Thirdly, statement of accused-Prakash and Ravi Karan under Section 313 Cr.P.C. was recorded on 19.10.2013 after filing of FSL report (Ex.Ka.8). The accused said that they do not know about the report. The extract of medico legal report Register page No. 47 injury report of Sarla Devi dated 17.2.1992 has been filed by P.W.7 who stated that this report has not been prepared before him. Moreover, he stated that he cannot tell by whom this report was prepared.

9. In the autopsy report, following injuries were found on the body of deceased;

1. *Fire arm wound of entry 8 cm x 5 cm x cavity deep over left iliac fossae of abdomen 5 cm. to A.S. aliac spinal. Blackening present. Direction from right to left and little upward. Blackening present. Liver and intestine loops coming out of wound and wadding piece recovered from muscle.*

2. *Fire arm wound of entry 8 cm. x 4 cm. bone deep over right leg middle part anterior surface. Tibia and fibula bones fractured into multiple pieces. No blackening and tattooing. Three small pellets recovered. Seven small pellets recovered from abdominal cavity.*

3. *Multiple fire arm wound of entry in an area of 15 cm. x 6 cm. x 0.1 cm. over left thigh postero-lateral surface upper part. No blacking and tattooing. Two small pellets recovered from wound cavity.*

4. *Multiple fire arm wounds of entry in an area of 7 cm. x 3 cm. over left leg lower part lateral surface. No blackening or tattooing. One small pellet recovered from wound.*

10. Photo copies of the injury reports of injured Phulmati, Chiya and Suresh are not much visible and therefore, relevant extract from the statement of the doctor is quoted here in below;

श्रीमती फूलमती

चोट नं0–1 फटा हुआ घाव 05 सेमी ग स्किन डीप जो कि अग्रबाहु पर सामने की ओर रिस्ट जोड़ से 3.5 सेमी उपर था। लालिमा युक्त खून का थक्का लगा था। ? चोट नं0–2 फटा हुआ घाव 0.5 सेमी ग 0.5 सेमी ग त्वचा की गहराई तक जो कि दाहिनी निचले अग्रबाहु पर सामने की ओर 6.5 सेमी दाहिनी रिस्ट लाइन से उपर था। तथा लालिमा युक्त खून का थक्का लगा था।

चिया

चोट– फटा हुआ घाव 1 सेमी ग 1 सेमी ग मांस तक गहरा जो कि दाहिनी जांघ के सामने की ओर तथा घुटने के जोड़ से 8 सेमी उपर अन्दर की तरफ। घाव के अन्दर कोई वस्तु घुंसी हुयी प्रतीत हो रही थी। घाव अनियमित था तथा वह वस्तु जो घाव में धंसी हुयी वह घाव से 1 सेमी आगे थी। घाव में कालिमा मौजूद थी। घाव से लालिमा युक्त पदार्थ रिस रहा था। चोट को एक्स रे की सलाह दी गयी थी।

मेरी राय में यह चोट साधारण थी और अग्नेयास्त्र द्वारा पहुंचाई गयी थी। चोट 3/4 दिन पुरानी थी। यह चोट भी दिनांक 16.02.92 को 6.00 बजे सांय को आना सम्भव है।

सुरेश

चोट– फटा हुआ घाव 4 सेमी ग 1 सेमी ग मांस तक गहरा जो कि दाहिनी छाती में सामने की ओर 5.5 सेमी दाहिनी निप्पल से दूर था। इस चोट से खून रिस रहा था तथा घाव के किनारे अनियंत्रित थे।घाव के किनारे कालिमा युक्त थे। चोट के एक्स रे की सलाह दी गयी थी। चोट को निगरानी मे रखा गया था।

11. We have heard Sri Brijesh Sahai, learned Senior Counsel assisted by Sri Bhavya Sahai for appellant-Prakash and Sri Mangala Prasad Rai, learned Senior Counsel assisted by Sri Ashok Kumar for appellant- Ravi Karan, Sri Anil Kumar Kushwaha for informant and the learned

AGA on behalf of State and have perused the record.

12. Learned Counsel for the appellants argued that entire proceeding of trial is based on illegal evidence adduced by the prosecution; allegations of prosecution even if assumed to be true, in committing the said offence, no role has been assigned to the appellant. Learned Counsel appearing for appellant- Ravi Karan has raised argument that no role has been assigned; the appellant has been said to be armed with Rifle, where as no rifle injury was found either on the body of deceased-Moti Lal or any of the injured, and this indicates that in the commission of offence, appellant was not involved; only on the statement in chief of the witnesses, conviction has been based and not on the totality of the evidence adduced by prosecution; it was the categorical averment of the witnesses that they are not in a position to say by whom exhibited documents were prepared but even then the exhibited papers were relied upon by the Trial Court; merely saying that when these papers were being reconstructed, no objection was made by the defence, whereas the fact remains that while documents/papers were being exhibited, serious objection was raised by defence counsel which is apparent by perusal of oral evidence of the witnesses. These facts have also been asserted in their statements under Section 313 Cr.P.C. It was further argued by learned Counsel for the appellant that prior to committal, copies of relevant documents viz statement under Section 161 and other relevant documents were never provided to the accused and therefore, they failed to controvert the witnesses during trial and this major defect of the prosecution, affects the principle of just and fair trial rendering the entire prosecution case under shadow of doubt, besides causing prejudice and thus, the appellants are entitled for acquittal giving benefit of doubt.

13. Per contra, learned AGA and Sri Anil Kumar Kushwaha, learned Counsel for informant opposed the submissions made by learned Counsel for the appellants; supported the impugned judgment and order by saying that the learned Trial Judge has passed a detail and reasoned order believing the testimony of prosecution witnesses, there is no illegality or infirmity and thus, the appeal is liable to be dismissed.

14. P.W.1 Shiv Prasad scribe of the first information report has stated that on 16.2.1992, an altercation took place between Moti Lal and Pitai Kumhar; his son Hira Lal and Awadhesh brought Moti Lal home. Then about 20 minutes later, Bhola having Lathi, Prakash armed with DBBL gun and Ravi Karan armed with Rifle were seen going towards the house of Moti Lal; they were exhorting "इसकी गुन्डई बढ गई है, यह अपने आदमियो को भी सताने लगा है इसे जान से मार देगे।" He followed them; the above accused reached at the door of Moti Lal, upon which Moti Lal told that why they were abusing and exhorting; hearing noise, the wife of Moti Lal Sarla, his daughter Chiya, wife of Babu Lal-Phulmati and his son Suresh and Awadhesh arrived there. Bhola exhorted to kill Moti Lal on which, accused Ravi Karan and Prakash started firing; his son Suresh received injuries on his chest, his sister-in-law Sarla received injuries in her thigh, Chiya and wife of Babu Lal namely Phulmati received pellet injuries and Moti Lal received injuries in the stomach and leg. The accused fled away from the spot after committing the offence. In examination-in-chief, this witness stated that Moti Lal fell

down and when he was rescuing/lifting Moti Lal, the S.P. Guru Darshan Singh and police personal came and took Moti Lal to Dariyapur police outpost; his sister-in-law Sarla was also with them. From Dariyapur, they went to Vijaipur police outpost where he wrote the first information report. His brother Babu Lal took Moti Lal and Sarla both injured to the District Hospital, Fatehpur. Other injured were examined on the next day at Vijaipur hospital. He further stated that Moti Lal expired on 16.2.1992 while he was in the way to Dariyapur and he has given written report on the same day at 9.00 P.M. in the night at police outpost Vijaipur; from Vijaipur he never went to police station, Kishunpur. Re-constructed first information report (Ex. Ka-1) was read over to him which he accepted to have given at the police outpost. This exhibit was objected by the defence Counsel, but the objection was rejected by the Trial Judge. In the statement in Court, he explained that Moti Lal received injuries in his stomach and leg. In chief, this witness has stated that police never interrogated him at any point of time during investigation, though in his statement he stated that he reached on the spot just from behind the accused persons, but this fact has not been described in the first information report. In his cross examination, he stated that he was just behind 10 steps from the accused and when he was watching the incident, he was not stand still but was moving 2-3 steps here and there. This statement of the witness that he saw the entire incident from behind the accused is not corroborated by the site plan available on record where place "A' has been shown as the place from where Suresh, Shiv Prasad, Phulmati came out and saw the occurrence and they sustained injuries. It is admitted that in the incident, Shiv Prasad has ever received any injury. His presence on the spot becomes doubtful according to the site plan and the version of first information report, he has shown himself to be present on the spot behind the accused. He stated that he cannot tell how many shots were fired and which shot was fired by which of the accused as the firing was being made at some intervals; when firing was being made, he was behind 2-3 steps, his daughter was at distance of 4 steps south to him, wife was towards west at a distance of 2-3 steps. Phulmati was at a distance of about 10 steps towards western side of deceased-Moti Lal and Suresh was 5 steps towards south west from deceased. They received injuries. The mode and manner of assault, as has been stated by P.W.1, is not only contrary to the statement of P.W.2 an injured witness, but is also not supported by the site plan available on record. Even the presence of other person as stated by this witness is contrary to the statements of other witnesses, whereas this witness stated that on shouting of Bhola, wife of Moti Lal, his daughter Chiya, Phulmati(wife of Babu Lal) and Suresh reached on the spot.

15. P.W.2 stated that she and her husband were sitting on a bench outside the house, whereas P.W.8-Chiya injured stated that she was playing in front of house; her father was sitting with Suresh and was discussing something when the accused came and exhorted. How all injured and P.W.1 reached on the spot, in the statements of P.W. 1, P.W.2, P.W.8 are not corroborating each other so as to place reliance on their statements. Though, it has been asserted by P.W.1 and P.W.2 that pellets hits wall and window of Babu Lal, but during investigation, neither any pellet has been recovered by the Investigating Officer nor any such recovery memo was prepared during investigation. P.W.1 in his cross examination, has stated that accused Prakash and Ravi Karan were firing from one place. He did not remember that in which leg and where Moti Lal-deceased

received injuries; he cannot say that whose fire hit the leg of Moti Lal, though he admitted that after this injury in the leg, Moti Lal fell down. He cannot say that whether it was first or the second fire, but it might be third or fourth fire, but which shot hit, he did not count. He stated that daughter Chiya and sister]-in-law started running towards the house of Moti Lal. He stated that although he is a license holder of 12 gun, but he is not in a position to explain the difference of shots between rifle and 12 bore gun. The injury of stomach sustained by the deceased, has not been explained by any of the witnesses in their statements.

16. P.W.2- Sarla in her chief stated same version in support of the first information report and stated that in the said occurrence of firing made by Ravi Karan and Prakash, her husband, she herself, daughter Chiya and Phulmati received injuries, whereas P.W.1 stated that first information report was written by him at Vijaipur police outpost, but this witness in her chief states that his brother-in-law Shiv Prasad wrote this paper at home and went to Police Station Kishunpur, which is totally contrary to the statement of P.W.1. She stated that her husband Moti Lal died before reaching Fatehpur, Hospital. She stated that at the time of occurrence, she along with her husband were sitting on a Bench facing south; when the accused were firing, she saw Shiv Prasad, Chiya and Phulmati were also there. She did not count number of shots, but 7-8 shots were fired. She had seen gun and rifle from before the incident. She stated that without watching, only on sound, she can identify whether shots were fired from gun or by rifle. She categorically stated that first fire was made by gun which missed the target and she and her husband did not run towards house but moved 10 steps towards field and she was 2-3 steps behind her husband. Second shot was fired by rifle which also did not hit any one; none tried to escape even after said firing; Chiya, Phulmati and Suresh also did not run away; the first and second shot did not hit any one and pellets entered in the wall and window of Babu Lal, but third fire of rifle hit the leg of her husband,she was 4 steps towards north from the place where her husband was standing. This fact is not corroborated by the evidence available on record and also by the site plan. The third fire was made by rifle which hit right leg of her husband and that time, she was one step away from her husband. Even after receiving injury, neither her husband fell down nor he sat, but was still in standing position. She stated that fourth fire by gun hit her but what injury was sustained by her, has not been explained in the entire testimony and not the husband and at that time, daughter Chiya was towards west, Phulmati was towards north and Suresh was towards southern side. She stated that the shot which hit her was made from four furlongs from south eastern side. On query made by the Court, she stated that one furlong is equal to one hand and if it is so, injuries shown in the injury report (Ex.Ka-7) is not corroborated. She stated that fifth shot was fired by Prakash from gun which hit Suresh and Phulmati and firing was made from same place from where 4th shot was made; she further stated that sixth shot was fired by Prakash from gun which hit Chiya. P.W.2 stated that P.W.1-informant accompanied her from village to Fatehpur all time, whereas P.W.1 has stated that he sent Moti Lal and her sister-in-law(Sarla) along with his brother Babu Lal to District Hospital,

Fatehpur and he went to police out post to lodge report. The mode and manner stated by this witness and the injuries received during commission of offence, is not corroborated by medical evidence available on record. This witness also stated that she and other injured witnesses went to the police station, which creates doubt and her statement badly damages the prosecution version.

17. It is significant to note that there is no inquest report available on record. P.W.2 has stated that inquest was prepared at 7.00 P.M. on the day of occurrence where police Inspector was present and her jeth Shiv Prasad was also present there. It is also strengthen by the statement of P.W.1 Shiv Prasad that Moti Lal expired on 16.2.1992 while in the way to police outpost, Dariyapur.

18. P.W.8-Chiya in chief has stated that at the time of occurrence, she, her father, mother Sarla Devi, Suresh and Phulmati were present on the spot and Ravi Karan armed with rifle, Prakash armed with DBBL gun and Bhola armed with Lathi came and they assaulted her father, mother,Phulmati, Suresh and Chiya by firing from their weapons and her father after receiving injuries fell down They went to Vijaipur hospital, but doctor was not available there, so her father Shiv Prasad and Sarla went to Sadar Hospital. They were examined on the next day at Vijaipur Hospital. Her father expired on the next day in Sadar Hospital, Fatehpur due to injuries caused by the accused. The Investigating Officer of the case recorded her statement during investigation. The statement of this witness that her father expired next day in Sadar Hospital, Fatehpur is contrary to the statement of P.W.2 (Sarla Devi), where she stated that they reached Sadar Hospital, Fatehpur at about 12.00 in the night and when reached to the hospital, her husband expired, the fact remains that at one place she stated that her husband expired at 7.00 PM on the same day and inquest was prepared by the Investigating Officer. Exactly when Moti Lal-deceased expired is not clearly stated by any of the witnesses, hence the time of death of deceased is not ascertainable from the statement of so called eye witnesses, more so in the absence of inquest report on record. In her examination in chief, she stated that she, her mother,father, Suresh and Phulmati were present in front of house just prior to the occurrence, whereas in cross examination, she has stated that when assailants came in front of her house, her mother-Sarla was in the house and she was playing outside the door; her father and Suresh were there. She has stated that she cannot say that how many fires were made on her father; she cannot say how many shots were fired. However, this witness has admitted the fact that the Investigating Officer has recorded her statement and the statements of Phulmati and Suresh also, but she has not answered any question properly and deposed that she has forgotten every thing regarding incident. On careful scrutiny of the testimony of this witness, we are of the opinion that she is not wholly reliable and trustworthy. The statements of these witnesses comes within the purview of partly reliable and partly not reliable, hence in totality, it would not be safe to record conviction on the testimonies of these witnesses.

19. The mode of assessing reliability of a witness has been explained time and again by the Apex Court that certain factors are to be kept in mind while

assessing the testimony of a witness. The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely **(1)**wholly reliable**(2)**wholly unreliable and **(3)**neither wholly reliable, nor wholly unreliable. In the case of first two categories, there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of the cases where the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness or as the case may be.

20. The material discrepancies are those which are not normal, and not expected of a normal person. While appreciating the testimony of a witness, approach of the Court must be as to whether the evidence of witness after perusal appears to have line of credibility and once that impression is formed, it will be necessary for the Court to scrutinise the testimony more particularly keeping in consideration the deficiencies, drawbacks and infirmities pointed out in the evidence and to evaluate the same to arrive at a conclusion whether it is against general tenor or it is shaken so as to render it unworthy of belief. It is relevant to mention that other injured witnesses Suresh and Phulmati have not been examined by the prosecution.

21. P.W.3 Head Moharrir is formal witness who has executed chick FIR of the case., Though original chick has been lost, but he proved this document, which has been objected by the defence counsel. This witness has admitted the fact that original (Ex.Ka.3) is not before him nor available in the S.P. office, and he did not know who prepared (Ex.Ka.3); GD in respect to institution of case is not on record, hence he is not in a position to explain whether any *chitthi majroobi* was prepared or not. He stated that the case was investigated by SHO, R.C. Mishra. This witness has stated that he has taken blood stained clothes of injured in his possession at the time of preparation of chick FIR, fard was prepared and after getting it sealed was kept in Malkhana, but no such memo of recovery is available on record, nor has been exhibited. Hence, reliability of this assertion is meaning less, specially when P.W.2 in her statement has stated that she wore blood stained sari having wholes of pellets for about 7-8 days and none had taken the same from her. Therefore, this witness also is not reliable and trustworthy.

22. P.W.4 Dr. Bharat Namdeo conducted autopsy of the body of deceased Moti Lal on 18.2.1992 at 3.30 P.M. From perusal of post mortem report it transpires that injuries caused to the deceased was of gun fire and not by rifle as pellets and wadding were found and thus, it is clear that his injuries would not have been caused by rifle. In his statement, the doctor has given vague reply by saying that the all four injuries on the body of deceased might have been caused minimum by two shots or maximum by four shots.

23. P.W.5 Dr. Devendra Kumar examined injured Phulmati, Chiya and Suresh brought by constable Brijraj Chaubey on 17.2.1992 at 4.25 PM and he has opined the injuries to be simple

caused by fire arm. He has stated that he cannot tell about the distance from which the injuries were caused. He also stated that he cannot ascertain as to from which of the fire arm, these injuries were caused.

24. P.W.6 Ravi Chandra Mishra, Investigated the case and submitted charge sheet. He stated that as there is no prosecution documents, he is unable to described about the steps taken during investigation. He disown his signature on the photo copy of site plan available on record and also stated that he did not remember who has put signature on it. In cross examination, he stated that what the witnesses had stated, he cannot tell in absence of case diary. This witness was recalled and this time, he stated to have investigated case crime no. 30 of 1992 under Section 302,307,504 IPC, P.S. Kishunpur and submitted charge sheet against accused Ravi Karan, Prakash and Bhola, but today, neither original nor photo copy of the charge sheet is available before him. Although, this witness has admitted to have recorded statements of witnesses during investigation, but no statement recorded under Section 161 Cr.P.C is available on record. In this reference, argument of learned Counsel for the appellants that prior to committal, copies of the relevant documents such as statements under Section 161 Cr.P.C. were not provided to the accused, hence, they failed to controvert the witnesses during trial under Section 145 of Indian Evidence Act, has substance.

25. P.W.7 Subhash Chandra Singh-Phamacist stated in his statement that medico legal register dated 1.1.92 to 31.3.1992 is with me in which injuries received by Sarla Devi is noted who was examined on 17.2.1992 at 1.10 A.M. This witness has stated that at the time of examination, he was not present and thus, he cannot tell who had prepared it.

26. In the present case, although the accused were charged under Sections 302/307, but both the accused are convicted with the aid of Section 34 IPC without assigning any reason and no stress has been laid down by learned AGA on the point.

27. On the aforesaid facts and circumstances of the case, we gave our thoughtful consideration to remand the case back for fresh trial but remanding back case to the Trial Judge at this stage, will never be proper and justified after lapse of 27 years for the reason that reconstruction of those documents/records is impossible now and thus, initiation of fresh trial today will never meet the ends of justice.

28. Non supply of copies of documents such as statement under section 161 Cr.P.C, panchayatnama and other relevant record to the accused, in the case in hand has caused serious prejudice during trial to contradict the witnesses under Section 145 of Evidence Act. It will not be out of reference to note that an omission to comply with section 207 Cr. P.C. read with section 238 Cr. P.C. is bound to cause a serious prejudice to the accused. It is obligatory for the Trial Magistrate to ensure supply of copies of the relevant documents upon which the prosecution intends to rely upon during trial. The Hon'ble Apex Court held that it was incumbent upon the trial court to supply the copies of these documents to the accused as that entitlement was a facet of just, fair and transparent investigation/trial and constituted an inalienable attribute of the process of a

fair trial which Article 21 of the Constitution guarantees to every accused. We would like to reproduce the following portion of the said judgment discussing this aspect: "21.The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Cr.P.C. and would travel beyond the confines of the strict language of the provisions of Cr.P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced. (This was observed in Manjeet Singh Khera Versus State of Maharashtra,SPECIAL LEAVE PETITION (CRIMINAL) NO.5897 OF 2013. Also see V.K. Sasikala v. State Represented by Superintendent of Police (2012) 9 SCC 771).

29. In para-33 of the impugned judgment, although injuries sustained by Sarla Devi is mentioned, but the facts remain that wrongly, injuries sustained by Phulmati has been mentioned in the name of Sarla Devi.

30. The accused is entitled to get copy of police report and other documents and in this respect, provisions of Section 207 are necessary to be quoted here in below;

Section 207 in The Code Of Criminal Procedure, 1973

207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements record.ed under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173: Provided

that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

Section 208 in The Code Of Criminal Procedure, 1973

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session. Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under section 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely: Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

31. Section 238 of Cr.P.C. unequivocally provided that a solemn duty is cast on the Magistrate to satisfy himself that he has strictly complied with the provisions of Section 207 Cr.P.C. viz. furnishing the accused, free of cost, copies of documents as prayed for by him and referred to in that section itself without delay and such satisfaction has to be invariably judicial satisfaction. An omission to comply with the mandatory provision of law as enshrined in Section 207 Cr.P.C. read with Section 238 Cr.P.C is bound to cause serious prejudice to the accused and such a situation may even vitiate the criminal trial. The supply of documents and statements prepared at the investigating stage as mandated under Section 207 Cr.P.C. cannot be treated a mere superfluity or empty formality. It is highly improper and irregular on the part of the Court to shirk its responsibility in this regard and put the accused at the mercy of prosecution by merely observing inter alia that it is the duty of prosecution "to follow the rules of natural justice'. Thus, it can safely be held that accused could not be refused to supply copies of documents even at the stage of trial, if relied upon by the prosecution per statutory provisions of Section 207 Cr.P.C. and also as per the provisions of Section 238 Cr.P.C. If we go carefully through the ratio laid down in V.K. Sasikala Vs. State (2012) 9 SCC 771, we get clear idea about the solemn duty of the Court to supply copies of documents to the accused. It is the duty of the Court to supply to the accused, copies of the police report, the first information report recorded under Section 154 Cr.P.C., the statements recorded under Section 161(3), the confessions and statements, if any, recorded under Section 164 and any other documents or relevant extract thereof, which is forwarded to the Magistrate along with police report.

32. To sum up the matter, after careful scrutiny of the oral testimony of

the witnesses and the records available, we find following discrepancies;

i) No motive of the occurrence has been placed by any of the witness to inspire confidence.

ii) No x-ray report or supplementary report, inquest report is available on record.

iii) P.W.1-informant in his statement deposed that deceased-Moti Lal died in the way while going to Dariyapur and he reported the matter at Police outpost Vijaipur, while the FIR was lodged at Police Station, Kishunpur district, Fatehpur.

iv) P.W.1 disown his statement under Section 161 Cr.P.C. and stated that the police did not inquire anything from him.

v) P.W.2-injured Sarla Devi, although tried to describe the mode and manner of the incident together the injuries sustained during course of commission of offence, but her statement is not corroborated. Moreover, she stated that the FIR was written at home.

vi) In the site plan, house of Babu Lal is shown towards north. How this site plan was prepared and later constructed, itself is doubtful as no mode of reconstruction has been explained by any of the prosecution witnesses.

vii) P.W.1 stated to have seen the occurrence from behind the accused, whereas, in the map/site plan Suresh, Shiv Prasad and Phulmati all have been shown at place "A', which is towards north from the place of said firing and witnessing the occurrence from behind the accused is not corroborated from the perusal of available map as P.W.1 states.

xiii) According to FIR version, the informant stated that he sent the injured to hospital along with village people and then he came to the police station, and in chief, he stated that injured deceased-Moti Lal and injured-Sarla were with him while injured-Chiya was at home.....

ix) The injuries found on the body of injured as asserted by P.W.2 are not corroborated from medical evidence.

x) P.W.2 has not properly explained the mode and manner of assault/ occurrence which creates serious doubt about the prosecution version.

xi) P.W.1 is not reliable and trustworthy. P.W.8 is also totally unreliable, as at the time of occurrence, she was aged about 9 years.

xii) Non providing copies of documents to the accused, has caused serious prejudice to them and violates the principle of fair trial.

33. In view of discussion made above, taking cumulative effect of the evidence, as discussed above, we allow this appeal and set aside the impugned judgment and order dated 15.4.2015 passed by learned Trial Judge in S.T. No. 1185 of 2001 (State Vs. Ravi Karan and others). The appellants Prakash is in jail. He be set at liberty forthwith. The appellant Ravi Karan is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged. However, the appellants are directed to make compliance of the provisions of Section 437-A, Cr.P.C. in the concerned Court below.

34. Registry is directed to transmit the original record to the concerned Trial Court forthwith for compliance of this judgment. Trial Court is obliged to intimate compliance to this Court within a month.

35. Before parting with the case, we feel it necessary, in the ends of justice to obtain a report from the District Judge,

Fatehpur informing this Court that whether or not a non judicial enquiry as has time and again been circulated by the High Court in relation to loss of judicial records, conducted and if so, its result. It is also directed that after receipt of report from the District Judge, Fatehpur, the Registrar General of this Court shall place the matter before Hon'ble the Administrative Judge concerned for appropriate orders, in case of non compliance of the various Circulars of this Court regarding loss of record.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2019

BEFORE
THE HON'BLE AJIT KUMAR, J.

MISC PETITION NO. 4968 of 2019 (CIVIL)

(Matters Under Article 227)

Shriram Educational and Charitable Trust Registered Office &Anr.
...Petitioners
Versus
Alok Swaroop & Ors. ...Respondents

Counsel for the Petitioners:
Ms. Shreya Gupta, Sri Ravi Anand Agarwal, Sri Rakesh Pande.

Counsel for the Respondents:
Sri Bipin Lal Srivastava, Sri S.K. Varma.

A. C.P.C. Order 7 Rule 11 and Section 115 – Application - Injunction of Plaint- challenged to maintainability of Suit where the Plaint is challenged on the ground that the Suit being not maintainable, it is needless to observe that the question as to whether the Suit is barred by any law, would always depend upon the facts and circumstances of the case. The averments made in pleadings are wholly immaterial while considering the prayer of the defendant for rejection of the Plaint. Even when, if the allegations shows that the Suit is barred by any law, the power under Order VII Rule 12 of C.P.C. can be exercised as the Court will rip in the bad at the therehold- therefore, it is found and manifest error of law or facts by the Court below while rejecting the application.
(Para 13, 22, 25, 27, 33, 328, 34, 35)

Case Law: -

1.Surya Dev Rai Versus Ram Chander Rai, 2003 S.C. 3044

2. Durga Prasad Versus Naveen Chandra and others J.T. 1996 (3) S.C. 564

3. U.P. Rajkiya Nirman Nigam Ltd. Versus M/S C&C constructions and anothers, 2019 (132) ALR 389

4. Smt. Shivpatti Devi and others Versus Yudhishthir Dhar Dubey and others, 2016(2) JCLR 386 (All)

5. Baldevdas Shivlal and another Versus Filmistan Distributors (India) Pvt. Ltd. and others 1969 (2) SCC 201

6. Abdul Gagur and another Versus State of Uttarakhand and others, 2008 (10) SCC 97

7. Saleem Bhai and others Versus State of Maharashtra and others 2003 (1) SCC 557

8. Madanuri Sri Rama Chandra Murthy Versus Syed Jalal, 2017 (13) SCC 174

9. Central Provident Fund Commissioner, New Delhi and others Versus Lala J.R. Education Society and others 2016 (14) SCC 679 (E-2)

(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Sri Rakesh Pande, learned Senior Counsel assisted by Ms. Shreya Gupta, learned counsel for the petitioner

and Sri S.K. Varma, learned Senior Counsel assisted by Sri Bipin Lal Srivastava, learned counsel for the contesting respondents and learned Standing Counsel for the State.

2. By invoking the power of superintendence of this Court under Article 227 of the Constitution of India, the petitioner has questioned the propriety and legality of the order passed by the Additional Civil Judge (Senior Division), Court No.4, Muzaffarnagar dated 13th May, 2019 in rejecting the application of the petitioner bearing Paper No.- 43-C filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'C.P.C.').

3. Briefly stated the facts of the case are that the contesting respondents and the petitioner entered into the some agreement whereunder the premises in question were leased out on rent to be paid as per the terms and agreement reached between the parties. It appears that there arose some dispute regarding dues of rent and consequently arrears which the plaintiffs-respondents claimed to have remained unpaid for long compelling them to institute a suit seeking a relief for recovery of dues in terms of rent as well as interest thereupon for delayed payment. The suit was instituted on 16th October, 2018 and was registered as O.S. No.- 575 of 2018. From the perusal of relief clause of plaint it transpires that a sum of Rs.22,51,565/- was claimed towards arrears of rent accrued between 1st April, 2017 and 30th June, 2017 and also 1st April, 2016 and 31st August, 2016 and further a sum of Rs.11,96,970/- was claimed as interest thereupon. It transpires that subsequently the contesting respondents came to institute another suit bearing O.S. No.- 670 of 2018 that was registered on 7th December, 2018 and this time a sum of Rs.16,44,940/- were claimed towards the arrears of rent and further a sum of Rs.5,82,987/- were claimed towards the interest for the period between 1st July, 2017 and 31st October, 2017. Both the suits were filed as summary suits under Order XXXVII read with Section 151 of C.P.C.

4. The petitioners who were defendant in both the suits filed an application under Order VII Rule 11 of C.P.C. in O.S. No.- 674 of 2018 taking the plea that suit was clearly barred by law in terms of the Order XXXVII Rule 2 sub-rule 1-B of C.P.C. in the first instance and further the second suit would be barred for the relief which could have been claimed under the first suit and the petitioner having chosen not to seek such relief in the said earlier suit, the suit was barred under Order 2 Rule 2 of C.P.C. in the light of the U.P. amendment.

5. The argument advanced by the learned counsel for the petitioner is that the suit under Order XXXVII is maintainable in the event any of the conditions prescribed for under Rule 2 are met and according to him, Rule 2 (I) is attracted in the present case as the claim is sought to be set up on the basis of the written lease agreement reached between the parties. In order to correctly appreciate the controversy, learned counsel for the petitioner has drawn the attention of the Court towards paragraph 8 of the plaint in which it has been stated that there was a lease agreement reached between the parties on 29th June, 2010 and according to which either Rs.1,00,000/- or an amount equivalent to 30% of the receipts obtained in the name

of tuition fee/ admission fee etc., whichever higher, was to be paid as lease rent but at the same time, vide paragraph 12 of the plaint the amount of dues towards the lease rent were sought to be enhanced and claimed on the basis of the some admission made by the present petitioner in Writ-C No.- 15061 of 2018 and, therefore, it is argued that this stand taken in the plaint cannot be a ground to institute a suit for recovery of rent and arrears as a summary suit under order XXXVII of C.P.C. He further argued that this paragraph coming in the plaint has been made the basis of the relief ultimately claimed in the suit.

6. On the point of Order 2 Rule 2 of C.P.C., Mr. Pande has sought to urge that in view of the earlier suit filed by the present plaintiff-defendant registered as O.S. No. 575 of 2018, wherein the claim was set up for arrears of rent of different stages, would have covered the stage for which the decree for recovery of rent in the present suit has been prayed for but the plaintiff having not done so, it would amount to relinquishment of claim on the part of the plaintiffs and therefore, the suit was clearly barred by Order 2 Rule 2 of C.P.C. He submits that there is an admission of the plaintiffs themselves, as has come to be recorded in the order, that the claim for the dues towards the rent in the second suit was from 1st July, 2017 to 31st October, 2017 whcih included the period of 1st April, 2017 till 30th June, 2017 claimed in the earlier suit and, therefore, it is argued that the period would have been included in the earlier suit filed on 16th October, 2018.

7. Thus, according to him and in view of the submissions so advanced and the pleadings raised by the respondent-plaintiff in the plaint, the plaint in the suit bearing O.S. No.- 670 of 2018 was liable to be rejected.

8. *Per contra*, Sri S.K. Varma, learned Senior Advocate has vehemently urged that the present petition under Article 227 of the Constitution, was not maintainable as the proceedings under Order VII Rule 11 of C.P.C. are independent proceedings and dismissal of the application in the said order amounts to termination finally of the proceedings relating to the maintainability of the suit and, therefore, the revision would lie in court below and not the petition under Article 227 of the Constitution.

9. Learned Counsel for the petitioner for this purpose has placed heavy reliance upon the judgment of the Apex Court in the case of **Surya Dev Rai v. Ram Chander Rai, 2003 SC 3044** and the judgment of the Apex Court in the case of **Durga Prasad v. Naveen Chandra and others, JT 1996 (3) SC 564.**

10. Besides above, Sri Varma argued that ground of challenge to plaint are basically institutional in nature and the suit otherwise not being barred taking the plaint in its entirety, Order VII Rule 11 application was rightly rejected.

11. Countering the above argument of preliminary objection raised by the learned Senior Counsel, Sri Pande appearing for the petitioners has placed reliance upon two judgments of this Court: *firstly*, in the case of **U.P. Rajkiya Nirman Nigam Ltd. v. M/s. C & C Constructions and another, 2019 (132) ALR 389** and the judgment in the case of **Smt. Shivpatti Devi and others v. Yudhishthir Dhar Dubey and others, 2016 (2) JCLR 386 (All).**

12. Having heard learned counsel for the parties and their respective arguments advanced across the Bar and having gone through the pleadings available on record from the judgments cited by the parties, I would like to deal first with preliminary objection raised by Sri Varma, learned Senior Counsel.

13. The judgment cited by the learned counsel for the petitioners, in the case of **U.P. Rajkiya Nirman Nigam (supra),** chiefly deals with the powers of High Court under Section 115 of C.P.C. and Article 226 of the Constitution. The question with regard to the argument advanced as preliminary objection, in my considered opinion, has not been dealt with in the said judgment. So far the jurisdiction in terms of judicial discretion under Article 227 of the Constitution even while the power lies with Court sitting in revision, I would come to deal with a little later. Insofar as the judgment in case of **Smt. Shivpatti Devi (supra)** is concerned, in the said case the Court declines to interfere in civil revision on the ground that the question raised in the application under Order VII Rule 11 of C.P.C. involved mix question of fact and law which could not have been decided at the preliminary stage and, therefore, it was held that there was no failure of justice if the impugned order was to sustain and if the order sustained it would not dispose of finally any suit or proceedings.

Durga Prasad (supra)

14. From a bare reading of the aforesaid judgment it is clear that the Court refused to interfere in the revision petition in the said case in exercise of power in the revision itself on merits instead of holding that revision was not maintainable and, therefore, the judgment is also of no help to the petitioner.

15. Coming to the judgment cited by Sri Varma, learned Senior Counsel, in the case of **Durga Prasad** (supra), the Court in the said case dealt with order against the dismissal of the order 9 Rule 13 application. The writ petition was filed instead of revision petition and the Court held that the order was not appealable under Order 43 Rule 1 read with Section 104 of C.P.C. but still a revision would be maintainable. Vide paragraph 3 of the said judgment the Apex Court held thus:-

"3. On the last occasion when the matter had come up for admission, we had asked the learned counsel as to how the writ petition is maintainable in the circumstances. The learned counsel sought for and the matter was adjourned. Thus it has come up today. The appellant's counsel contended that three remedies are open to the appellant under the CPC, namely, right of appeal under Section 96 or appeal under Order 43 read with Section 104 or a revision under Section 115 CPC. In view of the fact that the matter does not come within the four corners of any of the three remedies, the appellant is left with no other remedy except approaching the High Court under Article 226. It is true that the impugned order is not appealable one either under Section 96 or under Order 43 Rule 1 read with Section 104 CPC. But still a revision would be maintainable and whether the order could be revised or not is a matter to be considered by the High Court on merits. But instead of availing of that remedy, the appellant has invoked jurisdiction under Article 226 which is not warranted and the procedure prescribed under C.P.C. cannot be bye-passed by

availing of the remedy not maintainable under Article 226. Under these circumstances, we decline to interfere with the order. It is open to the appellant to avail of such remedy as is open under law."

16. The next judgment cited is the case of **Surya Dev Rai (supra), Sri Varma,** learned Senior Counsel, has placed heavy reliance on paragraph 38 of the said judgment which is reproduced hereunder:-

"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are

to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

17. Placing emphasis upon point No.-9 in the conclusive paragraph 39 of the judgment, Sri Varma, submitted that the power of superintendence of the High Court has to be very sparingly exercised and the court would always relegating for remedy of revision, if available in law. I find that the Apex Court has laid emphasis on the point that the exercise of jurisdiction under Articles 226 and 227 of the Constitution cannot be tight down in a straight jacket formula. The Apex Court observed that no rigid rules can be prescribed for rendering the High Court in a state of dilemma; it observed that there may be cases were a stitch in time would save nine. It was left open for the High Court to exercise the discretion as per its own judicial conscience.

18. Considering the cope and ambit of Section 115 of C.P.C. the Apex Court in the case of **Baldevdas Shivlal and another v. Filmistan Distributors (India) Pvt. Ltd and others; 1969 (2) SCC 201** held that expression 'case' does not connote to entirely of the matter in dispute in an action and if it is interpreted as an entire proceedings and not a part of the proceedings, would impose an unwarranted restrictions on the exercise

of power of superintendence. Seeking for the Bench Justice J.L. Shah (as His Lordship then was) observed ***"A case may be said to be decided, if the court adjudicates for the purpose of suit same right or obligation of the parties in contrary ....."***

19. Learned Senior Advocate Sri Pande has sought to distinguish settled authorities with U.P. amendment to Section 115 of C.P.C. where words are 'suit or other proceedings finally decided'.

20. In order to deal with this above argument one has to understand what is suit and what could be 'other proceedings' in the in intendment of the state legislature.

21. Suit is an action to set up a claim and instituted for adjudication thereof. A suit proceeding has many stages: like registration of plaint as an action and rejection to its maintainability; framing of issues; leading of evidence, calling for reports and contesting issues of fact etc. The argument is that if application is allowed under Order VII Rule 11 rejecting the plaint it amounts to termination of the suit itself and such an order is revisable but rejection of application would not fall in the category of termination of 'other proceedings'. This argument does not appeal to reason. 'Other proceedings' would certainly mean proceedings where suit is on with registration of suit and issuance of summons.

22. Now in order to test the present case in the light of the legal position discussed above it is first necessary to examine as to what is the nature of the order if passed in terminating the proceedings either way, under Order VII Rule 11 of C.P.C. In order to appreciate the legal position, the provisions as contained under Order VII Rule 11 of C.P.C. are reproduced hereunder:-

"11. Rejection of plaint.- *The plaint shall be rejected in the following cases:-*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, failed to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

23. From the bare reading of the aforesaid provisions it clearly transpires that where the plaint is challenged on the ground that the suit being not

maintainable, it turns out to be an independent point in issue at the preliminary stage to deal with maintainability of the suit. Once an application under Order VII Rule 11 of C.P.C. comes to be allowed, the suit proceedings automatically stands terminated and the point stands decided in favour of the defendant raising objection. Why one should be forced to undergo a long hectic and burdensome procedure under civil law, if the very plaint at the threshold deserves rejection. Keeping this object in mind the Legislature conceived a proceeding under Order VII Rule 11 in C.P.C. before taking off a suit proceeding.

24. Thus, for the purposes of plaint case, every suit proceedings stands terminated with the rejection of the plaint and the order attains finality in respect of the plaintiff, who wants to pursue the suit seeking appropriate relief as claimed for. However, in case if the application under Order VII Rule 11 is rejected then for the purposes of defendant the point stands finally determined and the plea of maintainability of the suit comes to be rejected against him. In either of the situation, the order amounts to a case to determine terminating in the proceedings of that stage in terms of U.P. amendment with the Central Act and, therefore, the revision under Section 115 C.P.C., would be maintainable.

25. So what the testing anvil is that a proceeding if instituted on a miscellaneous application should be concluded with its disposal by an order after due adjudication. Such proceedings would amount to the word and expression 'other proceedings'. In view of the above what I have held in foregoing paragraphs of this judgment, emerges out to be legal position that an order rejecting application under Order VII Rule 11 of C.P.C., is therefore, held to be an order revisable under Section 115 of C.P.C.

26. The judgment in **Surya Dev Rai** *(supra)* is also a complete answer to the question of exercise of power of superintendence under Article 227 even while the remedy of revision is availability. Invoking jurisdiction of this Court under Article 227 should not be left open to exercise the option to apply for such relief ordinarily but where the Court finds sending back for revision would only amount to killing time and this Court can examine the exercise of jurisdiction by a Court sub-ordinate to it, on legal pleas, this Court can always exercise jurisdiction of superintendence. In the case like the present one where the issue is of maintainability of suit and plaint is to be tested on yardstick of clauses provided for under Order VII Rule 11 C.P.C., this Court looking to the plaint case easily examine whether jurisdiction has been properly exercised by the trial court and if upheld would not result in any miscarriage of justice. So, the issue I had earlier referred to be dealt with later, stands answered in favour of the petitioner for maintainability of this petition.

27. In view of the above, in my considered opinion, while the revision would be maintainable against the order passed under Order VII Rule 11 of C.P.C., in the given facts and circumstances of the present case, it would be a futile exercise to remit the matter to avail alternative remedy of revision besides sheer wastage of time. It would be cumbersome for the petitioner to relegate him to the remedy of revision in the facts and circumstances of the case. Accordingly, I proceed to consider and

decide this petition under Article 227 of the Constitution.

28. Insofar as the application under Order VII Rule 11 of C.P.C. is concerned, litigant has to bear in mind that objection can be of two categories: ***one institutional objection; and the other one relating to the maintainability of the suit itself as being barred by law.***

29. So far as the first category of objection is concerned, it permits the trial of the suit as it relates to the issues involved in the suit where a point needed determination as a point involving mixed question of law and facts and so far second category of the objection is concerned, it goes to the very root of the matter and if the Court, from a bare reading of plaint, can come to conclude that not only the plaint does not disclose any cause of action but also the suit is barred by any law and its continuance would hit the very jurisdiction of court, it would reject the plaint at the very threshold.

30. In the case in hand the suit has been instituted for recovery of arrears of rent and interest thereupon and the plea taken in the plaint is that in spite of the agreement reached between the parties, the defendant-petitioner fails to pay the rent and thus arrears have accrued. From the entire pleadings as have come to be raiseed in the plaint which has been entertained and the suit has been instituted as a summary suit, I find that the plea taken is that the defendants are arrears of rent. The defendants-petitioners have not denied agreement between the parties and their status as a lease holder under the lease agreement. This being the fact situation, the question would be how the arrears have accrued and whether the claim set up is right or wrong. This, in the considered opinion of the Court, is a pure question of fact emerging out of an agreement and conduct of affairs by the parties. The question whether plea taken in paragraph 12 is legally sustainable or not and would result in the claim not arising out of agreement and so consequently resulting it being held not maintainable for the relief claim, is a mixed question of law and fact. Similarly, the question whether the earlier suit and the pleadings raised therein amounted to relinquishment of the rights for the period recovery of rent having not been claimed in the said suit and, therefore, subsequent suit would be clearly barred under Order 2 Rule 2 of C.P.C. is also a mixed question of fact and law and needed to be adjudicated upon. At this stage, this Court may not ignore that statute does not bar a suit of this kind where arrears of rent and interest thereupon are claimed by landlord/ lessor from the tenant/ lessee but the question whether such a suit would be maintainable under Order XXXVII or not considering the plea taken in the plaint and defence set up against it and whether such a suit is also barred by Order 2 Rule 2 of C.P.C. considering the claim made in the earlier suit by the same plaintiff against the same defendant, is all to be determined by the trial court after framing the issues and, therefore, in the considered opinion of the Court, these are the institutional objections and required to be adjudicated upon after the issues are framed and the parties lead evidence.

31. The argument advanced by Sri Rakesh Pande, learned Senior Counsel appearing for the petitioner that there has been concealment of the material fact regarding earlier filing of the suit and

there have been mis-statements of fact in the plaint regarding obligation upon the petitioner to pay the rent and its amount would be taken into account while considering an application under Order VII Rule 11 of C.P.C., cannot be accepted. The legal position as has emerged from the series of judgment of the Apex Court is that the Court has to examine only the plaint i.e. the pleadings raised and the relief claimed for. In the case of **Abdul Gafur and another v. State of Uttarakhand and others; 2008 (10) SCC 97** vide paragraphs 16, 17, 18 and 19 the Apex Court has held thus:-

"16. Section 9 of the Code provides that civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on (1977) 4 SCC 467 other Tribunal or Authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.

17. In Smt. Ganga Bai Vs. Vijay Kumar &Ors.4, this Court had observed as under:

"15. ..... There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at ones peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit."

18. In Dhannalal Vs. Kalawatibai &Ors.5 relying on the afore-extracted observation in Ganga Bai's case (supra), this Court had held as follows:

"23. The plaintiff is dominus litis, that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with (1974) 2 SCC 393 (2002) 6 SCC 16 the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law."

19. ***It is trite that the rule of pleadings postulate that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7, Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil court has to be considered having regard to the contentions raised in the plaint.*** *For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed de'hors the factual averments made in the plaint. (See: Church of North India Vs. Lavajibhai Ratanjibhai &Ors.6) (2005) 10 SCC 760."*

(emphasis added)

32. In the case of **Saleem Bhai and others v. State of Maharashtra and others; 2003 (1) SCC 557** vide paragraph 9 the Apex Court has held thus:-

"9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit- before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects."

33. In the case of **Madanuri Sri Rama Chandra Murthy v. Syed Jalal, 2017 (13) SCC 174** vide paragraph 7 the Apex Court has observed thus:-

*"7. The plaint can be rejected under Order VII Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII Rule 11, CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order VII Rule 11, CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. I**t is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII Rule 11 of CPC can be exercised.** If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."*

(emphasis added)

34. Further, I find support in my observations regarding the present case being one of the cases where only institutional grounds have been taken and needed determination/ adjudication by the Court in the suit, from the judgment by

the Apex Court in the case of **Central Provident Fund Commissioner, New Delhi and others v. Lala J.R. Education Society and others; 2016 (14) SCC 679** in which while considering on the merit of the application under Order VII Rule 11 of C.P.C. the Court observed that the plaint has to be seen and nothing else. Vide paragraphs 3, 4 and 5 of the said judgment the Court has held thus:-

"3. On an application filed under Order VII, Rule 11, CPC, the Civil Court can only see the pleadings in the plaint and not anything else including written statement.

4. The main grievance urged in the plaint is that the procedure under the Act has not been followed and, therefore, the appellants are entitled to file a suit. If that be so, the plaintiff is entitled to file a suit, as held by this Court in the case of Dhulabhai and Others Vs. The State of Madhya Pradesh and Anr. reported in (1968) 3 SCR 662.

5. According to the appellants, the respondents have suppressed crucial facts in the plaint, which if seen, the suit is only to be dismissed at the threshold. Rejection of a plaint on institutional grounds is different from dismissal of a suit at pre-trial stage on the ground of maintainability. For dismissal on a preliminary issue, the Court is entitled and liable to look into the entire documents including those furnished by the defendant."

35. Thus, applying the above law to the facts of the present case, I do not find any manifest error of law or facts in the order passed by the court below while rejecting the application under Order VII Rule 11 of C.P.C. Equally, I do not find any flaw in exercise of jurisdiction of the trial judge in passing the order impugned nor, I find any likelihood of miscarriage of justice if suit is tried on merits including the issue of maintainability or institution of suit. I, therefore, decline to interfere with the order passed by the trial judge rejecting application under Order VII Rule 11 C.P.C.

36. Since the crucial question of maintainability of plaint case under Order XXXVII of C.P.C. and maintainability of the second suit on the ground of Order 2 Rule 2 has come to be raised, in my considered opinion, those points can be considered and disposed of as preliminary issues as far as O.S. No.- 670 of 2018 is concerned.

37. Learned counsels appearing for the plaintiffs-respondents also does not dispute the above question being decided afresh as preliminary issues.

38. Accordingly, I dispose of this petition with the following directions:-

(A). Either of the parties shall appear before the court below and shall place before the trial court a misc. application along with certified copy of this order praying for framing of those two issues as observed hereinabove and the court below shall frame those two issues as preliminary issues and shall first decide the same before proceedings further in the suit on merits.

(B). With the framing of the issues parties shall be permitted to lead evidence in support of their claim and shall be heard in so far as preliminary issues are concerned.

39. The issues shall be disposed of as expeditiously as possible preferably

within a period of three months from the date of production of certified copy of this order.

40. It is further provided that above time period is being fixed only on the undertaking by the parties through their respective counsels that they will not seek unnecessarily adjournment in the case except for compelling circumstances.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2019

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

Matter Under Art. 227 No. 1181 of 2019
With Writ -C NO. 3990 of2018

Piyush Bhattacharya &Anr. ...Petitioners
Versus
Samaj Sangathan&Anr. ...Respondents

Counsel for the Petitioners:
Sri Udai Chandani.

Counsel for the Respondents:
Sri Adarsh Kumar, Sri Brijesh Ojha, Sri P.N. Saxena

A. Limitation Act, 1963 – Section 5 and Municipal Corporation Act, 1959. When substantial justice and technical considerations are pitted against each other, cause of – substantial justice deserves to be preferred – the present-petitions stands allowed.

Challenge to – Application Under Section 5 of The Limitation Act – in this instant petition there is an inordinate delay i.e. of 33 years-rejection of Application Under Section 5 of The Act- by small causes Court-The same has been restored and affirmed Appellate Court because it is the sufficiency of the cause and not the number of the days, which is material for the purpose of consideration of application Under Section 5.

(Para 23, 24, 25, 26, 27, 29) (E-2)

(Delivered by Hon'ble Vivek Kumar Birla J.)

1. Heard Sri Udai Chandani, learned counsel for the petitioners, Sri P.N. Saxena, learned Senior Counsel assisted by Sri Adarsh Kumar, learned counsel for the respondent and Sri Brijesh Ojha, learned counsel appearing for the respondent no. 2.

2. Present petition has been filed for setting aside the order dated 2.2.2019 passed by Additional District & Session Judge, Court No. 10, Varanasi in Mutation Second Appeal No. 2 of 2019 (Bhola Nath Bhattacharya and others vs. Samaj Sangthan & another) as well as order dated 30.11.2018 passed by Judge Small Causes Court, Varansi in Misc. Mutation Case No. 75 of 2013 (Samaj Sangthan vs. Bhola Nath Bhattacharya).

3. The writ petition being Writ Petition No. 3990 of 2018 has been filed for setting aside the order dated 8.9.2017 passed by Additional District Judge, Court No. 14, Varanasi in Mutation Appeal No. 133 of 2014 (Samaj Sangathan vs. Nagar Nigam and others).

4. Both the parties agree that in view of the filing of this leading petition the connected petition has become infructuous. They also agree that in any case decision of leading petition would govern the fate of the connected petition.

5. Before proceeding further it would be appropriate to quote the detailed order passed by this Court on 2.4.2019, which contains necessary facts and the arguments broadly made by learned counsel for the parties at the initial stage. The said order is quoted as under:-

"The present application is directed against the order dated 2.2.2019 passed by Additional District and Sessions Judge, Court No.10, Varanasi in Mutation Second Appeal No.2 of 2019, invoking jurisdiction under Article 227 of the Constitution of India.

The categorical submission of learned counsel for the petitioner is that the appeal under section 472 of the Municipal Corporation Act,1959 filed by respondent no.1 namely Samaj Sangathan through SAnr.akshak Dilip Kumar Yadav, son of Satya Narain Yadav against the order dated 6.4.2013 rejecting the complaint filed by Sri Parthjeet Sen Gupta, Pradesh Adhyaksh, Samaj Sangathan, Uttar Pradesh, Varanasi, was not maintainable.

The submission is that the respondent no.1 being a complainant, is an outsider to the proceeding in the matter of mutation of name of the petitioners on the disputed property i.e House No.D-47/236 Ramapura, Varanasi. The submission is that the property in dispute admittedly belonged to Yogendra Nath Bagchi, who was original owner and the petitioners/appellants are claiming their right through Pulin Behari Bhattacharya, heir of Yogendra Nath Bagchi, whose name was mutated in the Municipal record as owner of the disputed property as early as on 23.10.1980.

In the complaint filed by Parthjeet Sen Gupta dated 11.1.2013, it was sought to be submitted that Sri Pulin Behri Bhattacharya got himself mutated as heir of Yogendra Nath Bagchi by fraudulent manner whereas Sri Pulin Behari Bhattacharya was one of the tenants of house in question alongwith another person named as Sri Satya Narain Yadav.

The complaint dated 11.1.2013 was rejected vide order dated 6.4.2013 passed by the competent authority namely, Nagar Ayukt, Nagar Palika, Varanasi with the observation that before mutation of name of Pulin Behari Bhattacharya, notice under section 213 of U.P. Municipal Corporation Act,1959 had been issued and no objections were received to the said notice. It was simultaneously recorded therein that the complainant had failed to file any document or material to establish that Sri Pulin Behari Bhattacharya son of late Syama Charan Bhattacharya was not the heir of Yogendra Nath Bagchi, admitted original owner of the disputed property.

It is submitted by learned counsel for the petitioner that the Mutation Appeal No.75 of 2013 has been filed by son of another tenant namely, Sri Satya Narain Yadav claiming him as Patron of Samaj Sangthan, Uttar Pradesh, i.e the respondent no.1. The submission is that the complaint was filed by Parthjeet Sen Gupta claiming himself to be the President of the Sanghthan whereas, the appeal has been filed by a person, who has no concern with the said Sanghthan. Moreover, the appeal is sought to be entertained on the alleged certificate dated 9.4.2013 given by Parthjeet Sen Gupta to certify that Mr. Dilip Kumar Yadav is a member of NGO, namely Samaj Sangathan, Uttar Pradesh as a Patron and has been working as such for a longtime. Further submission is that it has not been demonstrated by Sri Dilip Kumar Yadav who had filed appeal under section 472 of Municipal Corporation Act, namely Mutation Appeal No.75 of 2013 that he was authorized

to file the said appeal by any resolution passed by the alleged Sanghthan.

On a pointed query made by the Court, learned counsel for the respondent no.1 is not in a position to intimate the Court as to with what right or capacity, Mutation Appeal No.75 of 2013 has been filed by respondent no.1.

The status of respondent no.1 i.e as to whether it is registered Organization or not, is not known.

It is alleged that Dilip Kumar Yadav is son of the tenant Satya Narain Yadav and all proceedings are instituted at his instance. Moreover, the complainant or respondent no.1 had no right to maintain the complaint or the Mutation Appeal under section 472 of the Municipal Corporation Act' 1959.

Learned counsel for the respondent no.1 prays for and is granted ten days time to complete his instructions and file a short counter affidavit bringing on record the copy of the registration certificate of the Organization, who has filed the complaint dated 11.1.2013.

List of the office bearers and members of said Organization, if any, registered in office of the Registrar for the year 2012-13 and onwards i.e upto the date, shall also be placed before the court, the resolution of Organization to depute the appellant namely Sri Dilip Kumar Yadav son of Satya Narain Yadav to file appeal on behalf of the Sanghthan, challenging the order dated 6.4.2013, shall also be filed along with said affidavit. The copy of the complaint dated 11.1.2013 filed by Parthjeet Sen Gupta, Pradesh Adhyaksh Samaj Sanghthan U.P. be also placed on record.

The memorandum of Association and bye-laws of the Organization so as to demonstrate the activities of the said Organization shall also be brought on record. In the opinion of the Court these documents are necessary, to be examined by the court so as to know the actual motive of the complaint and appellant namely, respondent no.1 and to examine whether respondent no.1 can maintain mutation appeal under Section 472 of the Municipal Corporation Act' 1959.

As prayed, put up this matter on 12.4.2019 as fresh."

6. Case of the petitioner is that the owner of the property bearing H.No. D-47/236, Ramapura, Varanasi was one Sri Yogendra Nath Bagchi, who was having only one daughter namely Chandra Kala Devi, who was married to Shyama Charan Bhattacharya and out of the said wedlock father of the petitioners was born, namely, late Pulin Behari Bhattacharya. Father of the petitioners preferred mutation application after death of his father and mother and on 23.10.1980 in place of Yogendra Nath Bagchi the name of Pulin Behari Bhattacharya was recorded in the revenue record. Father of the petitioners died on 20.10.2012 leaving behind petitioners as legal heirs. After his death the petitioners preferred mutation application before the office of Nagar Ayukt, Nagar Nigam, Varanasi and an objection was preferred by one Sri Parthjeet Sen Gupta, President of Samaj Sangathan with the pleading that there are two tenant in the property in question, namely, Satya Narain Yadav and Pulin Behari Bhattacharya and by playing fraud

he got his name mutated in place of Yogendra Nath Bagchi showing himself as his heirs. Thereafter, Nagar Ayukt, Varanasi by a detailed order dated 6.4.2013 dismissed the objection and a categorical finding was recorded that Parthjeet Sen Gupta was unable to establish that the petitioners are not the legal heirs of Pulin Behari Bhattacharya and Yogendra Nath Bagchi. Thereafter, in a very arbitrary and illegal manner the respondent who was not even a party to Mutation Case No. D-1015/12/M as well as Mutation Case No. D-973/12/M and neither he filed any objection to the mutation application preferred by the petitioners before the Nagar Ayukt, straightway preferred a mutation appeal against the order dated 6.4.2013 before the Judge Small Causes Court, which was registered as Mutation Appeal No. 75 of 2013 bearing paper no. 4-Ga. Alongwith memo of appeal the respondent also filed a delay condonation application supported with affidavit bearing paper no. 5-Ga and 6-Ga in which it was prayed before the learned appellate court to condone the delay and recall the order dated 6.4.2013 as well as 23.10.1980. The petitioners preferred objection supported with affidavit bearing paper no. 16-Ga and 17-Ga to the delay condonation application preferred by the respondent and prayed before the learned appellate court to dismiss the mutation appeal preferred by the respondent on the ground of laches as the order which has been challenged is of 23.10.1980 and 6.4.2013. The respondent filed replication on frivolous and vexatious grounds to the objection preferred by the petitioners without there being any material evidence to demonstrate any illegality relating to mutation of the name of the petitioners. It is alleged that the respondent as well as Parthjeet Sen Gupta are hand in gloves as the respondent is the Patron of the N.G.O., namely Samaj Sangathan and Parthjeet Sen Gupta is the President of the said Sangathan and the said fact will be quite clear from the bare perusal of the letter dated 9.4.2013 on the letter pad of the Sangathan. On 22.8.2014 the mutation appeal no. 75 of 2013 was dismissed with cost of Rs. 5,000/- by the learned Judge Small Causes Court in which a categorical finding has been recorded that the respondent has preferred the present petition against the order dated 23.10.1980 i.e. about after 33 years and the same is unexplained by the respondent, therefore, the delay cannot be condoned by the learned court and hence the delay condonation application was dismissed with cost of Rs. 5,000/-. Against the order dated 22.8.2014 second appeal no. 133 of 2014 was preferred by the respondent before the District Judge, Varanasi supported with affidavit bearing paper no. 4-Ka and 6-Ka. The petitioners preferred an objection in the second appeal in which categorical assertions were brought on record. The respondent filed replication on untenable grounds without explaining the delay to the objection preferred by the petitioners on 6.10.2015. In between an amendment application was filed by the respondent on 5.5.2016 with the prayer to incorporate father of the respondent namely Satya Narain as a party as he was the tenant of the property in question. The petitioners strongly objected to the amendment application and has specifically stated that in the mutation case there is no requirement of impleading any party who has no concerned relating to the property in question as the same is a summary proceeding. The petitioners also brought on record before the learned appellate

court the copy of the judgment dated 24.9.2015 passed by this Hon'ble Court by means of an affidavit to demonstrate the fact that the father of the petitioners was the owner of the property in question and the father of the respondent was evicted from the same in compliance of the order passed by this Hon'ble Court. The amendment application of the respondent was dismissed by the learned court below by a detailed and reasoned order. The court below without appreciating the material evidence on record relating to delay of 33 years set aside the order dated 22.8.2014 and remanded back the matter before the learned court below for again consider the issue of delay at the earliest. The petitioner preferred Writ Petition No. 3990 of 2018 challenging the order dated 8.9.2017 passed by Additional District Judge, Court No. 14, Varanasi in Mutation Appeal No. 133 of 2014. Thereafter, during pendency of the aforesaid petition the Judge Small Causes Court heard the parties and allowed the application under Section 5 of the Limitation Act vide order dated 30.11.2018. Against the order dated 30.11.2018 the petitioners filed detailed Mutation Appeal No. 2 of 2019. The mutation appeal preferred by the petitioners was dismissed vide order dated 2.2.2019 without recording any finding relating to the submissions and grounds raised by the petitioners.

7. Submission is that both the courts below committed manifest error of law in deciding the title by exceeding the jurisdiction vested under law and allowing the delay condonation application against the provision contained under the Limitation Act; the orders passed by the court below are in utter disregard of the judgment pronounced by the Hon'ble High Court as well as by the Hon'ble Apex Court relating to the ground of limitation; learned court below committed manifest error of law while passing the order dated 8.9.2017 as in the second appeal the order dated 6.4.2013 and 21.5.2013 was never challenged and ignoring the said fact as well as the other material evidence the impugned order has been passed; there is violation of the provisions of Section 213 of U.P. Municipal Corporation Act, 1959 by the respondents and the court below ignoring the said fact passed the impugned order which is unjustified and illegal; the fact remains that against the order passed by the Hon'ble High Court the respondent preferred S.L.P. before the Hon'ble Supreme Court which was dismissed and the respondent vacated the premises belonging to the petitioners in compliance of the order passed by the Hon'ble High Court; the delay in filing the appeal as well as the objection has not been established by the respondent from any documents whatsoever; bare perusal of the amendment application would disclose that the respondents have admitted the fact that his father was the tenant of the property in question and was evicted by the order of a competent court from the disputed property of whom the owners are the petitioners; the names of the petitioners were duly mutated in the Nagar Nigam register and the same is in existence till today; the petitioners are having the peaceful possession and title on the property in question till today; there is an inordinate delay of more than 36 years which has not been explained by the respondent in challenging the order of mutation; no evidence whatsoever has been brought by the respondents to demonstrate that the petitioners are not the legal heirs of Yogendra Nath Bagchi

and Pulin Behari Bhattacharya; and the appeal preferred by the respondent is not maintainable from the very inception as the objection before the Nagar Ayukt was preferred by Parthjeet Sen Gupta and not by Dilip s/o Satya Narain as is evident from the material evidence on record and hence he has no locus to challenge the order as he has no right, title or interest in the property.

8. Learned counsel for the petitioner has placed reliance on judgments in the cases of **Smt. Nirmala Devi and others vs. Upper Commissioner, Nagar Nigam, Allahabad 2011 (8) ADJ 385, Kanhaiya Lal and others vs. District Deputy Director of Consolidation, Pratapgarh and others 1974 All LJ 552, Gauhar Ali vs. Municipal Corporation, Malviya Road, Raipur (C.G.) 2017 (1) CGLJ 77, Moti Ram vs. Shiv Saran 2003 (1) JKJ 801, Girraj Prasad vs. State of Rajasthan and others 2013 (3) WLC 526, State of Nagaland vs. Lipok AO and others AIR 2005 SC 2191, Sohan vs. Abdul Hameed Khan AIR 1976 All 159, Oriental Aroma Chemical Industries Ltd. vs. Gujarat Industrial Development Corporation and another 2010(5) SCC 459, Pundik Jalam Patil (D) by Lrs vs. Ex. En. Jalgaon Medium Progject and another 2008 (6) All MR 954, State of U.P. vs. Dhampur Sugar Mills Ltd. 2013 (98) ALR 434, Adi Pherozshah Gandhi vs. H.M. Seervai, Advocate General of Maharashtra, Bombay 1971 AIR (SC) 385, Hari Shankar Kushwaha and others v. State of U.P. thru Secretary Revenue Deptt., Lucknow and others 2019 (139) RD 521, Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others 1987 AIR (SC) 1353, Ram Kumar Goyel and others vs. Bhuwan Singh Pradhan AIR 2007 Sik 39, Mahesh Yadav and another vs. Rajeshwar Singh and others 2009 AIR (SCW) 218 and B.R. Mallikarjuna vs. Smt. D. Geetha 2016 (2) ICC 24.**

9. According to the respondent, both the petitions have arisen on account of grabbing of public property by committing fraud. The dispute relates to House No. D-47/236 Ramapura, Varanasi whose real owner was Yogendra Nath Bagchi who died intestate on 1.3.1990. This house was purchased by the said Yogendra Nath Bagchi on 2.2.1938 in an auction sale. Father of the petitioners late Pulin Behari Bhattacharya was tenant in the house in dispute hence, Pulin Behari Bhattacharya without consent or knowledge of Yogendra Nath Bagchi moved an application dated 18.4.1980 without annexing any death certificate of Yogendra Nath Bagchi alleging that he died in the year 1929 in Chatgaon and claiming himself to be the son of one Chandra Kala Devi, who had also died in the year 1953 in Chatgaon without any proof or succession certificate and death certificate got his name mutated in a collusive manner as owner of House No. D-47/236, Ramapura, Varanasi. When this fact came to the knowledge of fraudulent grabbing of property by late Pulin Behari Bhattacharya, Sri Parth Sen Gupta, President of Samaj Sangathan moved a complaint disclosing the fraudulent grabbing of public property by late Pulin Behari Bhattacharya to ADM City, Varanasi for fraudulent mutation. The above complaint was investigated by the Additional City Magistrate, Varanasi and finding fraud in the matter referred the complaint for an enquiry regarding the fraudulent succession of late Pulin Behari Bhattacharya to Municipal Commissioner,

Varanasi by its Administrative Order dated 17.1.2013. The Municipal Commissioner, Varanasi rejected the complaint by its Administrative Order dated 6.4.2013.

10. Crux of the submissions of learned counsel for the respondents is that hence, both the petitions arisen out of mutation proceedings by fraudulently grabbing property by late Pulin Behari Bhattacharya and for the reason highlighted above the property in dispute devolve upon the heirs of true owners and in absence of any heir to succeed it will vest in the state and hence, it is a case of grabbing of public property by fraudulent means.

11. Learned counsel for the respondent has placed reliance on judgments in the cases of **A.A. Gopalakrishnan vs. Cochin Devaswom Board and others 2007 (7) SCC 482, A.V. Papayya Sastry and others vs. Govt. of A.P. and others 2007 (4) SCC 221, State of A.P. and another vs. T. Suryachandra Rao 2005 (6) SCC 149, Ram Chandra Singh vs. Savitri Devi and others 2003 (8) SCC 319, Indian Bank vs. Satyam Fibres (India) Pvt. Ltd. 1996 (5) SCC 550, S.P. Chengal Varaya Naidu (dead) by Lrs. vs. Jagannath (dead) by Lrs and others 1994 (1) SCC 1 and Raj Kumar Bhatia vs. Subhash Chander Bhatia 2018 (2) SCC 87.**

12. I have considered the rival submissions and have perused the record.

13. Before proceeding further, from the case of the respondents, it is, therefore, clear that the respondents is not claiming any right or title over the property in question and only claim is that the petitioners are grabbing the public property by playing fraud.

14. It is not in dispute that names of the petitioners have already been mutated in the municipal records. It is also not in dispute that present proceedings are arising out of the mutation proceedings in respect of house no. D-47/236 Ramapura, Varanasi. It is not in dispute that initially one Yogendra Nath Bagchi was the owner of the house in question. Father of the petitioner Pulin Behari Bhattacharya s/o late Shyama Charan Bhattacharya sought mutation of the house in question in his favour claiming that daughter of Yogendra Nath Bagchi, namely, Chandrakali Devi was his mother. He is claiming that Yogendra Nath Bagchi died in Chittagong (now in Bangladesh) in the year 1929 and Chandrakali Devi, his mother died in 1953 and his father Shyama Charan Bhattacharya died in 1932. Thereafter, he applied for mutation of the house in question in his favour on which a notice dated 10.09.1980 under Section 213 of the Act was issued to which no objection was filed by anyone and thereafter the name of Pulin Behari Bhattacharya, father of the petitioners was mutated on 23.10.1980. Pulin Behari Bhattacharya died on 20.10.2012. Thereafter, the petitioners applied for mutation in their name on the basis of registered Will executed by their father Pulin Behari Bhattacharya. On this mutation application dated 30.01.2013 notice under Section 213 of the Act was issued but was suspended as a dispute was raised by complainant Parthjeet Sen Gupta claiming himself to be the Adhyaksha of Samaj Sangathan Uttar Pradesh. A complaint was filed on the ground that in the house in question there

were two tenants one is Satya Narayan Yadav and another is Pulin Behari Bhattacharya, father of the petitioners but by playing fraud claiming himself to be the legal heir of Yogendra Nath Bagchi, late Pulin Behari Bhattacharya got his name mutated. It is because of this complaint the mutation proceedings initiated on the application submitted by the petitioner were stayed. This complaint was decided and rejected by the Nagar Ayukt vide order dated 06.04.2013. In this order it was found by the Nagar Ayukt that a due notice was given under Section 213 of the Act before mutating the name of Pulin Behari Bhattacharya and, therefore, there is no illegality in the order of mutation dated 30.10.1980 hence, the complaint was rejected. It is pertinent to note that earlier complaint was filed by Parthjeet Sen Gupta claiming himself to be the Adhyaksha of one Organization, namely, Samaj Sangathan Uttar Pradesh, however, the Mutation Appeal No. 75 of 2013 was filed by Samaj Sangathan Uttar Pradesh through its SAnr.akshak (patron) Dilip Kumar. The memo of appeal filed under Section 472 of the Nagar Nigam Adhiniyam is Annexure-3 of the petition. A perusal of page 35 of the appeal disclosed that the name of father of Dilip Kumar, who claims himself to be the SAnr.akshak of the organization has not been disclose. A perusal of the memo of appeal further reflects that it has not been disclosed in the appeal that father of Dilip Kumar was infact Satya Narayan Yadav who was admittedly a tenant in the house in question. This appeal was filed with a delay condonation application. This fact becomes important inasmuch as there had been a litigation between Pulin Behari Bhattacharya and Satya Narayan Yadav and ultimately Writ A No. 25254 of 1991 (Pulin Behari Bhattacharya vs. ADJ and others), wherein Satya Narayan Yadav was admittedly respondent no. 3 as reflected from perusal of Annexure-14 to the petition, which is a judgment passed by this Court on 24.09.2015 in the aforesaid case setting aside the order dated 23.8.1991 passed by 8th Additional District Judge, Varanasi in Revision No. 50 of 1990 (Satya Narayan Yadav and another Vs. Additional District Judge (Civil Supply)/Rent Control and Eviction Officer, Collectorate, Varanasi. The writ petition was allowed and the release order in favour of the petitioner dated 25.05.1988 was restored. Thus, status of father of Dileep Kumar Yadav (respondent) is clear as a tenant of the house in question. In this respect it is also pertinent to note that Annexure-12 is an application filed under Order 6 Rule 17 C.P.C. filed by Dilip Kumar Yadav in Second Appeal No. 133 of 2014, whereby he was seeking impleadment of his father Satya Narayan Yadav as appellant no.2 and a paragraph was also sought to be added and that Satya Narayan Yadav was tenant in the house in question. It is also important to note that in paragraph 5 of the said affidavit at page 88 of the paper book it has been stated that when Satya Narayan Yadav came to know about the appeal Satya Narayan Yadav expressed his desire to implead as party in the litigation by stating that father of the petitioners was also tenant in the house in question and use to collect rent from him on behalf of Yogendra Nath Bagchi. Thus, it becomes an admitted fact that father of Dilip Kumar (i.e. Satya Narayan Yadav), who now claims to be patron of the alleged Samaj Sangathan Uttar Pradesh, admits that Pulin Behari Bhattacharya used to collect rent. It is, although, being claimed that rent was being collected on behalf of the landlord

by another tenant (i.e. Pulin Behari Bhattacharya). It may also be noticed that this application filed by Dilip Kumar under Order 6 Rule 17 CPC was rejected vider order dated 20.02.2017 (Annexure 15 to the writ petition). It is, therefore, clear that one organization namely Samaj Sangathan Uttar Pradesh, which, from perusal of the record annexed with the supplementary counter affidavit, is a society allegedly registered under the Societies Registration Act. Section 5 application filed along with the case by the contesting respondent was rejected by the Judge Small Causes Court vide order dated 22.08.2014 clearly holding therein that the application was given after about 33 years by Samaj Sangathan (a registered society) on the ground that the order was not known to the Sangthan. The locus of the Samaj Sangthan was not at all established or clarified. The application was dismissed with a cost of Rs. 5,000. It may be noticed that initially some other person has come forward to file the complaint after 33 years and now son of the earlier tenant Satya Narayan Yadav, namely, Dilip Kumar, who claims to be patron of the Samaj Sangathan further took up the matter and filed the aforesaid appeal. At the cost of repetition, it is pertinent to note that Satya Narayan Yadav, father of Dilip Kumar, who is pursuing these proceedings as per petitioners, had lost his case upto the Apex Court and the release order passed in favour of late father of the present petitioners dated 25.05.1988 was restored. The matter was further carried by the contesting respondent by filing Mutation Appeal No. 133 of 2014 challenging the order dated 22.08.2014 passed by the Judge Small Causes Court rejecting Section 5 of the Limitation Act as noticed above. The Second Appeal was allowed vide order dated 8.9.2017 setting aside the order dated 22.8.2014 passed by the Additional District Judge and the matter was remanded back to the lower court to decide Section 5 application afresh. This order was challenged by the petitioner by filing Writ Petition No. 3990 of 2018 before this court which is still pending, however, during pendency of the aforesaid petition the Judge Small Causes Court decided the application under Section 5 of the Limitation Act and allowed the same in the light of the directions given by the second appellate court vide order dated 30.11.2018. Against the same the petitioner preferred Second Appeal No. 02 of 2019 the same was rejected by the lower second appellate court on the ground that at this stage locus or maintainability of the appeal is not to be seen and this is to be considered only after hearing the appeal on merits.

15. At this stage it would also be relevant to note that vide order dated 02.04.2019 this court permitted the learned counsel for the respondent no. 1 to file a short counter affidavit bringing on record a copy of the registration certificate of the Organization, list of office bearers and members of the said Organization upto the date and resolution of the Organization to depute appellant, namely, Dilip Kumar Yadav s/o Satya Narayan Yadav to file appeal on behalf of the Samaj Sangthan challenging the order dated 06.08.2013. Memorandum of association and bye-laws of the Organization were also directed to be brought on record to demonstrate the activities of the said Organization for the purpose of examining the actual motive of the complaint and the appellant, namely, respondent no. 1 and to examine whether

respondent no. 1 can maintain mutation appeal under Section 472 of the Municipal Corporation Act, 1959. A perusal of the documents annexed with the supplementary counter affidavit indicates that on request made by Dilip Kumar Yadav on the letterhead of Samaj Sangathan Uttar Pradesh, written to the Mahanagar Adhyaksha/Upadhyaksha of Samaj Sangathan Uttar Pradesh Varanasi on the ground that he is aware of the facts of the case, therefore, he may be granted permission to look after the case, this permission was allegedly granted by Mahanagar Adhyaksha Samaj Sangthan U.P. signed by Mahanagar Upadhyaksha on 15.04.2013. This is clearly not a resolution passed by the registered society Samaj Sangathan and a perusal of Annexure-5 to the supplementary counter affidavit further indicates that the society was formed for educational purposes. It was constituted with the object of helping physically challenged person in education to make them self-dependent and to provide them vocational training. Further object is to help the helpless persons and widows by providing job oriented training and another object was to make the educated unemployed youth to do the educational work. Thus, the complaint that has been filed is not directed towards any of the objects to be achieved by the society. Further, as directed by this court the current status of organization activities and current list of members has not been annexed and document annexed as Annexure-5 to the supplementary counter affidavit is dated 24.09.1994. The alleged complaint annexed as Annexure-4 to the supplementary counter affidavit has been written by Parthjeet Sen Gupta, Upadhyaksha of the society on his letterhead and the resolution of the society for filing of such compliant on behalf of the organization has not been placed on record. Thus, the documents placed on record by respondent no.1 in support of his case do not inspire confidence and do not prove the locus of Dilip Kumar Yadav as according to Annexure-3 to the supplementary counter affidavit the object of looking after the case by Dilip Kumar Yadav is that his father was tenant in the house in question and he is aware of the facts. The aforesaid facts clearly proved that petitioner was aware of the facts regarding status of his father as tenant in the house in question. He himself has stated that Pulin Behari Bhattacharya used to collect rent of the house in question on behalf of Yogendra Nath Bagchi from Satya Narayan Yadav, who was tenant in the house in question though it has been claimed that he is used to collect rent on behalf of the earlier owner Yogendra Nath Bagchi. In this background of the case it is clear that the assertion made by respondent no. 1 and stated on affidavit by Dilip Kumar that prior to 08.05.2013 he was not aware of the order of mutation in favour of Pulin Behari Bhattacharya dated 23.10.1980 is patently false.

16. In such view of the matter I find that the Judge Small Causes Court rightly rejected the application under Section 5 of the Limitation Act filed by respondent no. 1 vide order dated 22.08.2014 by imposing cost.

17. I have gone through the judgments placed before this court by both the parties and there is no quarrel with law, therefore, I am not inclined to deal with each and every citation separately.

18. No doubt, it is the sufficiency of the cause and not the number of the days,

which is, prima facie, material for the purpose of consideration of an application under Section 5 of the Limitation Act, however, once there is an inordinate delay, which in the present case is of 33 years, and it is found that the application has been moved by a third person, who himself is not at all claiming any right, title or interest of property in question, he cannot be lightly permitted to drag other person in frivolous litigation on the ground that all such facts, without consideration of which the case cannot proceed, cannot be seen at the stage of consideration of Section 5 of the application.

19. It cannot be denied that the ultimate aim of the present litigation initiated by the contesting respondent no. 1 is to unsettle the mutation entry dated 23.10.1980, whereby in place of Yogendra Nath Bagchi name of Pulin Behari Bhattacharya, father of the petitioners, was recorded. It also cannot be disputed that without claiming any right, title or interest in the property the contesting respondent is trying to dispute the title of the petitioners in mutation proceedings, which are summary in nature. The relationship of Dileep Kumar Yadav with Satya Narayan Yadav (admittedly tenant in the house in question and who had admittedly lost upto this Court against Pulin Behari Bhattacharya) as son and father is also relevant in the present case.

20. In **Collector, Land Acquisition, Anantnag vs. Mst. Katiji (supra)** it was observed by the Hon'ble Apex Court that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. Here is a delay of about 33 years in attacking the mutation proceedings concluded in the year 1980 in accordance with law. It is a case of inordinate delay.

21. In **Vedabai @ Vaijayanatabai Baburao vs. Shantaram Baburao Patil and others JT 2001 (5) SC 608** it was observed that a distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach. It was also observed that no hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

22. In **Pundlik Jalam Patil (supra)** the Hon'ble Apex Court observed that statutes of limitation are sometimes described as 'statutes of peace'. It was further observed that an unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. This observation was made on the law already settled by the Hon'ble Apex Court. It may also be relevant to observe that even such claim for condonation of delay / limitation can be claimed by the person, who is the 'person aggrieved'.

23. In the present case the contesting respondent no. 1 is not claiming any right, title or interest in the property and his claim is that the petitioners are grabbing public property by playing fraud. This is being claimed by Dileep Kumar Yadav as patron of the respondent no. 1, whereas his father, as tenant, has lost the litigation upto this Court and the release order of the year 1980 was restored in favour of the Pulin Behari Bhattacharya as landlord

and the same was never challenged. Thus, even for the purpose of consideration of an application filed under Section 5 of the Limitation Act it has to be seen as to whether the person initiating litigation after such a long gap after 33 years is a person aggrieved or not, that too, by initiating proceedings in the name of registered society by challenging title of the petitioners in mutation proceedings, which are summary in nature, on the ground of fraud.

24. In **State of Nagaland (supra)** it was observed that if the refusal to condone the delay results in grave miscarriage of justice it would be a ground to condone the delay. In the present case, dragging the petitioners to contest the case, defending the mutation entries carried about 33 years back in the year 1980 now on a complaint / application challenging the title of the father of the petitioners in summary proceedings, would amount to miscarriage of justice.

25. It may also be noted that in all the rulings that have been relied on by learned counsel for the parties are related to a case where the agitating party, subject to correction, is claiming right, title or interest in the property in question. This is not so in the present case. Further, the judgments that have been relied on by learned counsel for the respondents are relating to fraud and was under challenge by the parties concerned and not by any stranger, and subject to correction, that too, were carried and agitated on the regular side of common civil law of the litigation and not in summary proceeding like mutation.

26. There is yet another aspect of the matter which is required to be taken note of is that it is well settled that mutation proceedings do not confer any title. It is always open to the aggrieved person to seek declaration in a court of law. Admittedly, as already noticed the contesting respondent no.1 is not claiming any right, title or interest in the property in question. His only claim is that the petitioners are grabbing the public property by playing fraud. Needless to point out that mutation proceedings are summary in nature, whereas the question of fraud is a question of fact that has to be proved by leading evidence and any such allegation can be seen under the common civil law which prevail on all other such proceedings. Thus, challenge to mutation proceedings on the ground of fraud, has to be taken into account moreso when the mutation entries were in existence for last more than 33 years.

27. In such view of the matter, I find that the learned District Judge committed a mistake in remanding back the matter to the trial court on the ground that the locus or maintainability of the appeal would be seen subsequently and cannot be seen at the time of consideration of the application under Section 5 of the Limitation Act. A perusal of the order passed by the lower court further reflects that it is because of the direction of the lower second appellate court the application under Section 5 of the Limitation Act has been allowed.

28. For the discussions made hereinabove I find that the orders impugned herein are not sustainable in the eye of law and are liable to be set aside.

29. Accordingly, the present petition stands allowed. The impugned orders dated 2.2.2019 and 30.11.2018 are hereby

set aside. The order dated 22.08.2014 rejecting the application under Section 5 of the Limitation Act by the Judge Small Causes Court in Miscellaneous Case No. 75 of 2013 (Samaj Sangathan Uttar Pradesh Vs. Nagar Nigam and others) is restored and affirmed.

30. For the discussions made hereinabove and the decision taken, the connected petition stands dismissed as infructuous.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2019

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Matters Under Article 227 No. 6665 of 2017

Sushila Devi ...Petitioner
Versus
Deevan Chand &Anr. ...Respondents

Counsel for the Petitioner:
Sri Sailendu Kumar Upadhyay, Sri Jahar Singh(Kashyap), Sri Shive Datta Yadav.

Counsel for the Respondents:
Sri Kunwar Bhadur Dixit.

A. Civil Procedure Code, 1908 – Order 6 Rule 17. Revisional Court has allowed the Revision Primarily on the ground that Principles of res- judicata did not permit trial Court to allow the second amendment application without considering that the second amendment application was on entirely different pleas- rejection of the first amendment application will not– operateas res-judicata- Thus trial Court allowing application for amending the written statement has been set aside by the Revisional Court- The Amendment sought was not necessary to determine the issue arising out in the suit and trial Court acted with material irregularities in exercise of its jurisdiction- Petition dismissed.(Para 5,7,8,9) (E-2)

(Delivered by Hon'ble Manoj Kumar Gupta J.)

1. The instant petition is directed against the order dated 27.09.2016 passed by the District Judge, Mainpuri in Civil Revision No. 77 of 2013. The revision has been allowed and the order passed by the trial court dated 26.09.2013 allowing application 79-ka-1 of defendant No.1 for amending the written statement has been set aside.

2. The first respondent instituted a suit bearing No. 49 of 2005 against the petitioner for specific performance of an agreement to sell dated 02.12.2003. According to the plaint assertions, the petitioner agreed to sell the suit property and accordingly entered into an agreement to sell dated 02.12.2003 whereunder the total sale consideration to be paid was Rs. 2,00,000/- out of which Rs. 95,000/- was paid as earnest money. It was also the case of the plaintiff that after execution of the agreement, a further sum of Rs. 1,00,000/- was paid to the petitioner against receipt dated 13.02.2004. Thus, according to the plaintiff, only Rs. 5,000/- remained unpaid. It seems that soon after gaining knowledge of the suit, the petitioner executed a sale deed dated 31.05.2005 of the suit property in favour of Shiv Pratap Singh, the second respondent. The petitioner filed written statement in the suit on 25.07.2005 wherein she took a stand that the alleged agreement is a sham document. No money was paid to her under the said agreement. There was also no agreement for sale of the property but the plaintiff by misrepresenting that the

defendant has to be witness in some matter obtained her signature and thumb impressions. Thus, the very execution of the agreement for sale was denied. The petitioner filed an additional written statement dated 23.04.2007 in which she reiterated the stand taken in the original written statement that in fact there was no agreement as alleged.

3. The second respondent who purchased the property from the petitioner during pendency of the suit was impleaded as defendant No.2. He filed his written statement on 16.05.2007 reiterating the stand taken by the petitioner in her written statement that her signatures were obtained by misrepresentation and in fact there was no agreement for sale between the parties nor any money was paid to her under the said agreement.

4. After commencement of the trial, the petitioner filed an application seeking amendment in the written statement to incorporate a plea that she is ready to return money paid to her under the alleged agreement to the plaintiff. The amendment was rejected by the trial court by order dated 08.07.2013 and the matter was fixed for recording of the remaining evidence of the defendant. The order rejecting the amendment application dated 08.07.2013 was not challenged before any higher court. On the other hand, the petitioner filed another application dated 22.07.2013 once again seeking amendment in the written statement. This time, the plea sought to be introduced was that sale deed dated 31.05.2005 was executed by the petitioner in favour of defendant No.2 to secure a loan. It confers no right or interest in favour of defendant No.2. It was also alleged that while executing deed dated 31.05.2005, the petitioner had informed defendant No.2 about document dated 13.02.2004 in favour of the plaintiff. He was informed that it was executed to secure Rs. 1,95,000/- taken as loan from the plaintiff. It was also alleged that in pursuance of sale deed in favour of defendant No.2 possession has not been delivered to him and that Rs. 35,000/- had already been returned. She is ready to return the balance amount of Rs. 1,70,000/- to defendant No.2. The sale deed dated 31.05.2005 is void and hit by lispendens. The petitioner has no other house and consequently plaintiff is not entitled to decree of specific performance and the suit is barred by Section 16 (c) of the Specific Performance Act. The trial court allowed the amendment application by order dated 26.09.2013 and aggrieved whereby the plaintiff filed Civil Revision No. 77 of 2013 which has been allowed by the revisional court by order dated 27.09.2016 impugned herein.

5. Learned counsel for the petitioner submitted that the revisional court has allowed the revision primarily on the ground that principles of res-judicata did not permit trial court to allow the second amendment application, but without considering that the second amendment application was on entirely different pleas. Thus, according to him, rejection of the first amendment application will not operate as res-judicata.

6. Learned counsel for the plaintiff respondent, on the other hand, submitted that the second amendment application was wholly frivolous and malafide. The trial had commenced long back and it was at the stage of cross-examination of DW-2 when the application was filed, therefore

it was barred under proviso to Order 6 Rule 17 C.P.C. as substituted by Act No. 22 of 2002. He further submitted that the second amendment application amounts to changing the case set up in the original written statement, therefore even otherwise, the same could not have been allowed.

7. It is not in dispute that when the second amendment application was filed, the suit was pending on the stage of cross-examination of DW-2. Order 6 Rule 17 C.P.C. as amended by Act No. 22 of 2002 provides that *"no application for amendment shall be allowed after the trial is commenced, unless the Court comes to the conclusion that inspite of due diligence, party could not have raised the matter before the commencement of trial"*. The reason disclosed in the application for not being able to raise the pleas in the beginning is that the previous counsel despite being informed about entire facts did not incorporate the same in the written statement. Thus, it is not in dispute that the pleas now sought to be introduced were in the knowledge of the petitioner since the very beginning and even before the written statement was filed. The explanation given by the petitioner for not being able to raise the pleas before commencement of the trial does not fall under the exception carved out under the proviso to Order 6 Rule 17 C.P.C. Had due diligence been exercised, the plea could have been raised before the commencement of the trial.

8. There is another reason why the amendment does not deserve to be allowed. The amendments in pleadings are allowed to determine the real question in controversy between the parties. By the amendment sought, the petitioner primarily wanted to raise plea to the effect that the sale deed dated 31.05.2005 executed by her in favour of defendant No.2 was by way of security and therefore possession was not delivered to defendant No.2. She also tried to contend that the sale deed in question is thus void in the eyes of law. The suit is for specific performance of agreement of sale allegedly executed by the petitioner in favour of the plaintiff respondent. The issue as to whether sale deed dated 31.05.2005 executed by the petitioner during pendency of the suit in favour of second respondent confers any title in his favour is not an issue in the instant suit. The trial court would not decide dispute between two defendants in a suit instituted by the plaintiff-respondent for specific performance of agreement of sale. Thus in my opinion, even otherwise, the amendment sought was not necessary to determine the issues arising out in the suit and the trial court acted with material irregularities in exercise of its jurisdiction in ignoring the said aspect while allow the amendment application.

9. There is another aspect of the matter. In the original written statement, the petitioner has denied having executed any agreement of sale in favour of the plaintiff respondent. Her specific case was that her signatures were obtained by misrepresenting that she had to act as a witness. However, the plea which is now sought to be introduced by amendment would show that the petitioner admits that the deed was duly executed between the parties and she had also received money thereunder, which she is ready to return. Thus, a new case is sought to be set up in this regard by the petitioner through amendment which has rightly been declined by the revisional court.

10. No doubt, the amendment now sought is not same as was sought earlier and to that extent the observation made by the revisional court may not be correct, but for the reasons spelt out above, this court reaches to the same conclusion. Accordingly, this Court declines to interfere with the impugned order in exercise of supervisory power under Article 227 of the Constitution.

11. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matters Under Article 227 No.5314 of 2019

Asharam Chaurasia ...Petitioner
Versus
Om Prakash Gupta &Ors. ...Respondents

Counsel for the Petitioner:
Sri Om Prakash Gupta & others

Counsel for the Respondents:
Sri Prem Chandra, Sri Manish Chandra Tiwari.

A. Provincial Small causes Courts Act, 1887, Section 23- Challenge to – Application – return of Plaint in a Suit involving question of title- there must be prima facie material on record to demonstrate that there was a serious substantial issue of title which may justify the relegation of parties to institute appropriate proceedings before the regular Civil Court having jurisdiction – The suit for arrears of rent and eviction is supposed to be decided on the basis of relationship of Landlord and tenant-between the parties. Hence the Court below has not committed any error in rejecting the application where the relationship is duly established the question of title documents arise and provision of Section 23 for return of plaint would not be attracted.

Petition dismissed. (Para 6, 7, 13, 14)

Case laws discussed: -

1.Budhumal Versus Mahabir Prasad and others (1988) k4 SCC 199

2.Pratap Singh Versus IX ADJ, Fatehpur and others 2000 (3) A.W.c. 1995

3.Shri Kant Trivedi Vesus Vijay Rani Tandaon and another

4.Jugal Kishore Versus The IInd A.D.J., Jalaun at Orai and other 1984 (2) A.R.C. 165

5.Ashok Kumar Gumbar and another Versus Waqf Khudaband Tala Mau suma SCC Revision no. 68/2019 /decided 24-05-2019

6.Shalini Shyam Shetty and another Versus Rajendra Shankar Patil (2010) 8 SCC 329

7.Radhey Shyam and another Versus Chhabi Nath and others (2015) 5 SCC 423 (E-2)

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava J.)

1. Heard Sri Manish Chandra Tiwari, learned counsel for the petitioner.

2. The present petition seeks to challenge the order dated 31.01.2018 passed by the Civil Judge (Senior Division) F.T.C. Jaunpur in SCC Suit No. 03/2009 (Om Prakash Vs. Asharam) whereby the application (Application No. 107-Ga) filed by the petitioner under Section 23 of the Provincial Small Causes Courts Act, 1887, (hereinafter referred to as 'the Act') has been rejected. The petitioner also seeks to challenge the

order dated 18.05.2019 passed in Civil Revision No. 27/2018 in terms of which the revision filed against the aforementioned order has been dismissed.

3. The sole contention raised by the counsel for the petitioner is that questions of title having been raised the Small Causes Court was not entitled to adjudicate upon the issues regarding the same and as such it should have passed an order directing return of the plaint.

4. Records of the case indicate that the aforementioned contention was raised before the trial court also and has been repelled upon taking notice of the fact that the petitioner had duly admitted the plaintiff to be the landlord, and once the landlord-tenant relationship had been accepted the application filed under Section 23 of the Act was liable to be rejected. The trial court has also taken note of the fact that no material evidence had been placed on record by the petitioner-tenant to show that there was any question of title pertaining to the property in dispute. The revisional court has reiterated the aforementioned findings and has held that in the absence of any material evidence having been produced by the petitioner-tenant mere assertion that questions of title were involved would not be sufficient to raise a claim for return of plaint under Section 23 of the Act, and accordingly the revision has also been dismissed.

5. It may be noticed that Section 23 of the Act provides for return of plaint in a suit involving questions of title and in terms thereof when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

6. It is thus clear that Section 23 confers a discretion on the Small Cause Court to return a plaint when a dispute in respect of title is raised which it finds is of such a nature that it would be more appropriate to be decided by regular civil court.

7. The Court while considering the return of plaint, has to bear in mind that the right of the plaintiff and the relief claimed by him must be of such a nature that the same would depend upon "proof or disproof of a title to immovable property". Thus, for the Court to exercise its discretion to return the plaint, there must be prima facie material on record to demonstrate that there was a serious substantial and complex issue of title which may justify the relegation of the parties to institute appropriate proceedings before the regular civil court having jurisdiction to determine the title.

8. The scope of Section 23 of the Act came up for consideration in the case of Budhu Mal Vs. Mahabir Prasad &Ors.1, and it was held that Section 23 does not make it obligatory on the court of small causes to invariably return the plaint once a question of title is raised by the tenant, and a question of title could also incidentally be gone into by the Court of Small Cause. The observations made in the aforementioned judgment are as follows :-

"10. It is true that Section 23 does not make it obligatory on the court of small causes to invariably return the

plaint once a question of title is raised by the tenant. It is also true that in a suit instituted by the landlord against his tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Causes in this behalf could not be res judicata in a suit based on title. It cannot, however, be gainsaid that in enacting Section 23 the Legislature must have had in contemplation some cases in which the discretion to return the plaint ought to be exercised in order to do complete justice between the parties...."

9. Reference may also be had in the case of ***Pratap Singh Vs. IXth Additional District Judge, Fatehpur and Ors.2,*** wherein it was held as follows :-

"6. A Small Causes Court is expected to try suits of a comparatively simple character and, therefore, suits involving question of title should not be entertained by that Court. Section 23 is intended to enable the Courts of Small Causes to save their time by returning the plaints in suits which involve enquiry into the question of title. This section is designed to meet the cases in which Judge, Small Causes Court is satisfied that the question of title raised is so intricate and difficult that it should not be decided summarily but in ordinary Court in which evidence is recorded in full and the decision is open to appeal. The underlying principle under Section 23 seems to be that where it is considered advisable by a Small Causes Court that a final decision on a question of title, which decision would. if given by an original Court. ordinarily be subject to appeal and even to second appeal and which decision would ordinarily be res judicata between the parties, should be given in the particular case before a Small Causes Court, by an original Court, the Small Causes Court though competent to decide incidentally the question of title in that particular case might exercise with discretion. the power of returning the plaint to be presented to the original Court which would have jurisdiction to so decide on that title finally. Obviously, the section is designed to meet the cases in which the Judge. Small Causes Court is satisfied that the question of title raised is so intricate and difficult that it should not be decided summarily but in an ordinary Court in which evidence is recorded in full and decision is open to appeal.

7. Section 23 is framed in optional terms giving discretion to the Court to act in the matter or not. and therefore, in suits involving question of title, the Small Causes Court has a discretion either to decide the question of title or to act under this section and return the plaint. It is not always bound to return the same. Nevertheless, when any complicated question of title arises. it would be the wiser course for Small Causes Court in the exercise of its discretion to act under Section 23 and return the plaint."

10. In the case at hand, the tenant-landlord relationship having been admitted the provisions of Section 23 would not be attracted.

11. In this regard reference may be had to the judgment in the case of ***Shri Kant Trivedi Vs. Vijay Rani Tandon and another3*** where this Court upon taking note of the fact that the defendant-tenant had accepted relationship of landlord and tenant between the parties, held that no

error had been committed by the court below in rejecting the application for return of plaint under Section 23 of the Act. The observations made in the judgment are as under :-

"2. In view of above agreement, under which the defendant revisionist accepts the relationship of landlord and tenant between the parties, the court below has not committed any error in rejecting the application under Section 23 of the Act inasmuch as the suit for arrears of rent and eviction is supposed to be decided on the basis of the above relationship and the question of title does not get involved at all."

12. A similar view was taken in the case of ***Jugal Kishore Vs. The IInd Additional District Judge, Jalaun at Orai and others4***, wherein this Court upon considering the fact that the authorities had found that there was a relationship of landlord and tenant between the petitioner and respondent, the refusal by Judge Small Causes Court to return the plaint could not be said to be arbitrary. The observations made in the aforementioned judgment are as follows :-

"*The second argument of the learned counsel for the petitioner was that since the dispute raised into written statement was relating to the title of the property, the Judge Small Causes under Section 23 of the Provincial Small Cause Court Act should have returned the plaint for presentation to the regular side. All the authorities have found that there was a relationship of landlord and tenant between the petitioner and respondent no. 3. On that basis the suit was decreed. Section 23 is not mandatory in nature and confers discretion on the court before which the suit is filed. On the facts and circumstances of the present case it cannot be said that refusal to return the plaint was arbitrary or was in violation to any provision of law."*

13. It may thus be seen that where the Small Cause Court is called upon to consider a prayer for return of plaint under Section 23 of the Act, what is required to be considered is whether the suit has been filed on the basis of relationship of landlord and tenant and as to whether the denial of relationship of landlord and tenant was bonafide or had been set up only to oust the jurisdiction of the Judge Small Cause Court. In a case where relationship between the parties of landlord and tenant had been established refusal by the trial court to return the plaint could not be said to be arbitrary.

14. A suit for eviction filed before the Judge Small Cause Court is to be decided on the basis of the relationship of landlord and tenant, and in a case where the said relationship is duly established the question of title does not at all get involved and the provisions of Section 23 of the Act for return of plaint would not be attracted.

15. The aforementioned legal position has been considered by this Court in a recent judgment in the case of ***Ashok Kumar Gumbar and another Vs. Waqf Khudaband Tala Mausuma5.***

16. This Court may also take notice of the fact that the power of superintendence conferred under Article 227, is to be exercised most sparingly and within the parameters which have been summarized in the

case of ***Shalini Shyam Shetty andanother Vs. Rajendra Shankar Patil6***, and also in the case of ***Radhey Shyam and another Vs. Chhabi Nath and others7.***

17. Counsel for the petitioner has not been able to point out any material error or illegality in the orders passed by the courts below so as to warrant interference in exercise of power under Article 227 of the Constitution of India.

18. Petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2019

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Matters Under Article 227 No. 3798 of 2019

Arun Kumar Srivastava &Anr. ...Petitioners
Versus
Raisul Hasan & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vikas Singh.

A. Motor Vehicle Act-Application-Tribunal has not taken into consideration the guideline of SC regarding release of amount of award. Tribunal must not to insist on investment of the compensation amount is long-term fixed deposit without appreciating the distinction drawn by the Apex Court.

In the case of minor, illiterate claimants, widows and literate person in this instant case both petitioners are lightly qualified. They had to pay loans-The Tribunal without considering mere fact, in a mechanical manner, permitted release of only the amount on directed under the main award- release of entire amount in favour of the petitioners- is allowed.

(Para 6,7,8) (E-2)

(Delivered by Hon'ble Manoj Kumar Gupta J.)

1. The instant petition is directed against the order dated 2.4.2019 passed by Additional District Judge in Civil Misc. Case No. 1/2019 arising out of Motor Accident Claims Petition No. 158/2015. By the impugned order, the Court below (MACT) has accepted the application of the petitioners for release of the amount awarded in their favour in MACP No. 158/2015 in part.

2. The facts necessary for disposal of the instant petition are that a claim petition was filed by the petitioners along with Satyanshu Srivastava for award of compensation on account of death of Beena Srivastava in an accident. Beena Srivastava was wife of petitioner No. 1 and mother of petitioner No. 2. The claim petition was allowed by award dated 25.4.2018 and an amount of Rs. 77,87,032/- along with 7% interest was awarded in favour of the petitioners. Out of the said amount, petitioner No. 1 was held entitled to a sum of Rs. 25,00,000/- while the remaining amount was to be paid to petitioner No. 2. There was a further direction that out of Rs. 25,00,000/- to be paid to petitioner No. 1, Rs. 23,00,000/- would be invested in a long term fixed deposit of five years in a Nationalised Bank, while the remaining sum of Rs. 2,00,000/- only will be paid to him. Likewise, in case of petitioner No. 2, the direction was for investing Rs. 50,00,000/- in a long term fixed deposit in a Nationalised Bank for five years and for payment of balance amount of Rs. 2,87,032/- plus interest to her. The appeal filed by the insurance company was dismissed on 7.9.2018. The amount payable under the award had since been deposited with the tribunal.

3. The petitioners filed separate applications for release of the amount directed to be invested in FDR for reasons disclosed in their applications. The applications filed by the petitioners, as noted above, were allowed in part. In respect of petitioner No. 1 only Rs. 2,00,000/- was permitted to be withdrawn while the remaining amount was directed to be invested in fixed deposit in a Nationalised Bank for five years, as was the direction under the award dated 25.4.2018. In respect of petitioner No. 2 also, a direction was given in terms of the award for investing Rs. 50,00,000/- in FDR for a period of five years and for release of only the remaining amount with interest, which on the date of passing of the impugned order was a sum of Rs. 14,56,641/-. Aggrieved thereby, the instant petition has been filed.

4. Learned counsel for the petitioners submitted that the petitioners in their application have stated that both of them are highly educated. The petitioner No. 1 had retired from the post of Head of Department (Psychology) from Dayanand Vedic College. Petitioner No. 2 is M.B.A. in International Business and claimed that she is competent to take care of her interest. In their applications, the petitioners have stated that they had taken loan of Rs. 25,00,000/- from Axis Bank, Delhi in the year 2017 at the time of marriage of petitioner No. 2 and the said loan is to be repaid. The EMI of the said loan is Rs. 66,000/- per month. It is further stated that petitioner No. 1 had taken another loan of Rs. 7,80,886/- from Punjab National Bank, Orai under which only a sum of Rs. 15,92,177/- had been repaid. They had prayed for release of the compensation amount to enable them to repay the loans. It is also stated in the application of petitioner No. 2 that after repayment of loan, if any amount is left, she would purchase a house in Delhi.

5. The tribunal without applying its mind to the case set-up by the petitioners in their respective applications passed the impugned order.

6. It is urged by learned counsel for the petitioners that the impugned order is manifestly illegal. The tribunal has not taken into consideration the case set-up by the petitioners for release of compensation amount in their favour. It is urged that the petitioners are both major and are highly qualified. They are in urgent need of money to repay the loan amount. Consequently, there was no justification on part of the tribunal not to allow the applications in toto. In support of his contention, he has placed reliance on the judgment of Supreme Court in *A.V. Padma and others Versus R.Venugopa*l and others, 2012 (3) SCC 378.

7. It is noteworthy that the Courts while awarding compensation in motor accident cases started imposing condition for investment of certain amount of compensation in FDRs in order to safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation following the guidelines laid down by the Supreme Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Versus Susamma Thomas and others, AIR 1994 (SC) 1631. In A.V. Padma (supra), the Supreme Court in context of literate claimants, after considering the guidelines laid down in Susamma Thomas, has observed thus : -

"4. In the case of Susamma Thomas (supra), this Court issued certain guidelines in order to "safeguard the feed

from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation". Even as per the guidelines issued by this Court Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also the Tribunal may resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that the Tribunal should. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.

5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi-literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in

a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the largerinterests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice."

8. It is clear from the above enunciation of law by the Supreme Court that in case of literate persons, it is not mandatory to direct investment of compensation amount in long term fixed deposit. The Tribunal has to deal with each case on its own facts. It cannot impose condition for investment of the compensation amount in Fixed Deposit of Nationalised Bank in a mechanical manner in each and every case being decided by it. In the case under consideration by the Supreme Court (A V Padma), the Supreme Court found that the first claimant was an educated lady who retired as Superintendent of the Karnataka Road Transport Corporation, Bangalore and the second claimant was a M.Sc. degree holder and the third claimant was also holding Master Degree in Commerce and Philosophy. One of the claimant was 71 years of age. She required money for maintenance of her house and for raising further constructions to provide dwelling place for her second daughter. The daughter was residing in a rented house and paying exorbitant rent. The Supreme Court held that the claimants were entitled to withdraw the entire amount and issued directions accordingly.

9. In the instant case, as noted above, both the petitioners are highly qualified. They have filed documentary evidence to prove that they had taken two loans, one of a sum of Rs. 25,00,000/- and another of Rs. 7,80,886/-. A major portion of loan amount is still to be paid and they want to liquidate the loan from the compensation amount. From the remaining amount, they would purchase a house in Delhi. The tribunal without considering these facts, in a mechanical manner, permitted release of only the amount as directed under the main award. In the circumstance of the instant case, I am unable to uphold the impugned order as I am satisfied that this is a fit case where there is no apprehension of the feed being frittered away by the beneficiary owing to ignorance or illiteracy or any such reason. Accordingly, the impugned order is set-aside. The applications filed by the petitioners for release of entire amount in their favour is allowed.

The Tribunal shall encash the Fixed Deposit Receipts and shall release the

maturity amount along with interest, if any, in favour of the petitioners, within a period of four weeks from the date of receipt of certified copy of this order.

10. The petition is allowed accordingly.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2019

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Matters Under Article 227 No. 5176 of 2019

Ram Nath & Anr. ...Petitioners
Versus
Smt Pushpa ...Respondent

Counsel for the Petitioners:
Sri Dushyant Singh, Sri M.C. Singh.

Counsel for the Respondent:
C.S.C.

A. Civil Procedure Code, 1908 Order 8 Rule 1 Delay in Filing of written statement beyond statutory period cannot be condoned as a matter of course but only by way of exception as Order 8 Rule 1 is directory-extension of time will be allowed in exceptional circumstances.

No illegality in the order passed by the Court below declining to take written statement on record-Petitioners have succeeded in getting the proceedings delayed for almost Fifteen years- Hence defeating the very object with which time limit is provided under Order 8 rule 1- such conduct on part of a litigant is highly deplorable- Petition dismissed with a cost of Rs. 10,000/- (Para 2, 4, 7, 8)

Case Law dismissed: -

Kailash Versus Nanhku and others, AIR 2005 CS 441 (E-2)

(Delivered by Hon'ble Manoj Kumar Gupta J.)

1. The instant petition has been filed challenging the order dated 28.2.2009 passed by Additional District Judge, Court No. 1, Agra dismissing Civil Revision No. 4 of 2008 and orders dated 20/21.11.2017 and 3.5.2019 passed by the trial court.

2. The fact of the case are alarming. The plaintiff-respondent instituted Suit No. 703 of 2003 against the petitioners for permanent prohibitory injunction. The defendants were duly served with summons on 25.04.2004. They did not file written statement within 30 days as contemplated under Order 8 Rule 1 C.P.C. They also did not file written statement within further period of 90 days. They filed the written statement on 10.2.2005 i.e. much after the expiry of statutory period prescribed under Order 8 Rule 1 C.P.C. The plaintiff objected to the filing of the written statement beyond statutory period and whereupon, the defendant-petitioners filed an application 62-Ga dated 23.10.2007 for condoning delay in filing the written statement. In the application, the petitioners stated that they had filed WS without unnecessary delay. They also stated that negligible delay, if any, in filing the written statement be condoned. The trial court by order dated 20/21.11.2017 relying on judgment of Supreme Court in ***Kailash v. Nanhku and Others, AIR 2005 SC 2441*** and other judgments following the said judgment, rejected the application 62-Ga filed by the petitioners for condoning the delay in filing written statement and directed for proceedings being held as per Order 8 Rule 10 C.P.C. Aggrieved thereby, the petitioners filed Civil Revision No. 4 of 2008. The same was

dismissed by order dated 28.2.2009. The petitioner did not challenge the order of the Revisional Court before any higher court but instead, filed an application 127-Ga for review of the order dated 20/21.11.2007. The petitioners succeeded in getting the proceedings of the suit delayed on basis of the said application for twelve years. The application has ultimately been dismissed by the trial court by order dated 3.5.2019.

3. The sole submission made by Shri M.C. Singh, learned counsel for the petitioners is that the court below erred in refusing to take on record the written statement. It is urged that there was delay of only few days and therefore, the courts below ought to have taken the written statement on record, as the interest of the plaintiff could be safeguarded by imposing cost. It is also urged that provisions of Order 8 Rule 1 C.P.C. are only directory in nature and therefore, the courts ought not to have taken a technical view in the matter.

4. In **Kailash** (supra), the Supreme Court though held that provision of Order 8 Rule 1 C.P.C. being in the realm of procedural law is directory in nature but also held that delay in filing written statement cannot be condoned as a matter of course but only by way of exception. In this regard, the relevant observations made by the Supreme Court in paragraph 45 (v) reads as under:

"Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

5. A perusal of the application filed by the petitioners seeking condonation of delay reveals that it does not disclose any ground whatsoever for getting the delay condoned. The application only mentions that if there is any delay, the same be condoned.

6. In considered opinion of the Court, in absence of any explanation, the case does not fall within the exception carved out by the Supreme Court. The Supreme court has held that the extension of time will be allowed in exceptional circumstances occasioned by reasons beyond the control of the defendant.

7. In such view of the matter, this Court finds no illegality in the impugned orders passed by courts below declining to take written statement on record.

8. It is noteworthy that the issue in question came to be raised soon after

filing of the written statement but the petitioners have succeeded in delaying the proceedings of the suit on basis of the said plea for considerable period. They filed review application against the order of the trial court, which had already been upheld in revision. Again, on basis of review application, they succeeded in getting the proceedings delayed for almost fifteen years, thus defeating the very object with which time limit is provided under Order 8, Rule 1 C.P.C. Such conduct on part of a litigant is highly deplorable.

9. Having regard to the facts of the case, the instant petition is dismissed with a cost of Rs. 10,000/-

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2019

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Matters Under Article 227 No 5629 of 2019

Smt. Prabha Devi & Ors. ...Petitioners
Versus
Brijeswar Singh &Ors. ...Respondents

Counsel for the Petitioners:
Sri Surta Bhan Dubey, Sri Ram Sajiwan Mishra.

Counsel for the Respondents:

A. Code of Civil Procedure 1908 :Order 22 rule 4 (2) and Order 8 Rule 9. A counter claim could be filed normally Under Order 8 rule 9 C.P.C. but that has to be with the Leave of the Court. Which granting such leave, the Court will also have regard to the conditions stipulated Under Order 6 rule 17 C.P.C. as a Counter claim

In case of legal representative of deceased defendant, the further rider Under Order 22 rule 4(2) C.P.C. is that he can only take defence appropriate to his charactor as legal representative of the deceased party. He cannot set up a different case. (Para 5,6,7,8)

Writ Petition dismissed.

(E-2)

(Delivered by Hon'ble Manoj Kumar Gupta J.)

1. The instant petition is directed against the order dated 1.5.2019 passed by Additional District Judge, Court No.7, Varanasi in Civil Revision No.24 of 2018. The revision has been allowed and the order of the trial court dated 10.1.2018, permitting the petitioners to file counter claim along with additional written statement has been set aside. The reivisional court has directed the trial court to decide the application 166-C afresh.

2. The husband of petitioner no.1 and father of petitioners no.2 to 4 was defendant no.4 in Original Suit No. 276 of 2008. It is not in dispute that he filed a written statement on 6.4.2009. He died on 8.4.2013 during pendency of the suit. The petitioners were substituted in his place by order dated 11.4.2014. After their substitution, the petitioners filed application 166-C for permission to file additional written statement alongwith counter claim. The trial court allowed the application for taking on record additional written statement along with counter claim by order dated 10.1.2018 observing that the petitioners, who came on record by way of substitution, did not have the opportunity to file counter claim earlier, therefore, the application deserves to be allowed.

3. The revisional court, not satisfied with the view taken by the trial court, has

set aside the order of the trial court. It has observed that the counter claim was not filed by the father of the petitioners along with the written statement filed by him. The revisional court has also noted that there had been a delay of more than five years in filing counter claim without there being any explanation in that regard. It has also observed that while filing additional written statement, the legal heirs do not automatically get right to file counter claim. The petitioners have sought to set up an entirely different case, withdrawn various admissions and have claimed relief which is inconsistent with the case set up in the written statement filed by the original defendant, which is not permissible.

4. Counsel for the petitioners submitted that the petitioners were compelled to file counter claim because of change of circumstances. It is for the said reason that they have to take a different stand than what was taken by their predecessor.

5. Indisputably, the predecessor of the petitioners had filed a written statement without setting up any counter claim therein. The petitioners, after the death of their predecessor, have stepped into his shoes. They got the right to file written statement under Order 22 Rule 4 (2) CPC. They could also have filed additional written statement after obtaining leave from the court under Order 8 Rule 9 C.P.C. However, it is well settled that the legal heirs, while filing additional written statement, cannot go beyond the case set up in the original written statement by the person in whose place they have been substituted.

6. In **Vidyawati Vs. Man Mohan and others, AIR 1995 SC 1653**, in a suit for possession of suit property after the death of one of the defendants (Brij Mohan Kapoor), his legal representative sought to file additional written statement claiming title and interest in the suit property under a Will executed by one Smt. Champawati. The trial court did not permit the same. So did the revisional court and the High Court. The issue that arose for consideration before the Supreme Court was whether the legal representative of the deceased defendant had to confine herself to the defence appropriate to her character as legal representative or she could raise a plea personal to her. In the above context, the Supreme Court has observed as under:-

4. This Court in Bal Kishan vs. Om Parkash &Anr. AIR 1986 SC 1952 has said thus:

"The sub-rule (2) of Rule of Order 22 authorised the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent."

6. This being the position in law, the view of the court below is perfectly legal. It is open the petitioner to implead herself in her independent capacity under Order 1 Rule 10 or retain the right to file independent suit asserting her own right. We do not find any error of jurisdiction or material irregularity committed in the exercise of jurisdiction by the court below warranting our interference. The S.L.P. is, accordingly, dismissed."

7. Normally, a counter claim has to be filed alongwith the written statement. It could also be introduced in the written statement by seeking amendment but in

which event, the conditions laid down under Order 6 Rule 17 CPC have to be fulfilled. A counter claim, in exceptional circumstances, could be filed under Order 8 Rule 9 CPC but that has to be with the leave of the court. While granting such leave, the court will also have regard to the conditions stipulated under Order 6 Rule 17 CPC as a Counter claim, as noted above, should normally be part of written statement. In case of legal representative of deceased defendant, the further rider under Order 22 Rule 4 (2) CPC is that he can only take defence appropriate to his character as legal representative of the deceased party. He cannot set up a different case or take plea which is inconsistent with the one raised by the original defendant, much less any right to file counter claim with his written statement.

8. The view taken by the trial court that because the petitioners were not party to the suit earlier and therefore, after their substitution, they got opportunity to file counter claim for the first time with their additional written statement and therefore, it has to be permitted, is based on complete misunderstanding of the scheme of the Code of Civil Procedure. The revisional court has rightly remitted the matter back to the trial court to consider whether there exists any justifiable ground on record to warrant accepting counter claim at such a delayed stage. The trial court would also be required to ascertain whether the counter claim is in respect of cause of action accruing before the original defendant had delivered his defence. It shall also have to consider as to whether permitting the petitioners to raise counter claim in the instant suit would embarrass the trial thereof at this stage or if it should exercise its power under Order 8 Rule 6-C so as to direct the petitioners to raise their claim by way of a separate suit.

9. This Court finds no illegality in the impugned order. Moreover, it is only a remand order whereunder the trial court will now decide the application afresh having regard to the observations made by the revisional court.

10. No ground is made out to interfere with the impugned order in exercise of supervisory power under Article 227 of the Constitution.

11. The petition is accordingly dismissed.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.08.2019

BEFORE
THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

U/S 378 Cr.P.C. No. 105 of 2019

State of U.P. ...Applicant
Versus
Pushpa &Anr. ...Opp. Parties

Counsel for the Applicant:
Govt. Advocate

Counsel for the Opp. Parties:

A. The parameters for Grant Leave to Appeal under Section 378 (3) Cr.P.C. the Court should keep in mind remains no more 'res integra'. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction.

B. The general principles are appellate court is having full power to reconsider the evidence upon which the order/ judgment of acquittal has been based and the accused cannot claim each and every doubt to get the benefit.

The evidence and material available on record and have found that the judgment is cryptic may not be a ground for interfering with the order of the acquittal, unless the view taken by the Trial Judge is not a possible view.(Para 42)

Grant of leave to appeal rejected.

Chronological list of Cases Cited: -

1.Ajmer Singh v. State of Punjab, 1953 SCR 418.

2. Sanwat Singh and others v. State of Rajasthan, AIR 1961 SC 715.

3. Sheo Swarup and others vs. The King Emperor AIR 1934 PC 227 (2).

4. Sadhu Saran Singh Vs. State of Uttar Pradesh and Others reported in 2016 Crlj 1908.

5. State of Maharashtra vs. Sujay Mangesh Poyarekar MANU/SC/8073/2008.

6. Hanumant v. State of Madhya Pradesh MANU/SC/0037/1952.

7. Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR, 1984 SC 1622.

8. Jaharlal Das v. State of Orissa, MANU/SC/0586/1991 : (1991) 3 SCC 27.

9. Varkey Joseph v. State of Kerala, MANU/SC/0295/1993.

10. Arjun Marik and Ors. v. State of Bihar MANU/SC/1037/1994 : 1994 Supp (2) SCC 372.

11. State of Goa v. Sanjay Thakran and Anr. MANU/SC/7187/2007 : (2007) 3 SCC 755.

12. Bodhraj alias Bodha and Ors. v. State of Jammu and Kashmir MANU/SC/0723/2002.

13. Jaswant Gir v. State of Punjab MANU/SC/2585/2005.

14. Mohibur Rahman and Anr. v. State of Assam MANU/SC/0690/2002. (E-2)

(Delivered by Hon'ble Justice Mohd. Faiz Alam Khan, J.)

1. Heard Shri Prabhat Adhaulia, learned A.G.A. for the State and perused the record.

2. By means of instant application, the State has requested to grant leave to appeal under Section 378 (3) Cr.P.C. against impugned judgment and order dated 24.12.2018 passed by Additional District & Sessions Judge, Court No.2 Ambedkar Nagar in S.C./S.T. No. 38/2013 "State Vs. Smt. Pushpa and Salim" arising out of Case Crime No. 50/2013, under Sections 304 I.P.C. & Section 3(2)(V) of S.C./S.T. Act, Police Station Sammanpur, District Ambedkar Nagar, whereby the accused persons/respondents were acquitted from the charges under Section 304 I.P.C. & Section 3(2)(V) of S.C./S.T. Act.

3. The prosecution story as unfolds from the record of the Subordinate Court is that, on 21.05.2013 at 7:30 in the morning, a written report was submitted to the S.H.O., P.S. Sammanpur, District Ambedkar Nagar by one Matru son of Chotai alleging therein that, his younger brother Rambali was living separately in his house with his wife Smt. Pushpa (Accused) and Daughter Km. Pooja. He was habitual of drinking liquor. On 20.05.2013, one Ramkrishna of Bahorikpur, P.S. Bheeti, Ambedkar Nagar and other persons came to her house with regard to perform the "Lagan Ceremony' of her daughter namely Km. Pooja. Her husband Rambali, after drinking liquor with accused Salim came to his house at

about 7:00 pm in heavily drunken state and again went back for drinking liquor, after snatching some money from his wife Smt. Pushpa. When he walked out of his house Smt. Pushpa chased her with a rope in her hand. She returned at about 8:00 pm in the night and informed that she did not find him and he, as usual, will return on his own. The Ceremony of "Lagan' ended at about 10:00 pm. in the night and there after Smt. Pushpa went with Ramkrishna, in search of her husband and found him in the field of one "Firtu' and silently brought her husband to home. Today i.e. on 21.05.2013, he (informant) on hearing her cries, went to the house of Pushpa, and found the dead body of Rambali, which was lying on a cot. He also noticed a black mark on the neck of deceased. It is further alleged that wife of deceased Rambali (Pushpa) is a character less and quarrelsome lady and is also having an extra-marital affair with co-accused Salim. He is having every reason to believe that due to her affair with co-accused Salim, she while fighting with the deceased in the field of " Firtu', strangulated Rambali by the rope she was carrying and concealed his death in the night.

4. On the basis of above mentioned written report, an FIR as Case Crime No. 50/2013 was registered under Section 304 I.P.C. at Police Station Sammanpur, District Ambedkar Nagar against both the accused persons and after investigation, charge-sheet was also submitted against both of them, under Section 304 I.P.C. & Section 3(2)(V) of Scheduled Caste Scheduled Tribe (Prevention of Atrocities) Act herein after called as S.C./S.T. Act.

5. The Trial Court framed charges against Smt. Pushpa under Section 304 I.P.C. while Charges under Section 304 I.P.C. and under Section 3(2)(V) of S.C./S.T. Act were framed against accused appellant Salim. The respondents, however denied the charges and claimed trial.

6. The postmortem on the body of the deceased Rambali was performed on 21.05.2013 at 3:30 pm. and two parallel Ligature mark surrounding the neck of the deceased were found. Apart from the ligature mark, multiple abrasions on an around left arm and just above the back of right thumb and on the toe of right foot were also found along with the fracture of hyoid bone. The trachea, lungs and both the kidneys were also found congested. The probable time of the death of the deceased was determined as one day. The cause of death was ascertained as shock due to antemortem strangulation.

7. The prosecution in support of its case produced following documentary evidence before the Trial Court :-

1. Exhibit Ka-1, Original application of FIR
2. Exhibit ka-3, Inquest Report
3. Exhibit ka-4, charge-sheet
4. Exhibit Ka-5, Chick FIR
5. Exhibit ka-6, Copy of G.D. FIR
6. Exhibit ka-7, charge-sheet
7. Exhibit ka-7, Postmortem report
8 Exhibit ka-8 Site Plan
9. Exhibit ka-9, Fard
10. Exhibit ka-10, Exhibit ka-11, Exhibit ka-12, Sample of seal of dead body ,Challan and sample of the Seal respectively.
11. Exhibit ka-13, Exhibit ka-14, Exhibit ka-15 are letter of R.I.-, letter of C.M.O and letter of P.S. Sammanpur to the C.M.O, respectively .

8. Apart form the above documentary evidence, the prosecution

also testified following witnesses to bring home the charges against the accused persons.

P.W.-1/Santram @ Matru (Informant)

P.W.-2/Ramkrishna (witness)

P.W.-3/Shyam Lal (witness/brother of deceased)

P.W.-4/ Ram Ashrey (witness)

P.W.-5/Chandrabhan Yadav (S.H.O.)

P.W.-6/Constable Hariprakash Singh (Scribe of FIR and G.D.)

P.W.-7/C.O. Ashok Kumar Singh (Investigating Officer)

P.W.-8/Dr. Vijay Bahadur Gautam (Doctor, who conducted the postmortem).

P.W.-9/Firtu Ram (HCP)

9. After completion of the evidence of the prosecution, the statement of accused was recorded under Section 313 of the Cr.P.C., wherein both the accused persons have denied of committing the offence and stated that as the daughter of the deceased was going to be married, therefore, deceased sold his land to his elder brother but consideration was not paid by his elder brother to him and due to the fact that the remaining money is not paid to the deceased, they have killed deceased. It is further stated that they have been falsely implicated and the murder of the deceased was actually committed by the elder brother of the deceased namely Shyamlal.

10. The trial Court after taking into consideration, the oral and documentary evidence, by passing a cryptic judgment consisting of only 08 pages, acquitted accused persons of the charges framed against them on the ground that the prosecution has failed to prove its case beyond reasonable doubt . Aggrieved by the judgment and order of the trial Court, the instant appeal along with an application to grant leave has been preferred by the State.

11. Learned A.G.A. while pressing the application for grant of leave to file appeal has submitted that, the Court below has committed material illegality in appreciating the evidence available on record. The trial Court has passed a cryptic judgment without discussing in detail, the evidence available on record and has not considered the evidence of the prosecution in right perspective.

12. It is further submitted that the Court below has failed to take into account the fact that the accused persons were having a strong motive to eliminate the deceased Rambali and in the facts and circumstances of the case, in all probability it was proved on record that the crime has been committed by the accused persons.

13. It is further submitted that, it was established on record that, accused persons were having very good relations and also that on the fateful night, Pushpa followed the deceased with a rope in her hand and on the next day deceased was found dead with a ligature mark around his neck. The Doctor Vijay Bahadur Gautam, who has been testified as P.W.-8, has certified that the death of the deceased has occurred due to ante-mortem strangulation.

14. It is further submitted that, the Court below has not considered the circumstances available, against the accused persons, on record and from the circumstances and evidence available on record, the only hypothesis coming out of the record is that the crime in any case has

been committed by the accused persons and, therefore, the Court below has committed material illegality in acquitting them.

15. It is overwhelmingly submitted that the State be granted leave to file the appeal and to challenge the order of the Court below.

16. We have heard learned A.G.A. and have perused the material on record as well as the Judgment of the trial Court.

17. This case is based on circumstantial evidence, as there is no witness who claimed to have seen the commission of the offence. The FIR of the incident is admittedly lodged by one Matru who is the brother of the deceased , wherein it is alleged that, on 20.05.2013 a "Lagan Ceremony' was scheduled pertaining to the marriage of the daughter of deceased namely Km. Pooja. It is also alleged therein that the deceased was a habitual alcoholic, and on the day of "Lagan' also, he was drinking liquor with co-accused Salim at Kurki Bazar and came to his house at about 7:00 pm in drunken state and after forcefully taking some money from his wife Pushpa (accused), again went back for the purpose of drinking more liquor. He was followed by his wife Smt. Pushpa with a rope in her hand and at about 8:00 pm, Smt. Pushpa returned and informed that she had not found the deceased and he will come on his own. However, she in the night at about 10:00 pm. searched the deceased along with Ramkrishna, who was at her house in connection with the "Lagan Ceremony' . They found the deceased Rambali towards south of the village in the field of one "Firtu'. They brought him back to her house and on 21.05.2013, when informant reached at the house of the deceased, he found him dead, lying on a cot with a black sign on his neck. He apprehended that deceased might have been killed by his wife, who in the heat of passion might have strangulated him, in the field of Firtu, with the rope, she was carrying.

18. Informant, Santram @ Matru, who has been testified as P.W.-1 in his examination in chief has not supported the story of the prosecution. He has stated in his statement that, the deceased was a habitual drunker and he did not see deceased on the fateful day taking liquor with co-accused Salim. He denied to have seen the deceased in a drunken state, however, admitted that the deceased used to come home after drinking liquor on regular basis. He further denied to have seen the accused Smt. Pushpa chasing the deceased with a rope in her hand and goes on to say that on fateful day, he even did not met Smt. Pushpa. However, he acknowledged to have lodged the First Information Report. This witness was declared hostile and was cross-examined by the prosecution, wherein he denied to have given the statement under Section 161 of the Cr.P.C. to the Investigating Officer.

19. P.W.-2/Ramkrishna was at the house of the deceased in connection with the 'Lagan Ceremony' of his (deceased) daughter namely Km. Pooja, who was married with his sister's son. He stated that when he reached the house of deceased, he was not at home. Deceased was a habitual alcoholic. It is admitted by him that, there were occasional fights in between the deceased and his wife. He after taking his dinner, went to sleep at about 10:00 pm. and till that time Rambali

did not return to his home. However, he along with other village persons, found him dead in the morning. He categorically denied to have gone along with Pushpa to search Rambali in the night. This witness was also declared hostile by the prosecution and was cross-examined, wherein he denied to have given the statement under Section 161 of the Cr.P.C.

20. P.W.-4 Ram Asrey has stated that on the fateful day, the deceased was sent by his wife to fetch two bottles of liquor. However, he did not return back and in the morning, when he went to the house of the deceased, he found Pushpa crying. She informed him that Rambali has not spoken a word whole night. He noticed that Rambali was dead and there was black mark on his neck. He also acknowledged himself to be a witness of inquest report. In cross-examination, this witness admitted that 10 days before his death, Rambali sold his land to Shyamlal and a portion of the consideration was also not paid by Shyamlal to the deceased.

21. P.W.-5, 6 and 7 are formal witnesses, who proved various stages of investigation. However, P.W.-8/Doctor Vijay Bahadur Gautam has proved the postmortem report, which has been elaborately described herein before.

22. P.W.-9/Firtu Ram (HCP) has proved recovery memo of rope from the house of appellant Pushpa as Ex. ka-9 as well as Ex. Ka-8 to ka-15.

23. P.W.-3 Shyam Lal is brother of the deceased to whom, P.W.-4/Ram Ashrey referred to have purchased the land of the (Rambali) deceased about 10 days before the incident. He has stated that, on the fateful night, accused Pushpa came to his home and requested to provide her some "Chilly and Ghee' as the throat of deceased was chocking and and in the morning he was informed that Rambali has died. He stated to have noticed some injury marks on the neck of deceased. He also testified that, co-accused Salim use to visit Pushpa and was having very close relations with her. He admitted to have purchased some land from the deceased but maintained that he had paid the whole consideration. In cross-examination, this witness testified that, apart from seeing the dead body, he do not know anything else.

24. The question as to how the application for grant of leave to appeal made under Section 378(3) of the Code should be decided by the High Court and what are the parameters which this Court should keep in mind remains no more 'res integra '. This Issue was examined by the Hon'ble the Apex Court in the case of **Ajmer Singh v. State of Punjab, 1953 SCR 418** wherein the accused was acquitted by the trial Court but was convicted by the High Court in an appeal against acquittal filed by the State. The aggrieved accused approached Apex Court. It was contended by him that there were 'no compelling reasons' for setting aside the order of acquittal and due and proper weight had not been given by the High Court to the opinion of the trial Court as regards the credibility of witnesses seen and examined by him. It was also contended that the High Court committed an error of law and the Hon'ble Supreme Court found substance in the argument that when a strong 'prima facie' case is made out against an accused person it is his duty to explain the circumstances appearing in evidence

against him and he cannot take shelter behind the presumption of innocence and cannot state that the law entitles him to keep his lips sealed. It was further held that in an appeal, the High Court had full power to review the evidence upon which the order of acquittal was founded ...

25. Upholding the contention, it has also been held in para 6 as under ;

"We think this criticism is well-founded. After an order of acquittal has been made, the presumption of innocence is further reinforced by that order, and that being so, the trial court's decision can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons."

26. In the case of **Sanwat Singh and others v. State of Rajasthan, AIR 1961 SC 715** after placing the reliance on the judgment given by Privy Council in Sheo Swarup and others vs. The King Emperor AIR 1934 PC 227 (2) and many other authroities Hon'ble the Apex Court on the point in issue held as under :-

" Para 16- The foregoing discussion yields the following results :

(1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified".

27. Hon'ble the Apex Court in the case of **Sadhu Saran Singh Vs. State of Uttar Pradesh and Others reported in 2016 Crlj 1908** has considered this difference and has observed as under:

"18 Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court,while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in Sambasiva V. State of Kerala 1998 SCC (Cri) 1320 has held:

"The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But

where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

19. This Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative."

28. In **State of Maharashtra vs. Sujay Mangesh Poyarekar MANU/SC/8073/2008 Hon'ble Supreme Court** held as under:-

"21. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

22. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

23. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial Court must be allowed by the appellate Court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial Court could not be said to be `perverse' and, hence, no leave should be granted.

24. We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate Court against an order of acquittal recorded by the trial Court. We only state that in such cases, the appellate Court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial Court should not be disturbed. Where there is application of mind by the appellate Court and reasons (may be in brief) in support of such view are recorded, the order of the Court may not be said to be illegal or objectionable. At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappreciation, review or reconsideration

of evidence, the appellate Court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave."

29. From the above decisions some general principles which may emerged out are that the appellate court is having full power to review or re-appreciate or reconsider the evidence upon which the order/ judgment of acquittal has been based and there is no limitation, restriction in exercise of such power by the appellate court and the appellate court may reach at it is own conclusion on the same set of evidence, both on question of facts as well as on law. However, it is to be kept in mind that in case of acquittal, the presumption of innocence which was initially with the accused persons has been fortified, reaffirmed, strengthened and also the golden principle which runs through the Web of criminal jurisprudence is that if two reasonable and logical conclusions can be derived on the basis of evidence on record the appellate court should not normally disturb the finding of the trial court. But simultaneously it is also to be kept in mind that the benefit of only a reasonable doubt can be given to accused persons in a criminal trial. The accused persons cannot claim the benefit of each and every doubt. To get the benefit of a doubt the same has to pass the test of reasonableness and a reasonable doubt is a doubt which emerges out of the evidence itself.

30. The law with regard to appreciation of circumstantial evidence has been clearly enunciated in the case of **Hanumant v. State of Madhya Pradesh MANU/SC/0037/1952** : wherein Hon'ble Supreme Court held as follows:

"10/12 ...It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused"

Hon'ble Apex Court in the case Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR, 1984 SC 1622 laid down that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

"1. the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature and tendency;

4. they should exclude every possible hypothesis except the one to be proved, and

5.there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

31. In **Jaharlal Das v. State of Orissa, MANU/SC/0586/1991 : (1991) 3 SCC 27**, it was held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to Rule out a reasonable likelihood of the innocence of the Accused. It is further held that in Para 8, in order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

i.) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii.) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

iii.) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

32. In **Varkey Joseph v. State of Kerala, MANU/SC/0295/1993**, it was held that suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond reasonable doubt.

33. Therefore, keeping in view the above settled legal position the law pertaining to cases based on circumstantial evidence can be summarized in following terms:

1. The circumstances relied upon by the prosecution which lead to an inference to the guilt of the accused must be proved beyond doubt;

2. The circumstances should unerringly point towards the guilt of the accused;

3. The circumstances should be linked together in such a manner that the cumulative effect of the chain formed by joining the links is so complete that it leads to only one conclusion i.e. the guilt of the accused;

4. That there should be no probability of the crime having been committed by a person other than the Accused.

34. It is in the light of the aforesaid law that we have to consider the evidence and the circumstances relied upon by the prosecution before the court below. In a case based on circumstantial evidence it is always better for the courts to deal with each circumstance separately and then link the circumstances which have been

proved to arrive at a conclusion. Unfortunately, in this case no such attempt has been made by the trial Court and in absence of such effort by the Court below, it is incumbent on this Court to appreciate the evidence for the limited purpose to see whether the Court Below has committed any error in coming to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt or whether the view of the Court below is a probable view.

35. At this juncture it is in the interest of things to have a look about the legal position pertaining to law related to "last seen together'. In **Arjun Marik and Ors. v. State of Bihar MANU/SC/1037/1994 : 1994 Supp (2) SCC 372**, this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded.

36. We may also refer to **State of Goa v. Sanjay Thakran and Anr. MANU/SC/7187/2007 : (2007) 3 SCC 755** wherein the Ho'nble Supreme Court held that in the absence of any other corroborative piece of evidence to complete the chain of circumstances it is not possible to fasten the guilt on the accused on the solitary circumstance of the two being seen together. Reference may also be made to Bodhraj alias Bodha and Ors. v. State of Jammu and Kashmir MANU/SC/0723/2002, wherein the Ho'nble Supreme Court held:

"The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases..."

37. In **Jaswant Gir v. State of Punjab MANU/SC/2585/2005**, Hon'ble Supreme Court held that it is not possible to convict appellant solely on basis of 'last seen' evidence in the absence of any other links in the chain of circumstantial evidence, the Court extended benefit of doubt to accused persons.

38. In **Mohibur Rahman and Anr. v. State of Assam MANU/SC/0690/2002,** Hon'ble Supreme Court held that the circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

39. Keeping in view the aforesaid legal position with regard to the disposal

of application to grant leave to file appeal against acquittal as also pertaining to the appreciation of evidence with regard to the cases based on circumstantial evidence particularly on last seen together theory, perusal of the evidence available on record, would reveal that the P.W.-1/Santram @ Matru, who had lodged the First Information Report has not supported the version of the prosecution as stated in the FIR and he has been declared hostile by the public prosecutor and was cross-examined. However, he admitted that on 21.05.2013, he had seen the dead body of his brother Rambali lying on a cot and there was a ligature mark around his neck. P.W.-2/Ramkrishna is the person, who was in the house of the deceased at that night in connection with the "Lagan Ceremony' of his sister's son Anil with the daughter of the deceased namely Pooja and he in his evidence has stated that, when he reached the house of Pushpa, he found her at home and her husband Rambali was not there. He after taking dinner remained in the house of Pushpa and next day he come back to his house. He also did not narrate any fact, which may reflect that the crime might have been committed by the respondents No. 1 and 2. This witness has also been declared hostile and the prosecution is not able to get any benefit from his evidence. P.W.-3/Shyam Lal is a witness against whom an allegation has been levelled by the appellant Pushpa in her statement recorded under Section 313 of the Cr.P.C. that, he procured a sale deed from the deceased Rambali barely 8 to 10 days before the incident and a major portion of the consideration had not been paid by him to deceased Rambali . However, he has only stated that in the night appellant Pushpa came to him and asked some "Ghee and Chilly' on the pretext that throat of her husband is chocking and in the morning, he found his brother Rambali dead and there was a ligature mark around his neck. However, he stated that from 06 months before the incident, accused Salim was visiting the house of Pushpa and they were having very close relations, but apart from this, he did not state anything, which may reflect that the crime might have been committed by the respondents. P.W.-4/Ram Ashrey has also not narrated any incident or circumstance, which may reflect any culpability on respondents. He only stated that the deceased Rambali was sent to the market by appellant Pushpa to fetch "Bheli' and thereafter 02 bottles of liquor and he did not return back in the night and when he visited the house of the deceased in the morning, he found that Pushpa was weeping and he also found a ligature mark around the neck of the deceased. Recovery of a house hold rope from Pushpa is also alleged which is stated to have been given by her daughter Pooja. Other witnesses are formal witnesses and, therefore, they were not in a position to narrate any circumstance or fact, which may fasten any criminal liability on the appellants. If we appreciate the evidence of the above witnesses, we found that the evidence of all above mentioned witnesses is to the tune that Rambali was not at his house on the fateful day, when the "Lagan Ceremony' of her daughter Pooja was going on, he was sent by respondent Pushpa to fetch "Bheli' and 02 bottles of liquor, but he did not return back and in the night, Pushpa asked P.W.-3/Shyamlal to give her some "Chilly' and "Ghee' as the throat of her husband (Deceased Rambali) is choking and in the morning,

he was found dead. The cumulative effect of the evidence given by all these factual witnesses before the trial Court would certainly not attract the satisfaction, which may be termed as proof beyond reasonable doubt. Needless to say that the instant case was purely based on circumstantial evidence as nobody had seen the respondents committing murder of deceased Rambali and it was the duty of the prosecution to prove all the circumstances from which an inference of guilt may be drawn and also it was the duty of prosecution to show and establish that the proved circumstances are of a definite tendency and they unerringly point towards the guilt of the accused persons and these circumstances, if taken cumulatively are forming a chain, so complete that there is no escape from the conclusion that in all probability the crime has been committed by the respondents only and by none else and it is also incapable of explanation of any other hypothesis then that of the guilt of the respondents.

40. Keeping in view the above factual and legal position, we are of considered opinion that the prosecution has miserably failed to prove its case beyond reasonable doubt.

41. The circumstances attempted to be proved before the court below are not such where from any inference may be drawn against the appellants. Even the fact that appellant chased deceased with a rope in her hand has not been proved as the informant P.W.-1/Matru has turned hostile. It is also not proved that who brought the deceased to his house or he came on his own. Simple circumstance of appellant Pushpa asking for "Ghee and Chilly' in the night is not a circumstance from which any adverse inference may be drawn. Appellants have not been seen by anyone with the deceased around the field of "firtu' and it is not proved as to what happened to deceased after he left his house.

42. On a careful perusal of the judgment, it appears that though the judgment has been written in a cryptic way and elaborate reasoning has not been given, but we have ourselves appreciated the evidence and material available on record and have found that, it cannot be said that the view taken by the Trial Judge is perverse or unreasonable. Simply, because the judgment is cryptic may not be a ground for interfering with the order of the acquittal, unless the view taken by the Trial Judge is not a possible view.

43. A criminal trial proceeds with the presumption of innocence of the accused persons and this presumption of innocence stands fortified with the acquittal of the accused persons. So very strong and cogent reasons must exist for interfering in the judgment of acquittal.

44. Keeping in view the aforesaid weaknesses of the prosecution case, we are of the considered view that the view taken by the trial court was a probable and logical view and the judgment of the trial court cannot be said to be illegal, illogical and improbable and not based on material on record. So, we are satisfied that there is absolutely no hope of success in this appeal and accordingly, no interference is called for.

45. Hence, the prayer for grant of leave to appeal is hereby rejected and the application to grant leave to file appeal is dismissed.

46. Since application for grant of leave to appeal has been rejected, the memorandum of appeal also does not survive. Consequently, the appeal is also dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 4794 of 2019

Santosh Kumar Pandey ...Petitioner
Versus
State of U.P. &Ors. ...Respondents

Counsel for the Petitioner:
Sri Achyut Jee

Counsel for the Respondents:
C.S.C.

A. Writ-Article 14 Constitution of India-Para7.3& 7.10 of Legal Remembrancer's Manual- Appointment of District Government Counsel - Fairness in manner of power exercised - Principal laid down-Held decision-making process suffers from vice of arbitrariness and unreasonableness - Writ petition allowed.

B. Writ - Article 226 of Constitution of India -Power of judicial review- Whether power exercised by authority is quasi-judicial or administrative-Nature of order is relevant factor.

C. Writ-Nature of post of District Government Counsel - Not only officers of the Court, but also representative of the State - It is a position of great trust and confidence - Applicability of the Provision of Article 14 - Appointment of Government Counsel at the level of District level as well of High Court level is not just professional engagement but to it public element is also attached - Requiring assessment of merit of the candidates by a credible process.(E-1)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Achyut Jee, learned counsel for the petitioner and Sri Neeraj Tripathi, learned Additional Advocate General, appeared on behalf of respondents.

2. The present petition raises a very important question pertaining to the appointments of District Government Counsel (in short D.G.C.) at the District Court, Ballia. The problem is recurring in nature and although the law on the question is fairly well settled, however, the present petition raises concerns with regard to the manners of powers exercised in making the appointments of D.G.C. at the District Courts.

3. The allegation made by the petitioner in brief are as follows:

4. The petitioner is an Advocate and was appointed as Assistant District Government Counsel on 14.1.2015 under the provision of paragraph 7.10 of the Legal Remembrancer's Manual (hereinafter referred to 'L.R. Manual') which governs the manner of appointment of District Government Counsels in the State of Uttar Pradesh. The petitioner discharged his duties till 01.05.2016 and his appointment was renewed from time to time.

5. The present writ petition has been filed stating that in pursuance of an advertisement issued on 08.12.2017 applications were invited for appointment

to the post of D.G.C., A.D.G.C. and Assistant D.G.C. in terms of the provisions of Para 7.3 of L.R. Manual, a copy of the said advertisement has been filed as Annexure-10 to the writ petition. The petitioner, desirous of being appointed, also applied under the said advertisement for being considered for appointment.

6. In terms of the applications received under the said advertisement, the District Magistrate sent all the applications to the District Judge, Ballia, who in turn, formed a Committee of three judges' for shortlisting for recommending the eligible candidates for being considered for appointment in pursuance of the advertisement dated 08.12.2017. The said Committee constituted by the District Judge, Ballia recommended the name of 254 counsels as suitable for being considered for appointment and the same list was sent by the District Magistrate to the Legal Remembrancer/State Government. The State Government returned the said list of 254 counsels as short-listed by the Committee with a direction to the District Magistrate, Ballia to select three names against one post as advertised in the advertisement dated 08.12.2017. In pursuance of the said directions of the State Government, the District Magistrate once again sent all the records to the District Judge, Ballia for suggesting the names of three persons against one vacancy as was directed by the State Government. The District Judge, Ballia once again formed a Committee of four members and the said Committee interviewed the applicants and shortlisted 51 names as considered appropriate by them for being considered for appointment, the said list of 51 names was sent to the District Magistrate, Ballia, who in turn, forwarded the said list to the State Government/Legal Remembrancer for its consideration and suitable directions. The list of earlier 254 candidates and the subsequent list of 51 candidates has been filed by the petitioner as Annexure-13 to the writ petition. The petitioner claims that his name appears in both the said lists. It is stated and argued at the bar that instead of selecting the candidates out of the said 51 shortlisted candidates, the Under Secretary, State of U.P. vide his letter dated 21.8.2018 sent a letter to the District Magistrate asking him to recommend the name of 19 persons (as mentioned in the letter) for being appointed for a period of 14-14 days. The said list was not carved out, out of the 51 candidates list that was initially forwarded by the District Magistrate (Annexure-13 to the writ petition) The District Magistrate, Ballia, on the basis of the said directives, issued by Under Secretary, recommended the said 19 names as were forwarded to him by the Under Secretary vide his letter dated August 2018 without any change for being appointed in terms of provisions of Para 7.10 of the L.R. Manual. The State Government, vide its order dated 24.11.2018, selected 14 counsels out of the list of 19 counsels as sent by the District Magistrate, Ballia for being appointed on the post of D.G.C., A.D.G.C. and Assistant D.G.C. under the provisions of para 7.10 of L.R. Manual. It is these appointments that are under challenge in this writ petition.

7. After entertaining the writ petition we had called for instructions from the Standing Counsel and also the records pertaining to the appointments as recommended by the State Government only to verify and peruse the decision

making process by which the said appointments were made ignoring the recommendations made by the Committee constituted by the District Judge, Ballia.

8. Sri Neeraj Tripathi, learned Additional Advocate General, appeared and assisted the Court and forwarded the records pertaining to the manner of appointment. He also brought on record the instructions received through the District Magistrate, Ballia in respect of the averments made in the writ petition. We have taken the said instructions on record and perused the original record in details. The averments made in the writ petition with regard to the recommendations made by the Committee constituted by the District Judge of the 51 candidates and the subsequent forwarding all the said 51 names by the District Judge to the State Government are not in dispute.

9. From perusal of documents on record as well as the instructions, it is revealed that on 23.8.2018 Sri Brajesh Pathak, Minister for Justice, Political Pension and Additional Power Source, vide letter No. 2064, addressed to the Chief Secretary (Justice), the Hon'ble Minister directed the Chief Secretary that with regard to the appointment of Government Counsels on various posts in the District Ballia, the names of the under written counsels be called for from the District Magistrate along with his proposal. In the said letter, the name of 19 counsels was recorded along with their mobile numbers, a copy of the said letter is extracted here-in-below:

संख्या एम 253/सत्र न्याय0–3/2018

ब्रजेश पाठक कार्यालयः कक्ष सं0–91–91ए मुख्य भवन

मंत्री उ0प्र0 सचिवालय

विधायी एवं न्याय, दूरभाषः 0522–2238074/2213292(का0)

राजनैतिक पेंशन संख्या 2064/वी.आई.पी./वि. न्या.अति.ऊर्जा रा.पें./2018

अतिरिक्त ऊर्जा स्त्रोत लखनऊ

दिनांक 23.08.18

प्रमुख सचिव, न्याय।

कृपया जनपद **बलिया** में शासकीय अधिवक्ताओं के विभिन्न पदों पर रिक्तियों के सापेक्ष निम्नलिखित अधिवक्तओं को 14–14 दिन के लिए अस्थायी रूप से आबद्ध करने हेतु जिलाधिकारी से तत्काल प्रस्ताव प्राप्त कर अग्रेतर कार्यवाही हेतु प्रस्तुत करेः–

1. श्री संजीव कुमार सिंह पुत्र श्री केदारनाथ सिंह (मो0–9452350752), जि0शा0अधि0, फौजदारी।

2. श्री विनय कुमार सिंह, पुत्र श्री आनन्देश्वर प्रताप सिंह (मो0–9450780590), जि0शा0अधि0, सिविल।

3. श्री सम्पूर्णानन्द दूबे, पुत्र श्री हरिशंकर दूबे(मो0–9453776085), जि0शा0अधि0, राजस्व।

4. श्री सुधीर कुमार मिश्रा, पुत्र श्री शोकहरण मिश्र (मो0–9450780029),सहा0 जि0शा0अधि0, फौजदारी।

5. श्री अनिल पाण्डेय, पुत्र री केदार नाथ पाण्डेय (मो0–8115779009), सहा0 जि0शा0अधि0,फौजदारी।

6. श्री संदीप कुमार तिवारी पुत्र श्री वीरेन्द्र तिवारी (मो0–9415659131), सहा0 जि0शा0अधि0,फौजदारी।

7. श्री विनय कुमार सिंह पुत्र श्री कृष्ण नन्द सिंह (मो0–9839463730), सहा0 जि0शा0अधि0,फौजदारी।

8. श्री हर्ष नारायण प्रसाद पुत्र स्व0 शुकर प्रसाद (मो0–9454540908), सहा0 जि0शा0अधि0,फौजदारी।

9. श्री नरदेश्वर मिश्र पुत्र श्री सच्चिदानन्द मिश्र (मो0–9670360037), सहा0 जि0शा0अधि0,फौजदारी।

10. श्री संदीप कुमार गुप्ता पुत्र श्री अवध बिहारी प्रसाद (मो0–9936607367), सहा0 जि0शा0अधि0,फौजदारी।

11. श्री अजय कुमार राय पुत्र श्री स्वामीनाथ राय (मो0–9452099958), सहा0 जि0शा0अधि0,फौजदारी।

12. श्री विजय शंकर पाण्डेय पुत्र श्री बाल कृष्ण पाण्डेय (मो0–9450532255), सहा0 जि0शा0अधि0,फौजदारी।

13. श्री विपिन कुमार मिश्र पुत्र स्वा0 बालेश्वर मिश्र (मो0–9450776561), सहा0 जि0शा0अधि0,फौजदारी।

14. श्री विनोद कुमार भारद्वाज पुत्र स्व0 मनोगी (मो0–9415829955), सहा0 जि0शा0अधि0,फौजदारी।

15. श्री मनोज पाण्डेय पुत्र श्री राम विलास पाण्डेय (मो0–9415694789), सहा0 जि0शा0अधि0,सिविल।

16. श्री कुंज बिहारी गुप्ता पुत्र स्व0 राजेन्द्र प्रसाद गुप्ता(मो0–9452866203), सहा0 जि0शा0अधि0,सिविल।

17. श्री दीप नारायण ठाकुर पुत्र स्व0 जगन्नाथ ठाकुर (मो0–9415361851), सहा0 जि0शा0अधि0,सिविल।

18. श्री बृज नारायण राय पुत्र श्री ठाकुर राय (मो0–9415657598), सहा0 जि0शा0अधि0, राजस्व।

19. श्री मुरली यादव पुत्र स्व0 हरिनन्दन यादव (मो0–9415249940), सहा0 जि0शा0अधि0,राजस्व।

कृपया उपरोक्तानुसार तत्काल कार्यवाही करने का कष्ट करें।

21.08.2018

(ब्रजेश पाठक)

मंत्री
विधायी एवं न्याय अतिरिक्त ऊर्जा स्त्रोत
राजनैतिक पेंशन विभाग उत्तर प्रदेश शासन।

10. In pursuance of the said direction by the Hon'ble Minister, the Under Secretary, vide his letter dated 21.8.2018, wrote a letter to the District Magistrate, Ballia directing him to send a proposal for appointment of 19 persons as were recommended by the Minister for being appointed on 14 days basis. The said letter was in sum and substance the same as the letter dated 23.8.2018. Copy of the said letter is being extracted here-in-below:

संख्या–एम–252 / सात–न्याय–3–18
प्रेषक,
ओम प्रकाश
अनु सचिव,
उत्तर प्रदेश शासन।
सेवा में,
जिलाधिकारी,
बलिया।
न्याय अनुभाग–3(नियुक्तियॉ) लखनऊः दिनांक 31 अगस्त, 2018
विषयः– जनपद बलिया में रिक्त शासकीय अधिवक्ताओं के विभिन्न पदों पर 14–14 दिन के आबन्धन के संबंध में।

महोदय,

उपर्युक्त विषय के संबंध में मुझे यह कहने का निदेश हुआ है कि जनपद बलिया में शासकीयअधिवक्ताओं के विभिन्न रिक्त पदो के सापेक्ष विधि परामर्शी निदेशिका के सुसंगत प्राविधानों के अनुसार 14–14 दिन हेतु अस्थायी रूप से आबद्ध किये जाने के संबंध में नियमानुसार प्रस्ताव उपलब्ध कराने का कष्ट करेः– 1. श्री संजीव कुमार सिंह पुत्र श्री केदारनाथ सिंह (मो0–9452350752), जि0शा0अधि0, फौजदारी।

2. श्री विनय कुमार सिंह, पुत्र श्री आनन्देश्वर प्रताप सिंह (मो0–9450780590), जि0शा0अधि0, सिविल।

3. श्री सम्पूर्णानन्द दूबे, पुत्र श्री हरिशंकर दूबे(मो0–9453776085), जि0शा0अधि0, राजस्व।

4. श्री सुधीर कुमार मिश्रा, पुत्र श्री शोकहरण मिश्र (मो0–9450780029),सहा0 जि0शा0अधि0, फौजदारी।

5. श्री अनिल पाण्डेय, पुत्र श्री केदार नाथ पाण्डेय (मो0–8115779009), सहा0 जि0शा0अधि0,फौजदारी।

6. श्री संदीप कुमार तिवारी पुत्र श्री वीरेन्द्र तिवारी (मो0–9415659131), सहा0 जि0शा0अधि0,फौजदारी।

7. श्री विनय कुमार सिंह पुत्र श्री कृष्ण नन्द सिंह (मो0–9839463730), सहा0 जि0शा0अधि0,फौजदारी।

8. श्री हर्ष नारायण प्रसाद पुत्र स्व0 शुकर प्रसाद (मो0–9454540908), सहा0 जि0शा0अधि0,फौजदारी।

9. श्री नरदेश्वर मिश्र पुत्र श्री सच्चिदानन्द मिश्र (मो0–9670360037), सहा0 जि0शा0अधि0,फौजदारी।

10. श्री संदीप कुमार गुप्ता पुत्र श्री अवध बिहारी प्रसाद (मो0–9936607367), सहा0 जि0शा0अधि0,फौजदारी।

11. श्री अजय कुमार राय पुत्र श्री स्वामीनाथ राय (मो0–9452099958), सहा0 जि0शा0अधि0,फौजदारी।

12. श्री विजय शंकर पाण्डेय पुत्र श्री बाल कृष्ण पाण्डेय (मो0–9450532255), सहा0 जि0शा0अधि0,फौजदारी।

13. श्री विपिन कुमार मिश्र पुत्र स्वा0 बालेश्वर मिश्र (मो0–9450776561), सहा0 जि0शा0अधि0,फौजदारी।

14. श्री विनोद कुमार भारद्वाज पुत्र स्व0 मनोगी (मो0–9415829955), सहा0 जि0शा0अधि0,फौजदारी।

15. श्री मनोज पाण्डेय पुत्र श्री राम विलास पाण्डेय (मो0–9415694789), सहा0 जि0शा0अधि0,सिविल।

16. श्री कुंज बिहारी गुप्ता पुत्र स्व0 राजेन्द्र प्रसाद गुप्ता (मो0–9452866203), सहा0 जि0शा0अधि0,सिविल।

17. श्री दीप नारायण ठाकुर पुत्र स्व0 जगन्नाथ ठाकुर (मो0–9415361851), सहा0 जि0शा0अधि0,सिविल।

18. श्री बृज नारायण राय पुत्र श्री ठाकुर राय (मो0–9415657598), सहा0 जि0शा0अधि0, राजस्व।

19. श्री मुरली यादव पुत्र स्व0 हरिनन्दन यादव (मो0–9415249940),
सहा0 जि0शा0अधि0,राजस्व।

भवदीय
ह0 अपठनीय
(ओम प्रकाश)
अनु सचिव।

11. In pursuance of these two directives the District Magistrate, Ballia recommended the names of the persons as directed by the Under Secretary for being appointed. The said recommendation was made by the District Magistrate on 16.9.2018 which is extracted here-in-below:

संख्या–डी–1374/सात–न्याय–3–18
प्रेषक,
जिला मजिस्ट्रट
बलिया।
सेवा में,
विशेष सचिव,
उत्तर प्रदेश शासन
न्याय अनुभाभग (नियुक्तियॉ)
लखनऊ।
संख्याः 699/न्याय सहा0

विषयः–जनपद बलिया में रिक्त शासकीय अधिवक्ताओं के विभिन्न पदों पर 14–14 दिन के आबंधन के संबंध में।

महोदय,

कृपया, उपर्युक्त विषयक शासन के पत्र संख्या–एम–253/सात–न्याय–3–18 दिनांक 21.08.2018 का सन्दर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा जनपद बलिया में शासकीय अधिवक्ताओं के विभिन्न रिक्त पदो के सापेक्ष विधि परामर्शी निदेशिका के सुसंगत प्राविधानों के अनुसार 14–14 दिनों हेतु अस्थाई रूप से आबद्ध किये जाने के सम्बन्ध में नियमानुसार प्रस्ताव उपलब्ध कराने का निर्देश दिया गया हैं।

2– शासन के पत्र में कुल 19 शासकीय अधिवक्ताओं के नाम के सम्मुख पदनाम भी अंकित हैं, का उल्लेख हैं, जिसके क्रम में पत्रांकित अधिवक्तागण द्वारा 14–14 दिनों के अस्थायी आबन्धन के लिए आवेदन पत्र प्रस्तुत किया गया है, जो निम्नवत हैः–

क्रम संख्या	अधिवक्ता का नाम	पदनाम
1	श्री संजीव कुमार सिंह, पुत्र–श्री केदारनाथ सिंह ग्राम व पोस्ट–शाहपुर थाना गडवार जनपद बलिया। मो0नं0–9452350752	जिला शासकीय अधिवक्ता (फौजदारी)
2	श्री अनिल पाण्डेय पुत्र–श्री केदारनाथ पाण्डेय, पता–ग्राम व पोस्ट–रेवती जनपद बलिया। मो0नं0–81155779009	अपर जिला शासकीय अधिवक्ता (फौजदारी)
3	श्री सुधीर कमार मिश्र पुत्र–श्री शोकहरण मिश्र, पता–ग्राम–सुहवल पोस्ट–कुसौरा थाना बांसडीह रोड जनपद बलिया। मो0नं0 9450780029	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(1)	श्री संदीप कुमार तिवारी पुत्र–श्री वीरेन्द्र तिवारी, ग्राम व पोस्ट–चितबड़गांव थाना चितबड़ागांव जनपद बलिया। मो0 नं0 8353985535/9415659131	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(2)	श्री विनय कुमार सिंह, पुत्र–श्री कृष्णानन्द सिंह, ग्राम व पोस्ट–रामनगर थाना दोकटी जनपद बलिया। मो0नं0–9839463730	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(3)	श्री हर्षनारायण प्रसाद, पुत्र–स्व0 शूकर प्रसाद, ग्राम–चडवां बरवां थाना सिकन्दरपुर जनपद बलिया। मो0नं0–9454540908	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(4)	श्री नर्देश्वर मिश्र, पुत्र–श्री सच्चिदानन्द मिश्र ग्राम व पोस्ट– जगदेवा थाना बैरिया जनपद बलिया। मो0नं0–9670360037	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(5)	श्री संदीप कुमार गुप्ता पुत्र–अवध बिहारी प्रसाद ग्राम–सहतवार तह0 बांसडीह जनपद बलिया।मो0नं0 9936607367	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(6)	श्री अजय कुमार राय पुत्र श्री स्वामीनाथ राय, ग्राम–आनन्द नगर तहसील बलिया जनपद	सहायक जिला शासकीय अधिवक्ता (फौजदारी)

	बलिया। मो0नं0– 9452099958	
3(7)	श्री विजयशंकर पाण्डेय, पुत्र–श्री बालकृष्ण पाण्डेय ग्राम–नन्दपुर पोस्ट–हल्दी जनपद बलियां मो0नं0– 9450532255	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(8)	श्री विपिन कुमार मिश्र, पुत्र–स्व0 बालेश्वर मिश्र ग्राम–पाण्डेयपुर पोस्ट–ताखा	सहायक जिला शासकीय अधिवक्ता (फौजदारी)
3(9)	श्री विनोद कुमार भारद्वाज पुत्र–स्व0 मनोगी ग्राम–गौरीताल घोसा पोस्ट–सोनडीह जनपद बलिया। मो0नं0 9415829955	जिला शासकीय अधिवक्ता (दीवानी)
4	श्री विनय कुमार सिंह पुत्र–आनन्देश्वर प्रताप सिंह, ग्रम–जानकी निवास बहादुरपुर देवकली बलिया। मो0नं0 9450780590	जिला शासकीय अधिवक्ता (दीवानी)
5	श्री मनोज पाण्डेय पुत्र–श्री रामविलास पाण्डेय, ग्राम–नसीराबाद पोस्ट–सागरपाली जनपद बलिया। मो0नं0 9415694789	अपर जिला शासकीय अधिवक्ता (दीवानी)
6	श्री कुंजबिहारी गुप्ता पुत्र–स्व0 राजेन्द्र प्रसाद गुप्ता, ग्राम– मैरीटार तह0–बांसडीह जनपद बलिया। मो0नं0 9452866203	सहायक जिला शासकीय अधिवक्ता (दीवानी)
	श्री दीपनारायण ठाकुर पुत्र–स्व0 जन्नाथ ठाकुर ग्राम– कोतवाली हरपुर बलिया। मो0नं0– 9415361851	जिला शासकीय अधिवक्ता (दीवानी)
7	श्री सम्पूर्णानन्द दूबे पुत्र– स्व0 हरिशंकर दूबे, ग्राम व पोस्ट–बेरूआरबारी तह0– बांसडीह जनपद बलिया। मो0 नं0 9453776085	जिला शासकीय अधिवक्ता (राजस्व)
8	श्री ब्रजनारायण राय, पुत्र–श्री ठाकुर राय ग्राम– व पोस्ट–जीराबस्ती सुखपुरा बलिया। मो0नं0– 9415657598	सहायक जिला शासकीय अधिवक्ता (राजस्व)
	श्री मुरली यादव पुत्र–स्व0 हरिनन्दर यादव ग्राम–मालीपुर पोस्ट–गौवापार जनपद बलिया। मो0नं0– 9792433975	सहायक जिला शासकीय अधिवक्ता (राजस्व)
9	--	अपर जिला शासकीय अधिवक्ता (राजस्व)
	कुल विज्ञाप्ति रिक्त पदो की संख्या	18

विज्ञाप्ति रिक्त पदों का विवरण निम्नानुसार हैः–

क संख्या	पद का नाम	संख्या
1	जिला शासकीय अधिवक्ता (फौजदारी)	
2	अपर जिला शासकीय अधिवक्ता (फौजदारी)	
3	सहायक जिला शासकीय अधिवक्ता (फौजदारी)	
4	जिला शासकीय अधिवक्ता (दीवानी)	
5	अपर जिला शासकीय अधिवक्ता (दीवानी)	
6	सहायक जिला शासकीय अधिवक्ता (दीवानी)	
7	जिला शासकीय अधिवक्ता (राजस्व)	
8	सहायक जिला शासकीय अधिवक्ता (राजस्व)	
9	अपर जिला शासकीय अधिवक्ता (राजस्व)	
	कुल विज्ञाप्ति रिक्त पदो की संख्या	18

सहायक जिला शासकीय अधिवक्ता फौजदारी के मात्र 8 पद रिक्त हैं, जिसके सापेक्ष 10 व्यक्तियों का नाम शासन से प्राप्त हुआ हैं। इस प्रकार 2 नाम अतिरिक्त हो रहे हैं। अपर जिला शासकीय अधिवक्ता राजस्व के पद पर श्री हंसराज तिवारी वैकल्पिक व्यवस्था में आबद्ध होकर कार्य कर रहे है। शासन द्वारा दिनांक 27.10.2017 को पूर्व से कार्यरत शासकीय अधिवक्तागण का नवीनीकरण न करते हुए आबद्वता समाप्त किये जाने के फलस्वरूप इनके द्वारा अस्थायी एवं वैकल्पिक रूप में दीवानी न्यायालयों में शासकीय हित में वादों की पैरबी हेतु सम्बद्ध किया गया है।

यह भी उल्लेखनीय है कि वर्तमान समय में सत्र न्यायालयों में शासन द्वारा आबद्ध श्री भरत तिवारी एवं देव नारायण पाण्डेय अपर जिला शासकीय अधिवक्ता (फौजदारी) एवं अभियोजन अधिकारीगण को शासकीय हित में वादों की पैरबी हेतु सम्बद्ध किया गया है।

शासन के निर्देश के क्रम में जनपद में शासकीय अधिवक्ताओं के रिक्त पदों पर आबन्धन हेतु विज्ञाप्ति प्रकाशित करके प्राप्त आवेदन पत्रों पर मा0 जनपद न्यायाधीश बलिया द्वारा संस्तुत पैनल पुलिस विभाग से चरित्र सत्यापन कराकर शासन को प्रेषित किया गया है। जिस पर कतिपय बिन्दुओं पर आख्या वांछित है, जिसे पृथक से भेजा जायेगा।

उपरोक्त अधिवक्तागण जिनका नाम शासन से प्राप्त हुआ है, उनके कार्य अनुभव, व्यवसायिक आचरण, गुणावगुण के सम्बन्ध में न तो मा0 जनपद न्यायाधीश की कोई आख्या/संस्तुति प्राप्त है और न ही पुलिस विभाग से उनका चरित्र सत्यापन ही हुआ है।

अतएव उपरोक्त के दृष्टिगत शासकीय हित में वादों के पैरबी हेतु मेरा सुविचारित मत है कि शासन को भेजे गये पैनल जो मा0 जनपद न्यायाधीश बलिया द्वारा संस्तुत है, में से ही विधि परामर्शी निदेशिका के अध्याय 07 के प्रस्तर 7.10 के प्राविधानों के अन्तर्गत 14–14 दिनों के लिए अस्थायी वैकल्पिक व्यवस्था में शासकीय अधिवक्तागण के रिक्त पदों पर आबन्धन हेतु निर्णय लेने का कष्ट करें।

संलग्नक उपरोक्तानुसार।

भवदीय
ह0 अपठनीय
(भवानी सिंह खंगारौत)
जिला मजिस्ट्रेट
बलिया।
संख्या व तिथि उपरोक्त।

प्रतिलिपिः अनु सचिव, उत्तर प्रदेश शासन, न्याय अनुभाग–3 (नियुक्तियॉं), लखनऊ को सूचनार्थ एवं आवश्यक
कार्यवाही हेतु प्रेषित । ह0 अपठनीय
(भवानी सिंह खंगारौत)
जिला मजिस्ट्रेट बलिया।

12. In pursuance of the said recommendation, the Under Secretary sent a letter to the District Magistrate conveying that the proposal for appointment as sent for 19 names has been considered and the following 14 names, out of the said 19 names recommended, are being sent for appointment to the various posts for a period of 14 days under Para 7.10 of the L.R. Manual, a copy of the said dated 29.11.2018 is extracted here-in-below:

संख्या–डी0–1374/सात–न्याय–3–18–48 (बलिया)/2014
प्रेषक,
अजीत सिंह राठौर,
अनु सचिव,
उत्तर प्रदेश शासन।

सेवा में,
जिलाधिकारी,
बलिया।
न्याय अनुभाग–3 (नियुक्तियॉं) लखनऊ : दिनांक 29 नवम्बर, 2018

विषयः– जनपद बलिया में रिक्त शासकीय अधिवक्ताओं के विभिन्न पदों पर 14–14 दिनों के आबन्धन किये जाने के संबंध में।

महोदय,
उपर्युक्त विषयक अपने पत्र संख्या–699/न्याय सहा0 दिनांक 16.09.2018 का कृपया संदर्भ ग्रहण करने का कष्ट करें।

2. उक्त के सन्दर्भ में मुझे यह कहने का निदेश हुआ है कि विधि परामर्शी निदेशिका के प्रस्तर–7.10 के प्राविधानों के अन्तर्गत रिक्त पदों के सापेक्ष अस्थायी रूप से 14–14 दिनों के लिये आबद्ध किये जाने के संबंध में आप द्वारा प्रेषित प्रस्ताव में निम्नलिखित अधिवक्ताओं के नामों पर अनुमोदन प्रदान किया जाता हैः–

1. श्री संजीव कुमार सिंह पुत्र श्री केदारनाथ सिंह, जि0शा0अधि0, फौजदारी।

2. श्री अनिल पाण्डेय पुत्र श्री केदारनाथ सिंह, अपर जि0शा0अधि0, फौजदारी।

3. श्री सुधीर कुमार मिश्र पुत्र श्री शोकहरण मिश्र, सहा0 जि0शा0अधि0, फौजदारी।

4. श्री संदीप कुमार तिवारी पुत्र श्री वीरेन्द्र तिवारी, सहा0 जि0शा0अधि0, फौजदारी।

5. श्री विनय कुमार सिंह पुत्र कृष्णानन्द सिंह, सहा0 जि0शा0अधि0, फौजदारी।

6. श्री नर्देश्वर मिश्र पुत्र श्री सच्चिदानन्द मिश्र, सहा0 जि0शा0अधि0, फौजदारी।

7. श्री विजयशंकर पाण्डेय पुत्र श्री बालकृष्ण पाण्डेय, सहा0 जि0शा0अधि0, फौजदारी।

8. श्री विनोद कुमार भारद्वाज पुत्र श्री स्व0 मनोगी, सहा0 जि0शा0अधि0, फौजदारी।

9. श्री विनय कुमार सिंह पुत्र श्री आनन्देश्वर प्रताप सिंह, जि0शा0अधि0, दीवानी।

10. श्री मनोज पाण्डेय पुत्र श्री रामविलास पाण्डेय, अपर जि0शा0अधि0, दीवानी।

11. श्री दीपनारायण ठाकुर पुत्र स्व0 जगन्नाथ ठाकुर, सहा0 जि0शा0अधि0, दीवानी।

12. श्री सम्पूर्णानन्द दूबे पुत्र स्व0 हरिशंकर दुबे, जि0शा0अधि0, राजस्व।

13. श्री ब्रजरानायण राय पुत्र श्री ठाकुर राय, सहा0 जि0शा0अधि0, राजस्व।

14. श्री मुरली यादव पुत्र स्व0 हरिनन्दन यादव, सहा0 जि0शा0अधि0, राजस्व।

अतः कृपया उक्त प्राविधानों के अन्तर्गत आवश्यक कार्यवाही करने का कष्ट करें।
भवदीय,
(अजीत सिंह राठौर)
अनु सचिव।

13. Sri Neeraj Tripathi, learned Additional Advocate General, has brought on record a letter dated 03.08.2018, sent by the Under Secretary to the District Magistrate, stating that the earlier recommendation of the District Magistrate pertaining to 51 names shortlisted and sent, did not observe certain provisions of the L.R. Manual, as such, the said panel was being sent back for being considered and sent afresh after considering certain points as mentioned in the said letter dated 03.08.2018. Contents of the said letter dated 03.8.2018 are extracted herein-in-below:

संख्या–डी0–999/सात–न्याय–3–18–48
(बलिया)/2014
प्रेषक,
ओम प्रकाश,
अनु सचिव,
उत्तर प्रदेश शासन।
सेवा में,
जिलाधिकारी,
बलिया।
न्याय अनुभाग–3 (नियुक्तियॉ) लखनऊ : दिनांक 3 अगस्त, 2018
विषयः–जनपद बलिया में जिला/अपर/सहायक, शासकीय अधिवक्ता (दीवानी/फौजदारी/राजस्व) के रिक्त पदों के सापेक्ष नियुक्ति हेतु पैनल/प्रस्ताव उपलब्ध कराये जाने के संबंध में।
महोदय,
उपर्युक्त विषयक अपने पत्र संख्या–543,544,545/न्याय सहा0 दिनांक 10.06.2018, तथा विभिन्न पत्र संख्या–7510,7511,7512,7513,7514/न्याय सहा0 दिनांक 10.07.2018, का संदर्भ ग्रहण करने का कष्ट करें।

2. इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि जिला/अपर/सहायक, शासकीय अधिवक्ता (दीवानी/फौजदारी/राजस्व) के रिक्त पदों के सापेक्ष उपलब्ध कराये गये पैनल के संबंध में विधि परामर्शी निदेशिका के कतिपय प्राविधानों का अनुपालन नहीं किया गया है। अतः उक्त पैनल इस आशय से संलग्न कर वापस किये जाते हैं कि कृपया विधि परामर्शी निदेशिका के प्रस्तर संख्या–7 के प्राविधानों के अनुसार निम्नलिखित बिन्दुओं को सम्मिलित करते हुए पुनः पैनल गठित कर शासन को उपलब्ध कराने का कष्ट करें:–

1. संबंधित जिलाधिकारी विधिज्ञ वर्ग संस्था (बार) के सदस्यों को रिक्तियों के बारे में सूचित करेगा।

2. जिला सरकारी अधिवक्ता की दशा में 10 वर्ष विधि व्यवसाय किया हो।

3. सहायक जिला शासकीय अधिवक्ता की दशा में 07 वर्ष विधि व्यवसाय किया हो।

4. उप जिला शासकीय अधिवक्ता की दशा में 05 वर्ष विधि व्यवसाय किया हो।

5. आयु, विधिक विशेष ज्ञान, (बार) में किये गये विधि व्यवसाय की अवधि।

6. हिन्दी में प्राप्त योग्यताएं।

7. पिछले तीन वर्षों विधि व्यवसाय की आय का विवरण।

8. दो वर्षों की कार्यवाही के दौरान उनके द्वारा किये गये कार्य का न्यायालय द्वारा सत्यापित आपराधिक, सिविल
और राजस्व संबंधी विधि कार्य किया है।

9. पैनल में तीन विधि व्यवसायियों के नाम होने चाहिए।

10. चरित्र, व्यवसायिक आचरण, उसकी अपयुक्तता, गुणावगुण तथा सत्यनिष्ठा के विषय में रिपोर्ट।

11. सिविल अपील सं0 13727/2015 स्टेट आफ यू0पी0 व अन्य बनाम अजय कुमार शर्मा आदि में मा0 उच्चतम न्यायालय द्वारा पारित आदेश दिनांक 26.11.2015 तथा यूनियन आफ इण्डिया बनाम रघुवीर सिंह (1989)
2 एस0एस0सी0 754 में पारित निर्णय के आलोक में पैनल भेजा जाना चाहिए।
संलग्नक यथोक्त
भवदीय,
(ओम प्रकाश)
अनु सचिव।

14. In the instructions, sent by the District Magistrate, which are taken on

record, he has reiterated that the Government had raised certain objections with regard to the list of 51 candidates sent through the letter dated 03.08.2018 and, in fact, it further goes to show that in response to the letter dated 03.08.2018, a report was sent on 12.10.2018 in accordance with Para 7 of the L.R. Manual and after approval of the learned District Judge, Ballia, it is also stated that format of the application as per Para 7 of the L.R. Manual and guidelines, issued by the Hon'ble Apex Court in Civil Appeal No. 13727 of 2015 issued vide order dated 26.11.2015 and the guidelines issued in Raghuvir Singh's case, the said letter dated 12.12.2018 is also placed on record through instructions. A perusal whereof reveals that all the points, which were raised in the letter dated 03.08.2018, were clarified by the District Magistrate, Ballia in his said communication dated 12.10.2018. There is nothing on record that any further orders were passed thereafter in respect of the list of 51 candidates.

15. Based upon the said facts, as narrated above, and, as pleaded by both the parties and as borne by the original records. learned counsel for the petitioner proceeded to argue that appointments made through letter dated 29.11.2018 were wholly arbitrary, illegal and contrary to the provisions of Chapter VII of the L.R. Manual. It is argued that the manner of appointment smacks of non-application of mind and is arbitrary. He has further argued that although no person has right to be appointed as a Government Counsel, however, any appointment made de hors the rules and the provisions of the L.R. Manual as well as the pronouncement of the Hon'ble Supreme Court deserves to be set aside. He has further argued that even if the Government was not agreeable to the 51 names sent by the District Magistrate on the basis of recommendation of the Committee constituted by the District Judge, the Government could have appointed the counsels on a short-term basis only in terms of Para 7.10 of the L.R. Manual out of the panel lawyers that existed and the appointments could not be done of the persons who were never on the panel and had never undergone any procedure whatsoever for selection and thus the appointments made by the State Government deserves to be quashed. The petitioner has argued that appointments of the District Government Counsel in the state of Uttar Pradesh are governed by the L.R. manual as well as under the provisions of Section 24 of Cr.P.C. (in relation to the Public Prosecutors and the Additional Prosecutors, Criminal). He has extensively argued that in terms of the power conferred either under Section 24 Cr.P.C. or the L.R. Manual, the Under Secretary was not empowered to send the names as has been done by the Under Secretary as he has no authority whatsoever to appoint or even recommend for appointments, the names as has been done by the Under Secretary in the present case. It is argued at the bar that the appointments are made on considerations beyond what is prescribed under the L.R. Manual and for oblique motives and are politically motivated.

16. Sri Neeraj Tripathi, on the other hand, has argued that the process of finalizing the appointments in terms of the advertisements dated 08.12.2017 is in process and the present appointments are only as stop gap arrangement till the final selection is over. He has heavily relied upon the letter dated 23.8.2018 to suggest

that the names as recommended by the District Magistrate and the Committee constituted by the District Judge, Ballia were objected to which establishes that the process of selection did not come to an end and owing to government exigencies it was necessary that stop gap arrangements be made so the work of the Government does not suffer and, thus, it is prayed that the writ petition is devoid of merits and is liable to be dismissed.

17. Learned counsel for the petitioner has placed heavy reliance on the judgement in the case of **State of U.P. and others vs. Ajay Kumar Sharma and another, (2016) 15 SCC 289**, the judgement in the case of **State of U.P. and another vs. Johri Mal, (2004) 4 SCC 714 and State of Punjab and another vs. Brijeshwar Singh Chahal and another, 2016 (6) SCC 1, Kumari Shrilekha Vidyarthi Etc. vs. State of U.P. And Ors, 1991 1 SCC 212.** To buttress his case that the appointments made are contrary to the L.R. Manual, Section 24 Cr.P.C and the law laid down by the Hon'ble Supreme Court in the judgements relied upon by the counsel for the petitioner.

18. On the basis of the pleadings, exchanged, perusal of records and the submissions made at the bar, the points that emerge for consideration are whether the manner of appointment of the 14 persons, impugned in the present writ petition are in accordance with law applicable for appointment to the post of D.G.C., Additional D.G.C. and Assistant D.G.C. and whether the appointments so made can meet the test of Article 14 of the Constitution of India.

19. We have given our anxious consideration to the facts pleaded and brought on record at the bar as well as the judgements relied upon by the parties. In the case of State of U.P. and another vs. Johri Mal, the Hon'ble Supreme Court considered the renewal of the term of D.G.C. (Criminal) after analysing the statutory provisions of section 24 Cr.P.C. as well as the provisions of L.R. Manual concerning the appointments of the District Government Counsels in the State of U.P. and the scope of judicial review with regard to the appointments made by the State Government in terms of the powers conferred under Section 24 Cr.P.C. as well as the L.R. Manual. In para 28, 30, 40, 42, 43, 44, 45 and 56 has observed with regard to scope of judicial are as under:

"28. The Scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put are :

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies;

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies.

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

40. So long as in appointing a counsel the procedures laid down under the Code of Criminal Procedure are followed and a reasonable or fair procedure is adopted, the Court will normally not interfere with the decision. The nature of the office held by a lawyer vis-`-vis the State being in the nature of professional engagements, the courts are normally charry to over-turn any decision unless an exceptional case is made out. The question as to whether the State is satisfied with the performance of its counsel or not is primarily a matter between it and the counsel. The Code of Criminal Procedure does not speak of renewal or extension of tenure. The extension of tenure of public prosecutor or the district counsel should not be compared with the right of renewal under a licence or permit granted under a statute. The incumbent has no legal enforceable right as such. The action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia on the ground that the same is arbitrary.

The courts normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of a public prosecutor or a district counsel. The jurisdiction of the courts in a case of this nature would be to invoke the doctrine of 'Wednesbury Unreasonableness' as developed in Associated Picture House vs. Wednesbury Corporation (1947) 2 All ER 640).

42. It may be true that the Legal Remembrancer's Manual provides for renewal but it contains executive instructions which even do not meet the requirements of clause (3) of Article 166 of the Constitution. The Legal Remembrancer's Manual is not a law within the meaning of Article 13 of the Constitution of India.

43. The State, however, while appointing a counsel must take into account the following fundamental principles which are required to be observed that good and competent lawyers are required to be appointed for (i) good administration of justice; (ii) to fulfill its duty to uphold the rule of law; (iii) its accountability to the public; and (iv) expenditure from the tax payers' money.

44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the public prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. No appointment of public prosecutors or district counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance.

45. However, malice in law can also be a ground for judicial review.

56. We would, however, like to lay stress on the fact that the consultation with the District Judge must be an effective one. The District Judge in turn would be well advised to take his colleagues into confidence so that only meritorious and competent persons who can maintain the standard of public office can be found out.

20. The Supreme Court also extensively dealt with the nature of the office of the District Government Counsel in para 71 to 78 which is recorded as under:

"71. The District Government counsel appointed for conducting civil as also criminal cases hold offices of great importance. They are not only officers of the court but also the representative of the State. The court reposes a great deal of confidence in them. Their opinion in a matter carries great weight. They are supposed to render independent, fearless and non-partisan views before the court irrespective of the result of litigation which may ensue.

72. The Public Prosecutors have greater responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal

Procedure and in particular Section 320 thereof.

73. The public prosecutors and the Government counsel play an important role in administration of justice. Efforts are required to be made to improve the management of prosecution in order to increase the certainty of conviction and punishment for most serious offenders and repeaters. The prosecutors should not be over-burdened with too many cases of widely varying degree of seriousness with too few assistants and inadequate financial resources. The prosecutors are required to play a significant role in the administration of justice by prosecuting only those who should be prosecuted and releasing or directing the use of non-punitive methods of treatment of those whose cases would best be processed.

74. The District Government Counsel represent the State. They, thus, represent the interest of general public before a court of law. The Public prosecutors while presenting the prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crime does not go unpunished. Maintenance of law and order in the society and, thus, to some extent maintenance of rule of law which is the basic fibre for upholding the rule of democracy lies in their hands. The Government counsel, thus, must have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to keep the standard of the high offices cannot be minimized. The holders of the post have a public duty to perform. Public element is, thus, involved therein.

75. In the matter of engagement of a District Government Counsel, however, a concept of public office does not come into play. However, it is true that in the matter of Counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence. The provision of Article 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or act in defiance, deviation and departure of the principles of law, the court may interfere. The court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason de hors the statute.

76. The appointment in such a post must not be political one. The Manual states that a political activity by the District Government Counsel shall be a disqualification to hold the post.

77. We cannot but express our anguish over the fact that in certain cases recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power. Those who do not have such political affinity although competent are not appointed. Legal Remembrancer's Manual clearly forbids appointment of such a lawyer and/or if appointed, removal from his office. The District Judge and the District Magistrate, therefore, are duty bound to see that before any recommendation is not made, or any political affinity. They must also bear in mind that the Manual postulates that any lawyer who is guilty of

approaching the authorities would not be entitled to be considered for such appointment.

78. The State, therefore, is not expected to rescind the appointments with the change in the Government. The existing panel of the District Government Counsel may not be disturbed and a fresh panel come into being, only because a new party has taken over change of the Government."

21. The Supreme Court also dealt with the question of manner of appointment and the consultation process that should be resorted to the findings as recorded in the said judgement in para 84 to 87 are as under:

"84. Keeping in mind the aforementioned legal principles the question which arises for consideration in these appeals is, the nature and extent of consultation, a Collector is required to make with the District Judge.

85. The age-old tradition on the part of the State in appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge is based on certain principles. Whereas the District Judge is supposed to know the merit, competence and capability of the concerned lawyers for discharging their duties; the District Magistrate is supposed to know their conduct outside the court vis-`-vis the victims of offences, public officers, witnesses etc. The District Magistrate is also supposed to know about the conduct of the Government counsel as also their integrity.

86. We are also pained to see that the Stat of Uttar Pradesh alone had amended sub-section (1) of Section 24 and deleted sub-sections (3), (4) and (5) of Section 24 of the Code of Criminal Procedure. Evidently, the said legislative step had been taken to overcome the decision of this Court in Kumari Shrilekha Vidyarthi (supra). We do not see any rationale in the said action. The learned counsel appearing for the State, when questioned, submitted that such a step had been taken having regard to the fact that exhaustive provisions are laid down in Legal Remembrancer Manual which is a complete code in itself. We see no force in the said submission as a law cannot be substituted by executive instructions which may be subjected to administrative vagaries. The executive instructions can be amended, altered or withdrawn at the whims and caprice of the executive for the party in power. Executive instructions, it is beyond any cavil, do not carry the same status as of a statute.

87. The State should bear in mind the dicta of this Court in Mundrika Prasad Singh (supra) as regard the necessity to consult the District Judge. While making appointments of District Government Counsel, therefore, the State should give primacy to the opinion of the District Judge. Such a course of action would demonstrate fairness and reasonableness of action and, furthermore, to a large extent the action of the State would not be dubbed as politically motivated or otherwise arbitrary. As noticed hereinbefore, there also does not exist any rationale behind deletion of the provision relating to consultation with the High Court in the matter of appointment of the Public prosecutors in the High Court. The said provision being a salutary one, it is expected that the State of U.P. either would suitably amend the same or despite deletion shall consult the High Court with a view to ensure fairness in action."

22. The next judgement relied upon by the counsel for the petitioner is **State**

of U.P. and others vs. Ajay Kumar Sharma and another, the Hon'ble Supreme Court in the said case dealt with the renewal and the appointment of the District Government Counsel (civil and criminal) in the Subordinate Courts across the State of Uttar Pradesh. In the said case, it was extensively argued before the Supreme Court that the judgement in the case of **State of U.P. and another vs. Johri Mal** has categorically laid down that the post of District Counsel is a provisional appointment and no status of public nature is conferred on the incumbent and also that the L.R. Manual are merely instructions which do not contain the concomitants of Article 166(3) and, therefore, L.R. Manual is not a law under Article 13 of the Constitution of India.

23. The Supreme Court in case of **State of U.P. and others vs. Ajay Kumar Sharma and another (supra)** in para 18 & 19 recorded as under:

"18. Sitting in a Division Bench of two, we at present can do no better than apply the rules of precedent as have been left for us to follow. The law pertaining to the appointment of Additional District Government Counsel, Assistant District Government Counsel, Panel lawyers and Sub District Government Counsel was directly in issue before the Three-Judge Bench in State of U.P. v. Johri Mal, (2004) 4 SCC 714 where the law has been comprehensively clarified. No purpose is served by discussing Kumari Shrilekha Vidyarthi or any judgments rendered thereafter.

19. In Johri Mal, this Court perused the LR Manual as also the Code of Criminal Procedure and reiterated that the District Counsel stood professionally engaged; that the State Government was free to determine the course of action after being satisfied of their performance, and that the Courts must be circumspect in the exercise of judicial review on matters which fell within the discretion of the State Government, i.e. appointment of their counsel or advocates. This Court reiterated that the District Counsels do not enjoy the statutory rights with respect to the renewals of tenures and the State Government enjoyed the discretionary powers in this respect. The curial performance of the advocates should not be the sole criterion for their re-appointment as District Counsel and that the State Government must be free to repose trust and confidence in the persons whom they choose to appoint as their advocates. We can do no better than reproduce the following paragraphs from this judgment which is binding on us as also on any and every other Two-Judges Bench:

"40. So long as in appointing a counsel the procedures laid down under the Code of Criminal Procedure are followed and a reasonable or fair procedure is adopted, the court will normally not interfere with the decision. The nature of the office held by a lawyer vis-à-vis the State being in the nature of professional engagements, the courts are normally chary to overturn any decision unless an exceptional case is made out. The question as to whether the State is satisfied with the performance of its counsel or not is primarily a matter between it and the counsel. The Code of Criminal Procedure does not speak of renewal or extension of tenure. The extension of tenure of Public Prosecutor or the District Counsel should not be compared with the right of renewal under a licence or permit granted under a

statute. The incumbent has no legal enforceable right as such. ..."

41. In Om Kumar v. Union of India, (2001) 2 SCC 386 it was held that where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, the test of unreasonableness may be applied. The action of the State, thus, must be judged with extreme care and circumspection. It must be borne in mind that the rights of the Public Prosecutor or the District Counsel do not flow under a statute. Although, discretionary powers are not beyond the pale of judicial review, the courts, it is trite, allow the public authorities sufficient elbow space/play in the joints for a proper exercise of discretion.

...

44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the Public Prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. No appointment of Public Prosecutors or District Counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of the people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance.

46. The Code of Criminal Procedure does not provide for renewal or extension of a term. Evidently, the legislature thought it fit to leave such matters at the discretion of the State. It is no doubt true that even in the matter of extension or renewal of the term of Public Prosecutors, the State is required to act fairly and reasonably. The State normally would be bound to follow the principles laid down in the Legal Remembrancer's Manual.

...

75. In the matter of engagement of a District Government Counsel, however, a concept of public office does not come into play. However, it is true that in the matter of counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence. The provision of Article 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law, the court may interfere. The court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason dehors the statute. "

24. Coming to the judgement of State of Punjab and another vs. Brijeshwar Singh Chahal and another, the

Hon'ble Supreme Court was considering appointments of Government Counsels in the State of Punjab and Haryana. The Supreme Court noted that in the State of Haryana and Punjab there was no procedure prescribed for appointment of Government Counsels akin to the procedure in the State of Uttar Pradesh i.e. L.R. Manual. However, the Supreme Court, after considering the submissions made at the bar framed the following four questions for its consideration;

(1) Whether the States of Punjab and Haryana have made any realistic assessment of their requirement before making appointments of Law Officers.

(2) Whether the States of Punjab and Haryana have formulated any scheme, policy, norms or standards for appointing Law Officers.

(3) Whether appointment of Law Officers by the State Governments need to be made on a fair, reasonable, non-discriminatory and objective basis; and

(4) If answer to question Nos.1, 2 and 3 are found in the negative, what is the way forward?

Answer to the question no. 1 is recorded as under:

"The upshot of the above discussion is that for a fair and objective system of appointment, there ought to be a fair and realistic assessment of the requirement, for otherwise the appointments may be made not because they are required but because they come handy for political aggrandisement, appeasement or personal benevolence of those in power towards those appointed. The dangers of such an uncanalised & unregulated system of appointment, it is evident are multi-dimensional resulting in erosion of the rule of law, public faith in the fairness of the system and injury to public interest and administration of justice. It is high time to call a halt to this process lest even the right thinking become cynical about our capacity to correct what needs to be corrected."

Considering the question no. 2, the Supreme Court held as under:

"It is, in our view, too late in the day for any public functionary or Government to advance such a contention leave alone expect this Court to accept the same. If a Government counsel discharges an important public function and if it is the primary duty of those running the affairs of the Government to act fairly, objectively and on a non- discriminatory basis, there is no option for them except to choose the best at the bar out of those who are willing and at times keen to work as State counsel. It is also their duty to ensure that the process by which the best are selected is transparent and credible. Abdicating that important function in favour of the Advocate General of the State who, in turn, has neither the assistance of norms or procedure to follow nor a mechanism for assessment of merit will be self-defeating. We regret to say that in the matter of appointment of State Counsel, the States of Punjab and Haryana have much to do to reform the prevalent system which reform is in our opinion long overdue. Question No.2 is also answered in the negative."

25. Considering the question no. 3 which is relevant for the facts of the present case, the Supreme Court considered the entire gamut of judgements which have led to the doctrine of judicial review to be extended to the administrative actions concluded as under:

"36. The development of law in this country has taken strides when it comes to interpreting Articles 14 and 16 and their

sweep. Recognition of power exercisable by the functionaries of the State as a trust which will stand discharged only if the power is exercised in public interest is an important milestone just as recognition of the Court's power of judicial review to be wide enough to strike at and annul any State action that is arbitrary, unguided, whimsical, unfair or discriminatory. Seen as important dimensions of the rule of law by which we swear the law as it stands today has banished from our system unguided and uncanalised or arbitrary discretion even in matters that were till recently considered to be within the legitimate sphere of a public functionary as a repository of Executive Power. Those exercising power for public good are now accountable for their action, which must survive scrutiny or be annulled on the first principle that the exercise was not for public good in that the same was either malafide, unfair, unreasonable or discriminatory. Extension of the principle even to contractual matters or matters like engagement of law officers is symbolic of the lowering of the threshold of tolerance for what is unfair, unreasonable or arbitrary. The expanding horizons of the jurisprudence on the subject both in terms of interpretation of Article 14 of the Constitution as also the court's willingness to entertain pleas for judicial review is a heartening development on the judicial landscape that will disentitle exercise of power by those vested with it as also empower those affected by such power to have it reversed if such reversal is otherwise merited.

37. The question whether a fair, reasonable and non-discriminatory method of selection should or should not be adopted can be viewed from another angle also equally if not more important than the need for preventing any infringement of Article 14. The State counsel appears for the State Government or for public bodies who together constitute the single largest litigant in our Court system. Statistics show that nearly 80% of litigation pending in the courts today has State or one of its instrumentalities as a party to it. State Counsel/counsel appointed by public bodies thus represent the largest single litigant or group engaged in litigation. It is also undeniable that for a fair, quick and satisfactory adjudication of a cause, the assistance which the Court gets from the Bar is extremely important. It is at times said that the quality of judgment or justice administered by the courts is directly proportionate to the quality of assistance that the courts get from the Counsel appearing in a case. Our system of administration of justice is so modelled that the ability of the lawyers appearing in the cause to present the cases of their respective clients assumes considerable importance. Poor assistance at the Bar by counsel who are either not sufficiently equipped in scholarship, experience or commitment is bound to adversely affect the task of administration of justice by the Court. Apart from adversely affecting the public interest which State counsel are supposed to protect, poor quality of assistance rendered to the courts by State Counsel can affect the higher value of justice itself. A fair, reasonable or non-discriminatory process of appointment of State Counsel is not thus demanded only by the rule of law and its intolerance towards arbitrariness but also by reason of the compelling need for doing complete justice which the Courts are obliged to do in each and every cause. The States cannot in the discharge of their public duty and power to select and appoint State counsel disregard either the guarantee

contained in Article 14 against non-arbitrariness or the duty to protect public interest by picking up the best among those available and willing to work nor can the States by their action frustrate, delay or negate the judicial process of administration of justice which so heavily banks upon the assistance rendered by the members of the Bar.

38. To sum up, the following propositions are legally unexceptionable:

The Government and so also all public bodies are trustees of the power vested in them.

Discharge of the trust reposed in them in the best possible manner is their primary duty.

The power to engage, employ or recruit servants, agents, advisors and representatives must like any other power be exercised in a fair, reasonable, non-discriminatory and objective manner.

The duty to act in a fair, reasonable, non-discriminatory and objective manner is a facet of the Rule of Law in a constitutional democracy like ours.

An action that is arbitrary has no place in a polity governed by Rule of Law apart from being offensive to the equality clause guaranteed by Article 14 of the Constitution of India.

Appointment of Government counsel at the district level and equally so at the High Court level, is not just a professional engagement, but such appointments have a "public element" attached to them.

Appointment of Government Counsel must like the discharge of any other function by the Government and public bodies, be only in public interest unaffected by any political or other extraneous considerations.

The government and public bodies are under an obligation to engage the most competent of the lawyers to represent them in the Courts for it is only when those appointed are professionally competent that public interest can be protected in the Courts.

The Government and public bodies are free to choose the method for selecting the best lawyers but any such selection and appointment process must demonstrate that a search for the meritorious was undertaken and that the process was unaffected by any extraneous considerations.

No lawyer has a right to be appointed as a State/Government counsel or as Public Prosecutor at any level, nor is there any vested right to claim an extension in the term for which he/she is initially appointed. But all such candidates can offer themselves for appointment, re-appointment or extension in which event their claims can and ought to be considered on their merit, uninfluenced by any political or other extraneous considerations.

Appointments made in an arbitrary fashion, without any transparent method of selection or for political considerations will be amenable to judicial review and liable to be quashed.

Judicial review of any such appointments will, however, be limited to examining whether the process is affected by any illegality, irregularity or perversity/irrationality. The Court exercising the power judicial review will not sit in appeal to reassess the merit of the candidates, so long as the method of appointment adopted by the competent authority does not suffer from any infirmity."

26. Considering the 4th question and the fact that in the State of Punjab and Haryana (supra) there was no guidelines

existing for appointment to the post of Government Counsels at the district level. The Supreme Court taking a cue from Section 24 held as under:

"43. Consultation with the Sessions Judge for a Public Prosecutor in the District judiciary and with the High Court for one in the High Court is statutorily prescribed because of the importance of the appointment and the significance of the opinion of the Courts where the appointee has to work, as to his or her capacity and professional ability. The statute does not admit of an appointment in disregard of the requirement of consultation. The Law Commission has, therefore, rightly held the consultative process to be a check on the power of appointment which cannot be left unregulated or uncontrolled, lest a person not suited or competent enough gets appointed to the position for other reasons or considerations. Consultation, in that sense, lends reassurance as to the professional ability and suitability of the appointee. The Commission has on that premise placed a question mark on the validity of State amendment that deletes from Section 24 of the Code of Criminal Procedure Code the need for consultation with the Sessions Judge or the High Court.

44. Taking a cue from the provisions of Section 24, we are inclined to hold that what serves as a check on the power of the Government to appoint a Public Prosecutor can as well be a check on the appointment of the State Counsel also. That is because, while the Public Prosecutor's power under the Code of Criminal Procedure gives him a distinctive position, the office of a State Counsel, in matters other than criminal, are no less important. A State Counsel by whatever designation called, appears in important civil and constitutional matters, service and tax matters and every other matter where substantial stakes are involved or matters of grave and substantial importance at times touching public policy and security of State are involved. To treat such matters to be inconsequential or insignificant is to trivialise the role and position of a State Counsel at times described as additional and even Senior Additional Advocate General. What holds good for appointment of a Public Prosecutor as a check on arbitrary exercise of power must, therefore, act as a check on the State's power to appoint a State Counsel as well especially in situations where the appointment is unregulated by any constitutional or statutory provision. Such a requirement is implicit in the appointing power of the State which power is in trust with the government or the public body to be exercised only to promote public interest. The power cannot be exercised arbitrarily, whimsically or in an un-canalised manner for any such exercise will fall foul of Article 14 of the Constitution of India and resultantly Rule of law to which the country is committed.

45. We have while dealing with question No.1 held that no lawyer has a right to be appointed as State Government counsel or as public prosecutor at any level nor does he have a vested right to claim extension in the term for which he/she is initially appointed. We have also held that all candidates who are eligible for any such appointment can offer themselves for re-appointment or extension in which event their claims can and ought to be considered on their merit uninfluenced by any political or other

extraneous consideration. It follows that even the writ-petitioners cannot claim appointment or extension as a matter of right. They can at best claim consideration for any such appointment or extension upon expiry of their respective terms. Such consideration shall, however, have to be in accordance with the norms settled for such appointments and on the basis of their inter se merit, suitability and performance if they have already worked as State counsel. To that extent, therefore, there is no difficulty. The question is what should be the mechanism for such consideration. There are in that regard two major aspects that need to be kept in mind. The first is the need for assessment and requirement of the State Governments having regard to the workload in different courts. As noticed earlier, appointments appear to have been made without any realistic assessment of the need for State counsel at different levels. Absence of a proper assessment of the requirement for State counsel leads to situations that have been adversely commented upon by the CAG in his report to which we have made a reference in the earlier part of this judgment. The problem gets compounded by those in power adding to the strength of government advocates not because they are required but because such appointments serve the object of appeasement or private benevolence shown to those who qualify for the same. The CAG has in that view rightly observed that there ought to be a proper assessment of the need before such appointments are made.

46. The second aspect is about the process of selection and assessment of merit of the candidates by a credible process. This process can be primarily left to the State Government who can appoint a Committee of officers to carry out the same. It will be useful if the Committee of officers has the Secretary to Government, Law Department, who is generally a judicial officer on deputation with the Government as its Member- Secretary. The Committee can even invite applications from eligible candidates for different positions. The conditions of eligibility for appointment can be left to the Government or the Committee depending upon the nature and the extent of work which the appointees may be effected to handle. The process and selection of appointment would be fair and reasonable, transparent and credible if the Government or the Committee as the case may be also stipulates the norms for assessment of merit and suitability.

47. The third stage of the process of selection and appointment shall in the absence of any statutory provisions regulating such appointments involve consultation with the District & Sessions Judge if the appointment is at the district level and the High Court if the appointment is for cases conducted before the High Court. It would, in our opinion, be appropriate and in keeping with the demands of transparency, objectivity and fairness if after assessment and finalisation of the selection process a panel is sent to the Chief Justice of the High Court concerned for his views on the subject. The Chief Justice could constitute a Committee of Judges to review the names recommended for appointment and offer his views in regard to professional competence and suitability of candidates for such appointments. Appointments made after such a consultative process would inspire confidence and prevent any arbitrariness. The same procedure could be followed

where candidates are granted extension in their terms of appointment in which case the Committee appointed by the government and that constituted by the Chief Justice could also look into the performance of the candidates during the period they have worked as State counsel.

27. The salient features that can be culled out from the pronouncements of the Hon'ble Supreme Court are as under:

"(i) No person can claim appointment to the District Government Counsel as a matter of right.

(ii) Posts of the District Government Counsel is a post of public importance and sensitive to the justice delivery system.

(iii) The appointments to the said posts is on the discretion of the State Government, however, the said discretion should be exercised reasonably and fairly and in the interest of public without any element of arbitrariness or fulfillment.

(iv) There is no place for political intervention in the appointment process. The procedure whether it is statutory or administrative should confirm to the test of fairness and non-arbitrariness.

(v) Process of selection should be after due consultation with District Judge or Committee."

28. Thus, from the pleadings and judgements referred to above, it is clear that the procedure prescribed under the L.R. Manual although does not have statutory flavour, none the less provide the guidelines and the manner of appointment which conforms to the fairness doctrine as accepted and perpetuated and this should be followed in letter and spirit. The manner of appointment which includes consultation with the District Judge or any Committee constituted by the District Judge for shortlisting the candidates is a fair procedure and should be necessarily followed while making the appointments to the post of Government Counsels at the district level i.e. D.G.C., Additional D.G.C. and Assistant D.G.C. In fact, the procedure prescribed was duly followed in the present case. The 51 candidates were shortlisted in a transparent and fair manner which cannot be faulted or challenged on the ground of violation of fairness doctrine.

29. This Court however fails to understand as to how the Minister of Law and Justice could have forward 19 names along with mobile numbers of the advocates for being recommended by the District Magistrate for being appointed by the State of Uttar Pradesh. The said process was clearly without any powers conferred either by virtue of L.R. Manual or Section 24 Cr.P.C. or by any constitutional powers and thus smacks of arbitrariness, the same is also in the teeth of the directions given in the case of **Ajay Kumar Sharma (supra) & Johri Mal (supra)** which repel any political say in the appointments. There is nothing on record in the present case to establish as to how did the Hon'ble Minister come to make the choice while recommending the 19 names, in fact, on the record, there are recommendation even by retired IAS Officers for particular names which again smacks of arbitrariness, the manner of recommendation of the names by Hon'ble Minister and forwarded without any application of mind by the Secretary and the Under Secretary to the State of U.P. again are highly arbitrary and are against the principles of good governance, which is the foundation of the constitutional principles as enshrined under the

Constitution of India. This Court is again pained to note that the entire process through which 19 names were recommended, did not at any stage involved either the Legal Remembrancer or the District Judge concerned. It is also borne out from record that out of the 19 names three names were of the counsels whose names were mentioned in the list of 51 advocates which were recommended in accordance with the L.R. Manual and after following the procedure as prescribed under the L.R. Manual, this Court also notices that under the L.R. Manual a duty is cast upon the District Magistrate to observe the instructions in the L.R. Manual while recommending the names for appointment to the post of District Government Counsels. However, the District Magistrate did not address to the Manual and recommended the 19 names as were directed to be recommended by the Under Secretary. The District Magistrate did not even make any consultation with anyone prior to recommending the names as dictated by the Under Secretary. Thus, in the present case, the appointments have been made under the dictates of the Minister, who in turn, dictated the Secretary (Law) to recommend the names and, who in turn, further dictated the District Magistrate to recommend the names of 19 and out of the said 19 names 14 names were finalized for appointment. It is well settled that the powers conferred on the executive authorities should be exercised in a fair and reasonable manner and if any manner of exercise of powers is prescribed the same should be done in that manner alone. There is no explanation on record in the present case as to why did the District Magistrate not have any consultation with the District Judge prior to recommending the 19 names as was done by him under the dictation from the under Secretary. The Supreme Court while dealing with the bureaucrat politician relationship under the Indian Constitution in case Tarlochan Dev Sharma vs. State of Punjab, 2001(6)SCC 260 observed as under:

15. It is interesting to view the present day bureaucrat-politician relationship scenario:

"A bureaucratic apparatus is a means of attaining the goals prescribed by the political leaders at the top. Like Alladins lamp, it serves the interest of whosoever wields it. Those at the helm of affairs exercise apical dominance by dint of their political legitimacy. . . . . The ministers make strategic decisions. The officers provide trucks, petrol and drivers. They give march orders. The minister tells them where to go. The officers have to act upon instructions from above without creating a fuss about it." ("Effectiveness of Bureaucracy", The Indian Journal of Public Administration, April-June 2000, at p.165).

16. In the system of Indian Democratic Governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage there own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties, or in

the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja (1995) 5 SCC 302, this court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this court in The Purtabpur Company Ltd., AIR 1970 SC 1896, are instructive and apposite. Executive officers may in exercise of their statutory discretions take into account considerations of public policy and in some context, policy of Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated, we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power under Section 22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality under Section 22 of the Act. To say the least what has been done is not what is expected to be done by a senior official like the Principal Secretary of a wing of the State Government. We leave at that and say no more on this issue.

30. We are also inclined to accept the submissions made by learned counsel for the petitioner that even if the State Government feels that the process of finalizing the names cannot be completed or concluded, the short term arrangements as envisaged under Para 7.10 L.R. Manual should be resorted and the appointments should be made only out of the panel lawyers that exists prior to the finalization of the panel in terms of the advertisements issued. There is nothing on record in the present case to establish as to what objective satisfaction was recorded either by Hon'ble Minister, or the Chief Secretary (Law), the Under Secretary (Law) or the District Magistrate while recommending the said names.

31. Thus, testing the appointments only on the ground of decision making process, this Court is of the firm view that the decision making process in recommending the 19 names and then recommending the 14 names by the impugned order in the present writ petition suffers from the vice of arbitrariness, unreasonableness and, thus, are violative of Article 14 of the Constitution of India. The same are also in violation of law laid down by the Supreme Court in case of **Johri Mal, Ajay Kumar Sharma & Brijeshwar Singh Chahal (supra)**

32. In view of the findings recorded above and after considering the law as laid down by the Hon'ble Supreme Court, this Court has no hesitation in holding that the appointments made vide order dated 29.11.2018 (Annexure-15 to the writ petition) are liable to be quashed as

being wholly arbitrary and illegal. The State Government is directed to complete the appointments as finalized in pursuance of the advertisement dated 08.12.2017 and out of the 51 names recommended after due consultation by the Committee constituted by the District Magistrate (Annexure-13 to the writ petition) within a period of four months. However, for a period of four months, the State Government is free to make appointments in terms of Para 7.10 L.R. Manual out of the panel as already existed in the District Ballia as on 08.12.2017.

33. The writ petition is allowed in terms of the order passed above. Original records be returned to Sri Neeraj Tripathi, learned Additional Advocate General.

(Delivered by Hon'ble Mr. Justice Pradeep Kumar Singh Baghel, J.)

1. I agree with the view of my learned brother and the final order proposed by him but I would like to add few lines of my own to highlight some important aspect of the question involved in the matter.

2. A spate of writ petitions are filed in this Court whenever the State Government appoints Government Counsel (Civil, Criminal and Revenue) or refuses to renew their tenure and proposes new panel in the districts or after change of the Government, in spite of the fact that the Supreme Court in unbroken line of decisions has settled the law in respect of appointment, termination and renewal of tenure of the Government Counsel. The litigation is unabated.

3. The facts of the case have been very clearly and succinctly set out by my learned brother and it is not necessary to repeat the same.

4. Before adverting to the judgments of the Supreme Court on the issue, it would be appropriate to advert to the provisions of the Legal Remembrancer's Manual1 and the relevant provisions of the Criminal Procedure Code, 19732.

5. The L.R. Manual came into force in the year 1975. It contains executive instructions. It regulates, amongst others, the appointments of the District Government Counsel (Criminal, Civil and Revenue) and the State Counsel in the High Court.

6. Chapter I of the L.R. Manual deals with interpretations. Paragraph 1.03 of the L.R. Manual provides that there shall be two branches in the Secretariat of the State Government. In both the branches the Judicial Officers are appointed.

7. Chapter III of the L.R. Manual deals with the Legal Remembrancer to the Government and his duties. Paragraph-3.02 thereof says that he is also called Judicial Secretary. Paragraph- 3.04 says that he is the Chief Law Officer of the State. He is a senior Judicial Officer of the District Judge rank. Amongst other, one of his duties is to deal with the appointment of law officers in the High Court and the Supreme Court. Paragraph-3.17 provides that there shall be the posts of Additional, Joint, Deputy and Assistant Legal Remembrancers, and every Additional, Joint and Deputy Legal Remembranchers shall be the ex officio Special Secretary, Joint Secretary and Deputy Secretary respectively.

8. One of the objects to appoint Judicial Officers in the Secretariat is that they are ex officio authorised to act for the Government in respect of all judicial proceedings and to give proper legal advise to the Government. Paragraph-3.03 lays down the duties of the Judicial Secretary-cum- Legal Remembrancer.

9. Chapter VII of the L.R. Manual contains the provisions relating to the District Government Counsel. Paragraph-7.03 enumerates the procedure for appointment of the Government Counsel in the district. It includes the qualification, consultation by the District Magistrate with the District Judge in respect of the suitability and merit of each candidate. Paragraphs- 7.03 and 7.07 of the L.R. Manual, being relevant for the purpose, are extracted below:

*"**7.03. Applications and qualifications-**(1) Whenever the post of any of the Government Counsel in the district is likely to fall vacant within the next three months, or when a new post has been created, the District Officer concerned shall notify the vacancy to the members of the Bar. Members eligible for consideration would be those having at their credit a practice of 10 years in case of District Government Counsel, 7 years in case of Assistant District Government Counsel and 5 years in case of Sub-District Government Counsel. The District Officer shall ask those who want to be considered for appointment to a particular office to give their names to him with particulars such as age, length of practice at the Bar, proficiency in Hindi, Income-tax paid by them on professional income during last 3 years and if not assessed the return submitted by them, if any, details of the work handled by them during the course of the preceding two years duly verified by court and whether they have practised on criminal, civil and revenue side.*

(2) The District Government Counsel and legal practitioners of the neighbouring districts may also send the above particulars for the post of District Government Counsel through their District Officers, who shall forward the same to the District Officer of the district in which the appointment is to be made, with such remarks as they deem fit.

(3) The names so received shall be considered by the District Officer in consultation with the District Judge. The District Officer shall give due weight to the claim of the existing incumbents (Additional/ Assistant District Government Counsel), if any, and shall submit confidentially in order of preference the names of the legal practitioners for each post to the Legal Remembrancer giving his own opinion particularly about his character, professional conduct and integrity and the opinion of the District Judge on the suitability and merits, of each candidate. While forwarding his recommendations to the Legal Remembrancer the District Officer shall also send to him the biodata submitted by other incumbents with such comments as he and the District Judge may like to make. In making the recommendations, the proficiency of the candidate in civil or criminal or revenue law, as the case may be, as well as in Hindi shall particularly be taken into consideration:

Provided that it will also be open to the District Officer to recommend the name of any person, who may be considered fit, even though he may not have formally supplied his biodata for being considered for appointment. The willingness of such a person to accept the appointment if made shall, however, be obtained before his name is recommended.

7.04. *** *** ***

*7.05. *** *** ****

*7.06. *** *** ****

7.07. Political Activity-The District Government Counsel shall not participate in political activities so long they work as such; otherwise they shall incur a disqualification to hold the post.

NOTE- *The term political activity includes membership of any political party or local body as also press reporting work."*

10. Insofar as the appointment of the Public Prosecutors is concerned, it is governed by the provisions of the Cr.P.C. but the renewal is regulated by the L.R. Manual. The State of Uttar Pradesh by the Uttar Pradesh Act No. 18 of 1991 with effect from 16th February, 1991 amended sub-section (1) of Section 24 of the Cr.P.C. and sub-sections (4), (5) and (6) of Section 24 have been omitted. Similarly, the words "after consultation with the High Court" have also been omitted from sub-section (1) of Section 24 Cr.P.C..

11. The issue with regard to nature of office of the Government Pleader came to be considered for the first time in the case of **Mundrika Prasad Singh v. State of Bihar**3, wherein **Hon'ble Mr. Justice V.R. Krishna** Iyer speaking for the Bench held that the Government Pleader holds a public office. The Court quoted with approval the observations of the Madras High Court in the case of **Ramachandran v. Alagiriswami**4 which reads thus:

"The duties of the Government Pleader, Madras are duties of a public nature. Besides, as already explained the public are genuinely concerned with the manner in which a Government Pleader discharges his duties because, if he handles his cases badly, they have ultimately to foot the bill. The Rajasthan case does not take into account all the aspects of the matter.

(36) The learned Advocate General argued that the Government Pleader, Madras is only an agent of the Government, that his duties are only to the Government who are his principals and that he owes no duty to the public at all and that for that reason he would not be the holder of a Public Office.

(37) It is difficult to accept this view. The contention of the learned Advocate General may have been less untenable if the duties of the Government Pleader were merely to conduct in courts cases to which Government are a party. But, as the rules stand, he has a number of other duties to discharge. Besides, even if his only duty is the conduct of cases in which Government have been impleaded, still as explained more than once before the public are interested in the manner in which he discharges his duties.

(90) I am clearly of opinion that having regard to the fact that the Government Pleader of this court is employed by the State on remuneration paid from the public exchequer and having regard to the various functions and duties to be performed by him in the due exercise of that office, most of which are of an independent and responsible character, the office must be held to be a public office within the scope of a quo warranto proceeding."

12. In **Kumari Shrilekha Vidyarthi and others v. State of U.P. and others**5 the Supreme Court has elaborately analysed the provisions of the L.R. Manual, the concept of presence of some public element in the State action while appointing the Government Counsel, the scope of judicial review and the application of Article 14 of the Constitution. The Court held that even in the sphere of contractual matters the State cannot exercise unbridled power

unfettered by the requirement of Article 14. The State must act in the public interest and apply the requirement of Article 14 of the Constitution in the matter of appointment of the Government Counsel also. This root authority has been consistently followed by the Supreme Court in a large number of decisions. Reference may be made to the following judgments:

(i) Harpal Singh Chauhan and others v. State of U.P.6;

(ii) State of U.P. and another v. Johri Mal7;

(iii) State of U.P. v. Ramesh Chandra Sharma and others8;

(iv) State of U.P. and others v. U.P. State Law Officers Association and others9;

(v) State of Uttar Pradesh and others v. Rakesh Kumar Keshari and another10;

(vi) Ghulam Nabi Dar and others v. State of Jammu and Kashmir and others11;

(vii) State of Uttar Pradesh and others v. Ajay Kumar Sharma and another12; and

(viii) State of Uttar Pradesh and others v. Ajay Kumar Sharma and another13.

13. The golden thread, which runs through all these decisions, is that the appointment of the Government Counsel must be made only on the basis of their merit, competence and in the public interest. The Supreme Court time and again has laid emphasis for non-political appointments and that the political affinity with a party in power should not be a consideration for the appointment.

14. In **Johri Mal (supra)** the Supreme Court has culled out the principle in the following terms:

"44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the Public Prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. No appointment of Public Prosecutors or District Counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of the people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance."
(emphasis supplied)

15. The aforesaid observation of the Supreme Court has been reiterated and affirmed by the Supreme Court in the case of **Ajay Kumar Sharma and another14 (supra)**. Paragraph-20 of the said judgement reads as under:

"20. ...In Johri Mal15, this Court has categorically rejected the claim of an advocate to continuous renewal or reappointment as a Government Advocate. We entirely agree with this exposition of the law. We think that the correct approach is to ensure the competency of advocates being considered for appointment of Additional District Government Counsel, Assistant District Government Counsel, Panel lawyers and Sub District Government Counsel. It seems to us that it would be an incorrect approach to start this process

by considering the re-appointment or renewal of existing Government Counsels since that would dilute, nay, dissolve the discretion of the Government to appoint advocates whom they find trustworthy. The High Court has followed the second approach leading to the dissatisfaction of the State Government and their resentment that their realm of discretion has been eroded for no justifiable reason."

16. In the case of **State of Punjab and another v. Brijeshwar Singh Chahal and another**, the Supreme Court elaborately considered all the previous precedents on the issue. Though the case arose in different context but it has laid down the law in respect of appointment of the Government Counsel for all States including the State Counsel who are appointed in the High Court also. The Supreme Court formulated four questions for determination. The question nos. (i), (ii) and (iv) are only in respect of State of Punjab and Haryana, so we are omitting the same. However, question no. (iii) is relevant for our purpose as in answer to the third question the law has been laid down by the Supreme Court for all the States. The question no. (iii) reads as under:

"(iii) Whether appointment of Law Officers by the State Governments need to be made on a fair, reasonable, non-discriminatory and objective basis."

17. While answering question no. (iii) the Supreme Court held that the Government and its instrumentality are the trustee of power vested in them and custodians of public interest, hence it is the duty of the State that they must exercise their power to engage advisers in a fair, reasonable, non-discriminatory and objective manner like they are expected to do for engagement/ appointment of the civil servants, agents, representatives, etc. It has been held that arbitrariness has no place in a polity governed by the rule of law. Article 14 of the Constitution comes into place, if there is any arbitrary decision by the State Government. The Supreme Court in this case has considered the judgments of **Kumari Shrilekha Vidyarthi (supra), U.P. State Law Officers Association (supra) and Johri Mal (supra)**. The Court has highlighted the need for appointment of the Government Counsel only on the basis of competence, sufficient experience and also standing at the Bar. The Court expressed its anguish that in certain cases recommendations are made by the District Magistrates and the persons who have a political affinity to party in power and the State is not expected to cancel their appointment with a change in the Government because a new party has taken over charge of the Government. The Court has emphasized the need of age-old tradition of appointing District Government Counsel in consultation with the District Judge. Following passage of **Brijeshwar Singh Chahal (supra)** in this regard is apposite:

"38. ...The State Government counsel represents the State and thereby the interest of the general public before a court of law. This requires that Government Counsel have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to maintain the standard of the high office cannot be minimized, observed the Court, particularly, when the holders of the post have a public duty to perform. The Court

also expressed anguish over the fact that in certain cases the recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power and that State is not expected to rescind the appointments with the change in the Government because a new party has taken over charge of the Government. This Court also recognized the age-old tradition of appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge. The fact that the District Judge, who is consulted while making such appointment knows the merit, competence and capability of the lawyer concerned, was also recognized by the Court."
(emphasis supplied)

18. In the above case, the Supreme Court has observed that the State is the single largest litigant and the statistics shows that in nearly 80% of the litigation pending in the Courts the State or one of its instrumentalities is party to it. The Court has highlighted the need of good assistance of the Government Counsel for quality of good judgments. The Court has further observed that quality of judgments is adversely affected by poor assistance at the Bar who are not sufficiently equipped in profound knowledge of subject, lack of experience in dealing with the different branches of law and above all high integrity. The Court has opined that if a fair, transparent and non-discriminatory process is not adopted, the administration of justice would badly suffer. The State must respect rule of the law. The State would fail in discharging its public duty to protect the public interest by appointing meritorious persons. Poor quality of assistance rendered to the Courts by the State Counsel can cause serious harm to higher value of the justice. The Court has sum up its decision in the following terms:

"41.1. The Government and so also all public bodies are trustees of the power vested in them.

*** *** ***

41.6. Appointment of Government Counsel at the district level and equally so at the High Court level, is not just a professional engagement, but such appointments have a "public element" attached to them.

41.7. Appointment of Government Counsel must like the discharge of any other function by the Government and public bodies, be only in public interest unaffected by any political or other extraneous considerations.

41.8. The Government and public bodies are under an obligation to engage the most competent of the lawyers to represent them in the Courts for it is only when those appointed are professionally competent that public interest can be protected in the Courts.

41.9. The Government and public bodies are free to choose the method for selecting the best lawyers but any such selection and appointment process must demonstrate that a search for the meritorious was undertaken and that the process was unaffected by any extraneous considerations.

41.10. No lawyer has a right to be appointed as a State/Government counsel or as Public Prosecutor at any level, nor is there any vested right to claim an extension in the term for which he/she is initially appointed. But all such candidates can offer themselves for appointment, re-appointment or extension in which event their claims can and ought to be considered on their merit, uninfluenced by any political or other extraneous considerations.

41.11. Appointments made in an arbitrary fashion, without any transparent method of selection or for political considerations will be amenable to judicial review and liable to be quashed.

41.12. Judicial review of any such appointments will, however, be limited to examining whether the process is affected by any illegality, irregularity or perversity/irrationality. The Court exercising the power of judicial review will not sit in appeal to reassess the merit of the candidates, so long as the method of appointment adopted by the competent authority does not suffer from any infirmity."

19. Guided by the settled principle of the law referred above, we are of the view that in the case at hand the provisions of the L.R. Manual and the law laid down by the Supreme Court in the decisions referred above have been followed in breach. As noticed by my learned Brother in his judgment, the advertisement was issued on 08th December, 2017 inviting applications for appointment on the posts of District Government Counsel, Additional District Government Counsel and Assistant District Government Counsel. The District Magistrate in consultation with the District Judge sent a list to the State Government with certain directions, which were duly complied with by the District Magistrate after consultation with the District Judge, Ballia. This time a list of 51 names were sent by the District Magistrate but the Under Secretary, State of U.P. on 21st August, 2018 sent a communication to the District Magistrate to recommend the names of 19 persons. From a perusal of the original record it transpires that 19 fresh names were sent by the Hon'ble Minister on 21st August, 2018 for their appointment on 14-days basis in terms of Paragraph 7.10 of the L.R. Manual.

20. It is pertinent to mention that the District Magistrate in his communication dated 16th September, 2018 has clearly pointed out that in respect of the names recommended by the Hon'ble Minister the District Judge has not been consulted with regard to their experience, merit and character. Their character verification has not been made by the Police. The District Magistrate has also noted with regard to their engagement for 14-days in terms of the provisions under Chapter VII. Paragraph 7.10 may be met only from the panel prepared in consultation with the District Judge. The State Government ignoring the said letter issued the impugned order. The relevant part of the communication/ letter of the District Magistrate dated 16th September, 2018 reads as under:

"उपरोक्त अधिवक्तागण जिनका नाम शासन से प्राप्त हुआ है, उनके कार्य अनुभव, व्यवसायिक आचरण, गुणावगुण के सम्बन्ध में न तो मा0 जनपद न्यायाधीश की कोई आख्या/संस्तुति प्राप्त है और न ही पुलिस विभाग से उनका चरित्र सत्यापन ही हुआ है।

अतएव उपरोक्त के दृष्टिगत शासकीय हित में वादों के पैरवी हेतु मेरा सुविचारित मत है कि शासन को भेजे गये पैनल जो मा0 जनपद न्यायाधीश बलिया द्वारा संस्तुत है, में से ही विधि परामर्शी निदेशिका के अध्याय 07 के प्रस्तर 7.10 के प्राविधानों के अन्तर्गत 14–14 दिनों के लिए अस्थायी वैकल्पिक व्यवस्था में शासकीय अधिवक्तागण के रिक्त पदों पर आबन्धन हेतु निर्णय लेने का कष्ट करें।"

21. The Under Secretary in his communication dated 29th November, 2018 issued the order for the appointment of 14 Government Counsel (Criminal, Civil and Revenue) under Paragraph 7.10 of the L.R. Manual.

22. It is distressing to note that despite the clear note of the District Magistrate that the procedure provided under the L.R. Manual has not been followed, inasmuch as the opinion of the District Judge in respect of the

merit, competence and capability of the counsel recommended by the Hon'ble Minister has not been obtained, the State has appointed the Government Counsel. The District Magistrate has very clearly mentioned that the appointment should be made only from the earlier list of 51 persons which was prepared in consultation with the District Judge, but the State Government has completely ignored the note appended by the District Magistrate.

23. We are at pains to point out that from the original record we have not found any noting made by the Judicial Officers, who are posted in Judicial Secretariat in the State, against the illegal procedure adopted by the State Government. The one of the objects to post the Judicial Officers in the Secretariat is to ensure that they will give correct legal advice to the State Government because they are independent and are not functioning under the State Government but they are part of judiciary. They are expected to work fairly, fearlessly and totally wedded to the rule of law. We are constrained to observe that the District Magistrate and the concerned Judicial Officers posted in Judicial Secretariat have abdicated their responsibility.

24. It is a well settled law that if an officer abdicated his power or duty on dictation of a superior authority, his action becomes illegal. Reference may be made to the judgments of the Supreme Court in the case of**Tarlochan Dev Sharma v. State of Punjab and others17, Dipak Babaria and another v. State of Gujarat and others18, and the judgment of this Court in Madan Kumar and others v. District Magistrate, Auraiya and others19.**

The Supreme Court in the case of Tarlochan Dev Sharma (supra) has observed as under:

"16. In the system of Indian Democratic Governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. ..."

25. The said judgment has been followed by the Supreme Court in the case of **Dipak Babaria (supra)** wherein the Court has considered this issue. Relevant part of the judgment reads as under:

"69. Besides, the present case is clearly a case of dictation by the State Government to the Collector. As observed by Wade and Forsyth in the 10th Edn. of Administrative Law:

"If the Minister's intervention is in fact the effective cause, and if the power to act belongs to a body which ought to act independently, the action taken is invalid on the ground of external dictation

as well as on the obvious grounds of bad faith or abuse of power."

The observations by the learned authors to the same effect in the 7th Edn. were relied upon by a Bench of three Judges of this Court in Anirudhsinhji Karansinhji Jadeja v. State of Gujarat20. In that matter the appellant was produced before the Executive Magistrate, Gondal, on the allegation that certain weapons were recovered from him. The provisions of TADA had been invoked. The appellant's application for bail was rejected. A specific point was taken that the DSP had not given prior approval and the invocation of TADA was non est. The DSP, instead of granting prior approval, made a report to the Additional Chief Secretary, and asked for permission to proceed under TADA. The Court in paras 13, 14, 15 has held this to be a clear case of "dictation", and has referred to Wade and Forsyth on Surrender, Abdication and Dictation."

26. This Court in the case of **Madan Kumar (supra)** had the occasion to deal with similar issue. In paragraph-21 of the said judgment the Court has quoted with approval excerpts from the Principles of Judicial Review, 1999 edition, by Professor De Smith and the Administrative Law, 7th Edition by Professor Wade in following terms:

"21. Professor De Smith, in his Principles of Judicial Review 1999 Edition, page 240 has aptly said :

"an authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two Commonwealth cases, licensing bodies were found to have taken decision on the instructions of the heads of Government who were prompted by extraneous motives. But, as less colourful cases illustrate, it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide, although it remains a question of fact whether the repository of discretion abdicated it in the face of external pressure."

Professor Wade in his Administrative Law, 7th Edition has dealt with "Surrender, Abdication, Dictation" and "Power in the wrong hands" in the following words:

"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the Courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them....

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise...."
22. This paragraph of Professor Wade has been applied by the Supreme Court in the case of Anirudhsinhji Karansinhji Jadeja v. State of Gujarat, (1995) 5 SCC 302."

27. It was submitted by learned counsel for the petitioner that the appointments have been made on the

ground of political affiliation of the persons, who have been recommended by the State Government. Hence, the impugned order is totally arbitrary. He further submits that from the record it is evident that the professional competence, integrity and character have not been considered in terms of the provisions of the L.R. Manual, hence no consultation has been made with the District Judge.

28. We find sufficient force in the submission of learned counsel for the petitioner. From the case of **Kumari Shrilekha Vidyarthi (supra)**, which has been reiterated in the **Uttar Pradesh State Law Officers' Association (supra)** and **Johri Mal (supra**), we find that the State is not expected to appoint persons with political affinity with the party in power and appointment made in the arbitrary manner for political consideration will be amenable to judicial review and is liable to be quashed.

29. We are constrained to observe that in spite of large number of judgments of the Supreme Court on this issue the State Government is appointing the Government Counsel in the State in utter disregard to the principles laid down by the Supreme Court. We are a democratic society and are governed by the rule of law. One of the facets of the rule of law is complete supremacy of the law and it is antithesis to arbitrary and/or unguided discretionary power. The rule of law is one of the basic structures of our Constitution. It is apposite to quote 'the rule of the law requires that the Government should be subject to the law, rather than law subject to the Government.'21.

30. In **Daryao and others v. State of U.P and others22** way back in 1962 the Supreme Court has highlighted the need for the observance of the rule of law in the following terms:

"11. ...The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. As Halsbury has observed "subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences".

31. In **S.G. Jaisinghani v. Union of India and others** the Supreme Court has observed as under:

"14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law."

32. In **Arundhati Roy, In Re24** the Supreme Court has reiterated the law thus:

" "Rule of law" is the basic rule of governance of any civilised democratic

polity. Our constitutional scheme is based upon the concept of rule of law which we have adopted and given to ourselves. Everyone, whether individually or collectively is unquestionably under the supremacy of law. Whoever the person may be, however high he or she is, no one is above the law notwithstanding how powerful and how rich he or she may be. For achieving the establishment of the rule of law, the Constitution has assigned the special task to the judiciary in the country. It is only through the courts that the rule of law unfolds its contents and establishes its concept...."

33. It is a pity that the circumstances compel us to state something more. Our experience shows that the State functionaries in same manner are appointing the State Counsel in the High Court. We are constrained to observe that huge number of State Counsel, who were working for last several years, have been removed by a single stroke of pen and fresh appointments have been made without bearing in the mind the law laid down by the Supreme Court in the above mentioned judgments. We are not getting proper assistance from the State Counsel. It appears to us that in a large number of fresh appointments merit and professional experience ought to have been given due preference in terms of the law laid down by the Supreme Court in the above cases.

34. Regard being had to the fact that Chapter V of the L.R. Manual deals with the appointment of the Chief Standing Counsel and Standing Counsel in the High Court. Paragraph 5.02 of the L.R. Manual enjoins that the views of the Advocate General or the Chief Justice or any Judge of the High Court may also be taken. For the sake of convenience Paragraph 5.02 of the L.R. Manual is extracted below:

***"5.02 Views of Advocate General may be taken**- In making such appointments as aforesaid the Government may, if considered necessary, take into consideration the views of the Advocate General or the Chief Justice or any Judges of the High Court or of any Committee that may be constituted for the purpose. All such appointments shall be notified in the Official Gazette.*

***NOTE**- General instructions relating to appointment and tenure of the Law Officers of the State as issued under Judicial (A-I) Department Office Memorandum no. 2556(i)/ VII-AI-202-51, dated June 29, 1968, are given in Appendix 'B'."*

35. In this regard in **Brijeshwar Singh Chahal (supra)** also the Supreme Court has observed for appointment of a Committee on similar line. The Supreme Court in Paragraph-51.2 of the judgment has directed the State to constitute a Selection Committee to determine the suitable candidates for appointment as State Counsel. The Secretary, Department of Law, in each State shall be Member-Secretary of the Selection Committee. It is provided that the recommendation of the said Committee shall be considered by a Committee of Judges constituted by the Chief Justice. The said Committee shall record its view regarding suitability of the candidates included in the panel. The said direction has been issued for the State of Punjab and Haryana, but the Supreme Court in Paragraph 51.6 has observed as under:

***"51.6.** We further clarify that although we are primarily concerned with the procedure regarding selection and appointment of Law Officers in the State of*

Punjab and Haryana and although we have confined our directions to the said two States only yet other States would do well to reform their system of selection and appointment to make the same more transparent, fair and objective, if necessary, by amending the relevant LR Manuals/ Rules and Regulations on the subject."
(Emphasis supplied)

36. In the light of the judgments of the Supreme Court in Brijeshwar Singh Chahal (supra) and Para 5.02 of the L.R. Manual we would like to have issued a direction to constitute a Committee but no such relief has been sought by the petitioner, hence we left this issue open.

37. For all the reasons mentioned above, we find that the decision of the State Government for appointment of 14 persons in terms of Paragraph 7.10 of the L.R. Manual is arbitrary, illegal and contrary to the provisions of the L.R. Manual and the law laid down by the Supreme Court in the cases referred above. Accordingly, the writ petition is allowed in terms of the operative portion of the judgment of my learned brother.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE
THE HON'BLE RAJIV JOSHI, J.

SECOND APPEAL No. 167 of 2014

Ratan Khanna & Anr. ...Appellants
Versus
Moradabad Development Authority, Moradabad ...Respondent

Counsel for the Appellants:
Sri Kshitij Shailendra

Counsel for the Respondent:
Sri P.K.Singh.

A. Second Appeal-Substantial Question of Law-O. I Rule 9 C.P.C.-Necessary parties is a party, who ought to have been joined as party and in whose absence, no effective order could be passed- Encroacher of Rasta cannot be said to be necessary party - Moreover no objection raised in w.s. either on or before settlement of Issue-Defendent waived their right in view of O. I Rule 13 C.P.C. - Suit cannot be dismissed for non-joinder - Second Appeal succeeds - Prohibitory Injunction issued against Defendent. (E-1)

(Delivered by Hon'ble Rajiv Joshi J.)

1. This is plaintiffs' second appeal filed under Section 100 CPC against the judgment and decree dated 30.11.2013 passed by Additional District Judge, Court No. 6, Moradabad, whereby Civil Appeal No. 37 of 2012 filed by the appellant-appellants was dismissed affirming the judgment and decree dated 9.11.2011 passed by Additional Civil Judge (Senior Division)/Judge Small Causes Court, Moradabad in Original Suit No. 1626 of 1994 (Ratan Khanna and others Vs. Moradabad Development Authority), whereby the suit filed by the plaintiff-appellants was dismissed.

2. Brief facts of the case are that plaintiffs-Ratan Khanna, Prem Khanna and Ram Nath Katyal filed a suit against the Moradabad Development Authority for grant of permanent injunction restraining the defendant not to make encroachment over the land of passage (raasta) situated towards southern side and also close the open doors shown by letter G, H, I. As per the plaint averments, plaintiff-1 Ratan Khanna and plaintiff-2

Prem Khanna purchased the disputed land situated in village Majholi, District Moradabad in the year 1971 and 1979 through an agreement to sell from Smt. Savitri Kaire and thereafter they became the owner and in possession over the said property mentioned in Schedule A of the plaint. There is 20 feet wide common passage from very beginning. Plaintiff-1 and 2 constructed a boundary wall shown by letters A, B, C and D and open door towards southern side, which has been shown by letters G, H and I in the plaint map. Plaintiff-2 sold some part of the land shown by letters A, D, E, F from the land shown by letters A, B, C, D to the plaintiff-3 Ram Nath.

3. Subsequently, plaintiff-3 also purchased the said land in the name and style of M/s Poonam Enterprises, showing himself to be a partner and opened a factory which is running since 12.11.1992. It is further averred in the plaint that there is no alternative way (raasta) except the way shown towards southern side, which is 20 feet wide since 1971. The land of gata no. 213 was acquired by the State Government for the defendant-Moradabad Development Authority but the land having area of 0.21 acre of the said gata no. 213 was left from acquisition and therefore Smt. Savitri Kaire remained the owner of 0.21 acre of land of gata no. 213 and the plaintiff-appellants have obtained the right to use the said land as way (raasta) from her.

4. It is further stated in the plaint that on 22.10.1994 at about 4.00 pm, the officials of the defendant-Moradabad Development Authority put their bricks etc. over the passage in dispute and intimated to the plaintiff-appellants that the doors opened towards the raasta are illegal, so these are being closed. The plaintiff-appellants have informed the defendant's officials that doors in dispute were existed since 1971 i.e. much prior to establishment of Moradabad Development Authority, which clearly indicated in the map, but the defendant did not pay any heed and therefore, the suit was filed.

The reliefs so claimed in the suit are:

(i) for declaration that the raasta in suit area 0.21 acre is free from acquisition;

(ii) for issuance of prohibitory injunction against the defendant or his agent not to encroach over the way in suit situated in South of the plaintiffs properties and not to put any hindrance in the egress and ingress and not to close the door opening on the way in suit; and

(iii) issuance of mandatory injunction to demolish the wall raised during the pendency of the suit.

5. The defendant-Moradabad Development Authority contested the suit and filed its written statement (30/C) wherein it is stated that there is no door or raasta as alleged by the plaintiffs on the disputed land. The total area of gata no. 213 was 5.58 acres, out of which 2.05 acre land was acquired by the defendant and the defendant took the possession over the same. It is further averred in the written statement that after acquisition of the land by the defendant, only one acre land was left in gata no. 213, whereupon the factory of the plaintiff exists and there is no door opened towards East side or South side. Some portion of the land of the plaintiff situated towards Ease side of

the factory, is acquired by the defendant and the rest portion of the land is towards Southern side. There is no way of factory of the plaintiff towards East or South. The plaintiffs themselves want to create hindrance in development work by making illegal pressure and took possession over the land acquired by the defendant, in fact there is no raasta of the plaintiffs' factory in these plots. Hence, the plaintiffs suit is liable to be dismissed.

6. During the pendency of the suit, plaintiff-3 Ram Nath Katyal died in June, 1998 and his legal heirs were not ready to contest the suit and therefore, they were not impleaded/substituted in his place. Plaintiff-1 Ratan Khann also died during the pendency of the appeal on 4.1.2012 and prior to his death, he had transferred his property in dispute to his grandson, appellant-1/1 Pushkar Khanna vide registered Will deed dated 30.9.2009, who was substituted subsequently at his place and necessary amendment/substitution in this regard were incorporated in the plaint.

7. On the basis of the pleadings of the parties, the trial court framed as many as five issues, which follows as under:

"(i) Whether there is 20 feet raasta over the disputed land and the plaintiffs has easementary right on it;

(ii) Whether the suit is undervalued;

(iii) Whether the court fees paid by the plaintiffs is sufficient;

(iv) Whether the land in dispute was acquired for the defendant and possession was delivered to him; and

(v) Whether the plaintiffs are entitled for relief in the facts and circumstances of the present case."

8. After settlement of issues, the trial court vide judgment and decree dated 9.11.2011 dismissed the suit with the finding that in the revenue record, entry of raasta has not been recorded over the land of plot no. 213 in the khasra and the factory is situated over 0.82 acres of khasra no. 213 and the plaintiffs have failed to prove the existence of 20 feet wide raasta on the disputed land. The trial court also recorded a finding that land in suit had been acquired and the possession of the same had been transferred to the defendant.

9. Being aggrieved by the judgment and decree passed by the trial court, the plaintiffs filed Civil Appeal No. 37 of 2012, which was dismissed on the basis of discussion made in the body of the judgment and decree passed by Additional Civil Judge (Senior Division)/Judge Small Causes Court in Original Suit No. 1626 of 1994 was set aside.

10. The lower appellate court framed points of determination as per provisions of Order 41 Rule 33 CPC, which read as under:

"(i) Whether there is existed any way of 20" wide in the Southern side of the plaintiff's properties?

(ii) Whether that Rasta extinguished when the land was acquired by the Moradabad Development Authority?

(iii) Whether the allottees of the plots are necessary parties?"

11. The points of determination nos. 1 and 2 have been decided in favour of plaintiffs holding therein that there exists 20 feet wide passage and the plaintiffs have got right of easement by way of grant from the original owner and the

Moradabad Development Authority would get right over those area, which has been acquired by it and cannot get any right beyond the acquired area of 2.58 acre and the raasta over plot no. 213 cannot be extinguished even on acquisition of land by the Moradabad Development Authority.

12. The lower appellate court while considering point no.3 has recorded that suit of the plaintiff-appellants is bad for non-joinder of necessary parties and the allottees, who raised some construction over the strip of raasta were not made parties in the suit in view of the Order 1 Rule 9 CPC. The finding so recorded by lower appellate court with regard to points of determination nos. 1 and 2 in paragraph 15 and 16 are quoted as under:

"15. Thus, from foregoing discussions, it is clear that there is no reason to disbelieve the plaintiffs version that they had given the pathway in dispute by grant for their use as they had purchased the properties from the original owner and this right was given even much prior to the acquisition made by the Moradabad Development Authority. It is also apparently clear that the Moradabad Development Authority had acquired 2.58 acres of land out of total area 3.58 acres of the plot no. 213 and thus Moradabad Development Authority would get rights only over that much area and not beyond that. I fail to appreciate as to how the summary inquiries hold by the then Executive Authorities specially when they were in contradictions to the documents on record, have been made basis of the judgment by the learned Trial Court. Similarly, I also fail to appreciate that the entries in the revenue record would be decisive for the adjudication of the easementary rights between the parties. Learned Trial Court committed error of law on relying upon erroneous summary inquiries reports conducted by Executive Authorities and the entries of the revenue/government records particularly in case of deciding easementary right of parties and thereby holding that there was no way left for the plaintiffs.

16. Thus, the first point of determination is decided in favour of the plaintiff and I hold that there exists 20 feet wide way and the plaintiffs have got right of easement by way of grant of the original owner. "

13. The judgment and decree passed by the lower appellate court is impugned in the present appeal.

14. The appeal was admitted on 24.2.2014 on the following substantial questions of law:

"1. Whether the Lower Appellate Court was at all justified in dismissing the suit for non-joinder of alleged necessary parties, particularly when neither this objection was taken in the written statement nor was any issue framed in this regard nor was any evidence led to this effect and more particularly in view of the clear bar contained under Order 1 Rule 9 of C.P.C. which provides that a suit cannot be dismissed for non-joinder of any party ?

2. Whether in view of the Order 1 Rule 13 C.P.P., the defendant having not raised any objection either at or before the settlement of issues, the suit could be dismissed by the Appellate Court for non-joinder of any party, though defendant had waived his right, if any, to raise objections in this regard ?

3. Whether the Lower Appellate Court, having set aside the entire judgment, reasoning and findings recorded by the trial court, was at all justified in dismissing the appeal instead of allowing the same?"

15. I have heard Sri Kshitij Shailendra, learned counsel for the plaintiff-appellants and Sri Satish Chaturvedi, learned counsel for the respondent.

16. It was contended by learned counsel for the plaintiff-appellants that the appeal was admitted vide order dated 24.2.2014 and lower appellate court was not at all justified in dismissing the suit for non-joinder of necessary parties, particularly when no objection in this regard has been taken in the written statement nor any issue was framed in this regard and even no evidence was led to this effect and in view of the bar contained under Order 1 Rule 9 CPC, the suit cannot be dismissed for non-joinder of necessary parties.

17. It was further further contended by learned counsel for the plaintiff-appellants that defendant never raised any objection either in his written statement or before the settlement of issues and therefore, the defendant waived his right. It was lastly contended that lower appellate court set aside the judgment/findings recorded by the trial court but has not at all justified in dismissing the suit for non-joinder of parties.

18. On the other hand, learned counsel appearing on behalf of defendant-respondent submitted that specific finding has been recorded by the lower appellate court that some wall has been raised by the allottee over the strip of the raasta existed at plot no. 213 and therefore, any order passed in the suit will effect their right and therefore, they are the necessary parties and the suit has rightly been dismissed by the lower appellate court for non-joinder of necessary parties.

19. I have considered the rival submissions so raised by learned counsel for the parties and perused the record.

20. The only question for consideration before this Court as to whether the lower appellate court was justified in dismissing the suit of the plaintiff-appellants for non-joinder of necessary parties particularly when no objection was raised in this regard by the defendant in its written statement and in view of Order 1 Rule 9 CPC, which provides that suit cannot be dismissed for non-joinder of any party and further the defendant had waived their right, if they have not raised any objection with regard to joinder of necessary party in view of Order 1 Rule 13 CPC. For considering the said question, Order 1 Rule 9 CPC as well as Order 1 Rule 13 CPC are quoted as under:

*"**9. Misjoinder and non-joinder-** No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:*

[Provided that nothing in this rule shall apply to non-joinder of a necessary party.]

***13. Objections as to non-joinder or misjoinder-** All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest*

possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

21. From bare perusal of the aforesaid provision, it is apparent that no suit shall be defeated by a reason of misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regarding the right and interests of the parties actually before it and further in absence of all the objections on the ground of non-joinder and misjoinder of parties shall be taken at the earliest possible opportunity and in all cases were the issues are settled at or before such settlement unless the ground of objection subsequently arisen and any such objection is not so taken shall be deemed to have been waived.

22. The lower appellate court has specifically recorded a finding that it seems that the disputed wall had been raised by the allottees over the strip of the raasta. The lower appellate court had also recorded a finding that there is a 20 feet wide raasta existed over the land of plot no. 213, which is out of acquisition and over the said raasta, which is out of acquisition, no land can be allotted to any person and in fact, there is some encroachment made by the allottee of Moradabad Development Authority over the said raasta for which they cannot be said to be a necessary party.

23. Necessary party is a person, who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court.

24. The persons, who encroached the land of the raasta cannot be said to be necessary parties in the suit and therefore, the lower appellate court has committed illegality while dismissing the appeal of the plaintiff-appellants. Accordingly, the questions framed are answered in negative.

25. The lower appellate court is not at all justified in dismissing the suit on the ground of non-joinder of necessary parties primarily, neither any objection in this regard has been raised in the written statement nor any issue in this regard has been settled and the bar contained under Order 1 Rule 9 CPC does not apply and the suit cannot be dismissed for non-joinder of any party and further in view of Order 1 Rule 13 CPC, the defendant failed to raise any objection either on or before the settlement of issue and the suit cannot be dismissed for non-joinder of any party since, the defendant waived their right in this regard.

26. Accordingly, the appeal succeeds and is, allowed. The decree passed by the lower appellate court is set aside to the extent it dismissed the appeal and the suit filed by the plaintiff for grant of permanent injunction stands decreed, the prohibitory injunction is issued against the defendant or his agent not to encroach over the way (raasta) in suit situated in the south of the plaintiffs' property, not to put any hindrance in ingress and egress and not close the door opening on the way (raasta) of the suit and further mandatory injunction issued directing the defendant-Moradabad Development Authority to demolish the wall/encroachment, which was raised during the pendency of the suit.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 74 of 1987

Mohd. Islam ...Appellant
Versus
Sri Shamshul Ansari &Anr. ...Respondents

Counsel for the Appellant:
Sri S.K. Vemra, Sri Bipin Lal Srivastava

Counsel for the Respondents:
Sri Kameshwar Nath Tripathi, Sri A.K. Upadhyaya, Sri A.P.S. Rathore ,Dr.Vinod Kumar Rai, Sri Ganga Singh, Sri K.S. Rathor, Sri Manish Kumar Nigam, Sri Rajeshwari Singh, Sri Shivendra Nath Singh

A. Second Appeal - Substantial Question of Law-Principle on adverse possession laid down-Suit founded on ownership-No pleading on adverse possession in court below-It presupposes ownership of else and person relying on it must not be owner, but has title by prescription- Plea on title and adverse possession are mutually inconsistent-Moreover, possession however long not means adverse to owner-It means hostile possession in denial of title of true owner-No Substantial Question of Law-Second Appeal lack merit. (E-1)

(Delivered by Hon'ble Sudhir Agarwal J.)

1. Heard Sri S.K.Verma, Senior Advocate, assisted by Sri Bipin Lal Srivastava, learned counsel for appellant, Sri M.K.Nigam, learned counsel for respondent.

2. This is plaintiff's appeal under Section 100 of Code of Civil Procedure, 1908 *(hereinafter referred to as "C.P.C.")*arising from judgment dated 23.10.1986 and decree dated 10.11.1986 passed by Sri R.M.Chauhan, IVth Additional District and Sessions Judge, Ghazipur in Civil Appeal No.172 of 1982 whereby appeal has been allowed and judgment of Trial Court dated 25.02.1982 and decree dated 05.03.1982 passed by Sri Prakash Chandra Mishra, IInd Additional Munsif, Mohamdabad, Ghazipur, in Original Suit No.130 of 1979 has been set aside.

3. Trial Court had decreed plaintiff's suit granting permanent injunction restraining defendants-respondents from interfering in possession of plaintiff in respect of house, A, B, C, D, E, F, G, H, as shown in map appended to the plaint and also hand over possession of disputed property to plaintiff. It is this judgment, which has been reversed by Lower Appellate Court *(hereinafter referred to as "LAC")*, as a result whereof plaintiff's suit stands dismissed.

4. The facts giving rise to this appeal in brief are that sole plaintiff Mohd. Islam son of Tulai, resident of Bahadurganj, Pargana Jahoorabad, District Ghazipur, instituted Original Suit No.130 of 1979 vide plaint dated 03.05.1979 impleading two defendants Shamshul Ansari son of Khalil and Shamshul Haq Kunjada son of Chetan in the Court of Munsif Muhammdabad, District Ghazipur seeking permanent injunction restraining defendant-1 from interfering in possession and other rights of plaintiff in respect of disputed house shown by letters A, B, C, D, E, F, G, H in the map given at the bottom of plaint. He further sought

eviction of defendant-1 from disputed property shown as F, F, G, G, in the map at the bottom of plaint and to hand over possession thereof to plaintiff.

5. The plaint case set up is that disputed house is situated in Kasba Bahadurganj. Part of house shown as A, B, C, D, F, G, H, was owned by Shamshul Haq son of Chetan, defendant-2 and plaintiff was a tenant therein for last 7-8 years. Defendant-2 vide sale deed dated 03.01.1978, for consideration of Rs.2,000/-, sold the aforesaid house, part whereof has been shown by letters A, B, C, D, E, F. to the plaintiff, who was already in possession of said property as tenant, and became owner after sale deed dated 03.01.1978 was executed by defendant-2. In Municipal record, earlier name of Sattar was shown in respect of house in dispute, who died long back and his legal heir defendant-2, after his death, became his successor in respect of disputed property. Sattar had no issue but his father Sallar were four brothers namely Sallar, Somaroo, Dukhi and Kadir. Dukhi and Kadir died long back without any issue and Somaroo's son Chetan became successor and Shamshul Haq and Anul Haq are sons of Chetan. After death of Sattar, therefore his entire property was succeeded by defendant-2 and his brother Anul Haq and their names were entered in Municipal record.

6. Defendant-1 got a document forged on 03.4.1978 and on the basis thereof claimed his right over property in dispute and sought to get his name entered in Municipal record illegally hence the suit.

7. Defendant-1, Shamshul Ansari, contested the suit, filing written statement dated 09.5.1979 in which he admitted that property in dispute was initially recorded in the name of Sattar. Rest averments of plaint were denied. In additional pleas, he said that Sattar had no brother and Samaroo, Dukhi and Kadir had no relation with him. Defendant-2 was neither legal representative or heir of Sattar nor has any right over property in dispute. Sattar had two daughters namely Nisar Begum and Haliya alias Hallam Bibi, who succeeded Sattar's property after his death. Defendant-1 got a deed executed by aforesaid daughters of Sattar on 03.04.1978 and therefore, has a right over property in dispute. Defendant-1 moved an application for mutation, on which Administrator, Town Area passed order on 06.05.1978 to mutate his name whereagainst plaintiff filed appeal, which was rejected vide order dated 26.9.1978. Thereagainst, a writ petition has been filed by plaintiff in High Court i.e. Writ Petition No.1609 of 1979 but the same was also dismissed. The suit has been filed on false premise and plaintiff had no right over property in dispute.

8. Trial Court formulated following eight issues :

^´1. क्या वादी विवादित मकान व बहरूफ /ठब्क्म्थ्ळभ नक्शा वादपत्र का स्वामी एवं अधिपत्यभोगी है?

1. Whether the plaintiff is the owner having occupation over the disputed house shown by letters ABCDEFGH in the site map appended to the plaint?

2. क्या वादी बहरूफ थ्श्ळळश नक्शा वादपत्र पर दखल पाने का अधिकारी है?

2. Whether the plaintiff is entitled to secure occupation over the

property shown by letters ध्श्ळळ' in the site map appended to the plaint?

3. क्या वाद संधारण योग्य नहीं है?

3. Whether the suit is not maintainable?

4- क्या वाद का मूल्यांकन दोषपूर्ण है तथा प्रदत्त न्याय शुल्क अपर्याप्त है?

4. Whether the suit is wrongly valued and the court fee paid is insufficient?

5- क्या वाद में मौन सम्मति एवं विवणन का दोष बाधित है?

5. Whether the suit suffers from the Principles of Acquiescence and Estoppel?

6- क्या वाद में तामादी का दोष बाधित है?

6. Whether the suit is barred by limitation?

7- क्या वाद में धारा 34 वि0 अनुतोष अधिनियम बाधक है?

7. Whether the suit is barred by Section 34 of the Specific Relief Act?

*8- अनुतोष?^*

8. Relief?"

(English Translation by Court)

9. Besides documentary evidence, oral evidence placed before Trial Court comprised of deposition of Islam PW-1 and Mukhtaar Ahmad as PW-2 while Shamshul Haq defendant-2 himself examined as DW-1 and Alimuddin as DW-2.

10. Considering Issue 1, Trial Court held that plaintiff is owner of disputed property and answered issue in affirmative. Issues 3, 5, 6 and 7 were not pressed by defendants hence answered in negative. Issue 4 was considered as preliminary issue and already answered in negative vide order dated 20.01.1982, which was made part of judgment. Issue 2 thereafter was answered in affirmative holding defendants' possession over disputed property unauthorized and illegal. Consequently suit was decreed vide judgment dated 25.02.1982 and decree dated 05.03.1982 passed by Sri Prakash Chandra Mishra.

11. Defendant-1 preferred Civil Appeal No.172 of 1982. LAC formulated two points for consideration as under :

^ ^1- क्या शमसुलहक स्वर्गीय सत्तार का बैधिक उत्तराधिकारी थे?

1. Whether Shamsul Haq was legal successor of Late Sattar?

2- क्या सत्तार की लड़कियॉ निसा बेगम व हलीफ उर्फ हल्लन बीबी है?''

2. Whether Nisa Begum and Haleef @ Hallan Bibi are daughters of Sattar?" (English Translation by Court)

12. Answering first point for determination, LAC held that Sattar was the only son and had no brother, therefore Shamshul Haq and Ainul Haq did not belong to family of Sattar. Hence plaintiff cannot derive any valid right or title from them. It, therefore, held that Shamshul Haq and Ainul Haq had no right to transfer the property and plaintiff did not gain any valid ownership right over disputed property. Second point for

determination was also answered in favour of defendant-1 holding that Nisar Begm and Haleem alias Hallan Bibi were daughters of Sattar and after death of Sattar, became co-owners of property in dispute hence could have validly transferred their ownership over property in dispute vide sale deed dated 03.4.1978. Consequently, appeal was allowed and judgment and decree of Trial Court was set aside by LAC vide judgment dated 23.10.1986.

13. This appeal was admitted on following two substantial questions of law:

(I) Whether Smt. Nesar and Smt. Haleem Bibi, who were born in 1949 and 1951, be the daughters of Sattar who died in 1947?

(II) Whether LAC reversed findings of Trial Court without meeting reasoning adopted by Trial Court and also the evidence relied by it?

14. So far as question (I) is concerned, it is said that one daughter was born to Sattar who died within one month. Another daughter was born on 02.7.1932, as per birth register of Town Area, Bahadurgan, Paper No.38C, but there is nothing on record to show that she also died. LAC has drawn inference that daughter born to Sattar on 02.07.1932 remained alive. Another daughter was born in 1934, who died.

15. On the basis of Family Register, wherein date of birth of two daughters were shown as 01.01.1949 and 31.01.1951, it was argued that these are Nisar Begum and Haleema Begum and not those daughters who were born to Sattar. However, I find that two daughters were born to Sattar and in absence of any evidence that both died, it cannot be said that Nisar and Haleema Begum are not his daughters. LAC, in my view, has not erred by simply negativing the date of birth shown in Family Register, in the light of above evidence.

16. Moreover, plaintiff's basic contention that Sattar died issuless stood proved false. In order to be successful in a suit, plaintiff has to stand on his own and if his basic claim falls, suit has to be dismissed. Question (I) is thus answered against appellant.

17. Sri S.K.Verma, Senior Advocate, then contended that plaintiff was in possession of disputed property for last more than twenty years and therefore, matured his right by way of 'adverse possession'. He also urged that though this issue has not been considered by Courts below and also not framed as a substantial question of law by this Court but still since it is evident from pleadings, it can be considered by this Court at this stage also. In support of above submission, he placed reliance on Supreme Court judgment in **Panchugopal Barua and others vs. Umesh Chandra Goswami and others (1997) 4 SCC 713** and **Nangali Amma Bhavani Amma vs. Gopalkrishnan Nair and others (2004) 8 SCC 785.**

18. In P**anchugopal Barua and others (supra)** Court has held that appellant cannot be allowed to set up a new case in second appeal or raise a new issue, not supported by any pleadings or material on record. Further, unless the appeal involves a substantial question of law, a second appeal cannot lie. It clearly said as under :

"The High Court was, therefore, ***not justified in entertaining the second appeal on an altogether new point, neither pleaded nor canvassed in the subordinate courts*** *and that too by overlooking the changes brought about in Section 100 C.P.C. by the Amendment Act of 1976 without even indicating that a substantial question of law was required to be resolved in the second appeal."*

19. In **Nangali Amma Bhavani Amma (supra)** I find nothing to help the appellant, inasmuch as, there, an issue was raised that second appeal was decided by High Court without framing any substantial question of law but in para 6 of judgment, Court negatived it by observing that High Court had indicated the question of law which arise out of the decision of the first appellate court and which required determination under Section 100 of C.P.C. Court also held that this is in substantial compliance with the requirement of Section 100 C.P.C., and therefore, it find no reason to set aside judgment of High Court.

20. It has been repeatedly held that at the time of hearing , Court will not frame a question, which has not arisen from pleadings before Court below and has not been raised before Court below.

21. Further, even on merits, I find that plaintiff has no case on the issue of "adverse possession" and reliance placed by plaintiff-appellant on Division Bench judgment of this Court in **Municipal Board, Etawah vs. Mt. Ram Sri and another AIR 1931 Allahabad 670 and Vasudeva Padhi Khadanga Garu vs. Maguni Devan Bakshi Mahapatrulu Garu 28 Indian Appeals 81** is clearly misconceived. Above decision infact have no application to the facts of this case.

22. Here suit instituted by plaintiff-appellant is founded on his plea of 'ownership' in pursuance of sale deed dated 03.01.1978 executed by defendant-2. At no point of time there is any pleading that plaintiff had 'adverse possession' over property in dispute, openly against its owner and has matured its right by adverse possession. The requirement of law in order to attract doctrine of adverse possession are very clear. In the matter of plea of adverse possession, mutually inconsistent or mutually destructive pleas cannnot be taken in the plaint. Whenever plea of adverse possession is raised, it pre supposes that onwer is someone else and the person taking the plea of adverse possession is not the actual owner but has perfected his title by prescription since real owner failed to initiate any proceeding for restoring the possession within the prescribed period under the statute.

23. In **P. Periasami Vs. P.Periathambi &Ors., 1995 (6) SCC 523** it was said:

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

24. In **Mohan Lal v. Mirza Abdul Gaffar (1996) 1SCC 639**, the Court said"

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or

interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario."

25. **In Karnataka Board of Wakf Vs. Government of India & others (2004) 10 SCC 779**, Court held that whenever the plea of adverse possession is projected, inherent therein is that someone else is the owner of the property. In para 12 it said:

"The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced."

26 . The decision in **Mohan Lal (supra)** has also been followed in Karnataka Board of Wakf (supra) and in para 13, the Court said:

"As we have already found, the respondent obtained title under the provisions of the Ancient Monuments Act. The ***element of the respondent's possession of the suit property to the exclusion of the appellant with the animus to possess it is not specifically pleaded and proved****. So are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable."*

(emphasis added)

27. In **M. Venkatesh and others vs. Commissioner, Bangalore Development Authority and others (2015) 17 SCC 1,** Court has referred to various earlier decisions including **Mohan Lal (supra) and Karnataka Board of Wakf (supra**) and observed that a person having come into possession having some title or agreement cannot claim hostile or adverse possession. Referring to **Annasaheb Bapusaheb Patil vs. Balwant (1995) 2 SCC 543** Court has said that where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. The same has been followed in **Bangalore Development Authority vs. N.Jayamma (2017)13 SCC 159**.

28. In **Chatti Konati Rao and Ors. vs. Palle Venkata Subba Rao (2010) 14 SCC 316,** Court said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner.

29. The above authorities have been followed recently in **Mallikarjunaiah vs. Nanjaiah and others 2019(7) SCALE 1.**

30. ation that plaintiff has no claim over property in dispute on the basis of alleged "adverse possession" and this plea has no substance.

31. Counsel for appellant in respect of question (II) contended that findings of Trial Court have not been reversed and still LAC has passed judgment in appeal reversing judgment of Trial Court. This argument has no substance for the reason that basic findings of Trial Court that Sattar was issueless and his property was succeeded by his brothers has been

reversed by LAC observing that Sattar had no brother but had two daughters and his property was succeeded by two daughters hence evidently findings of Trial Court have been reversed. Thus LAC was justified in passing a judgment of reversal.

32. Substantial question (II) therefore, is answered against appellant.

33. Appeal lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

WRIT C NO.11150 of 2000

Ram Kumar Misra ...Petitioner
Versus
The Competent Authority Act,Authority & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandan Sharma, Sri P.H. Vashistha, Sri S. Narain, Sri Vijay Bahdur Singh, Sri Vinod Shankar Tripathi, Sri B.D. Sharma Sri U.N. Sharma, Sri Chandan Misra.

Counsel for the Respondents:
C.S.C., Ms. Subhash Rathi, Sri Vineet Pandey, Sri Tejaswi Mishra.

A. Writ - Article 226 of Constitution-Sections 10 (5) & 10 (6) of Urban Land (Ceiling & Regulation) Act, 1976-Possesion of excess vacant land was not taken-Petitioner entitled to retain possession of land-Case law discussed-Writ Petition succeeds. (E-1)

(Delivered by Hon'ble Rajeev Misra J.)

1. Ram Kumar Misra, the writ petitioner has filed present writ petition under Article 226 of the Constitution of India, challenging order dated 30.12.1981 (Annexure 1 to the writ petition), passed by respondent No.1 Competent Authority (Urban Land Ceiling), Bareilly, whereby an area of 8258.21 Sq-meters of land of petitioner has been declared as excess-vacant land and notice dated 24/25.1.2000 (Annexure-4 to the writ petition) also issued by respondent No.1 purported to be under Section 11 (8) of the Urban Land (Ceiling & Regulation) Act, 1976 (herienafter referred to as 'Act 1976') asking the petitioner to file his objections, if any, alongwith evidence before respondent-1 on or before 3.2.2000 to the proposed compensation in lieu of land belonging to petitioner being declared as excess-vacant land. Apart from aforesaid reliefs, petitioner has also prayed for a writ of mandamus commanding respondents not to dispossess petitioner from land in dispute.

2. We have heard Sri Vijay Bahadur Singh, learned Senior Advocate assisted by Sri P.H. Vashishtha, learned counsel for petitioner, Mrs. Subhash Rathi, learned Additional Chief Standing Counsel for State-respondents and Sri Tejaswi Mishra, Advocate holding brief of Sri Vineet Pandey, learned counsel appearing for respondent no. 3 Bareilly Development Authority (hereinafter referred to as 'B.D.A').

3. It transpires from record that petitioner is a recorded Tenure Holder of survey plot Nos. 587 area 0.0468 hectares, 588 area 0.333 hectares and 589 area 0.721 hectare, situate in village, Haroo Nagla, District Bareilly.

4. Act of 1976, came into force on 17.2.1976. By means of Act 1976, a ceiling limit regarding land which can be held by a Tenure Holder was provided.

Section 4 of Act 1976 provides for different ceiling limits in different Urban Agglomerations falling in different categories. Section 6 mandates that every person who is holding land in excess of concerned ceiling limit shall file an statement before competent authority regarding land held by him. After the statement has been filed by Tenure Holder, competent authority under section 6 of Act 1976 after such survey, as it may deem fit to make, shall prepare a draft statement in respect of person who has filed the statement. Thereafter in compliance of section 8 of Act 1976, Competent Authority is required to issue a draft statement to Tenure Holder as regards vacant land held by him in excess of ceiling limit. In turn by virtue of sub section (4) of section 8, Tenure Holder is required to file his objections to draft statement within a period of 30 days from date of service of draft statement/notice under section 8 of Act 1976. After disposal of objections preferred by Tenure Holder, Competent Authority is required to decide the same. Thereafter as per section 9 of Act 1976, Competent Authority is required to prepare final statement determining vacant land held by a Tenure Holder in excess of ceiling limit. Section 9 further provides that final statement shall be served on Tenure Holder as per the procedure provided under section 8 (3) of Act 1976. Section 10 of Act 1976 contemplates that after service of final statement prepared under section 9 of Act 1976, Competent Authority shall cause a notification to be published in Official Gazette of the State concerned regarding land held by such person in excess of ceiling limit. The notification is to further state that such vacant land is to be acquired by concerned State Government and claims of all person interested in such vacant land may be made by them personally or by an Agent giving particulars of the nature of their interests in such land. Sub section (2) of section 10 provides for the disposal of objections preferred by such person who claims interest in the land proposed to be acquired. Sub section (3) of section 10 contemplates deemed acquisition of excess vacant land of Tenure Holder and vesting of same in the State Government free from all encumbrances. Sub section (4) of Section 10 puts a rider on the Tenure Holder whose land has been declared as excess vacant land or any other person not to transfer any excess vacant land or part thereof by way of sale, mortgage, gift, lease or otherwise. Sub section (5) of section 10 provides that after the land declared as excess-vacant land has vested in State Government, Competent Authority may by notice in writing order any person who may be in possession of excess-vacant land declared surplus, to surrender or deliver possession thereof to the State Government or to any person duly authorised by State Government in this behalf within 30 days from the date of service of notice issued under section 10 (5). Thus, section 10 (5) of Act 1976 contemplates voluntary surrender of possession upon notice by a Tenure Holder. Sub Section (6) of section 10 provides that upon failure to comply with an order made under sub section (5) of section 10 i.e. failure to surrender possession voluntarily, Competent Authority may forcibly take possession of land declared as excess-vacant land. Section 11 of Act 1976, provides for payment of compensation in lieu of land acquired upon declaration as excess-vacant land. Section 12 provides for the constitution of Urban Land Tribunal and

an appeal to Urban Land Tribunal against an order passed by Competent Authority under section 11 of Act 1976. Section 33 of Act 1976 provides for an appeal against an order passed by competent authority except an order passed under section 11 or under sub-section (1) of Section 30.

5. Accordingly, as per scheme of Act 1976 as noted herein above, petitioner submitted draft statement of land held by him before respondent-1 Competent Authority (Urban Land Ceiling) Bareilly on 14.9.1976 in terms of Section 6 (1) of Act 1976. After submission of draft statement by petitioner, survey of land held by petitioner was got conducted in terms of section 6 of Act 1976 and a survey report dated 26.9.1980 was submitted. On the basis of survey report dated 26.9.1980, a draft notice dated 27.4.1981, purported to be under section 8 of Act 1976 was issued to petitioner proposing to declare 8258.21 sq-meters of land belong to petitioner, as excess-vacant land. In response to aforesaid notice, petitioner submitted his objections dated 20.7.1981. According to petitioner, no land belong to him was liable to be declared as excess-vacant land, as same is being used for agriculture purpose. In case, land shown as excess-vacant land in site plan in red colour is acquired, remaining land of petitioner shall be in fragments. Petitioner shall not be able to efficiently use the same. Except for the tenure comprised in survey plot nos. 587, 588 and 589, there is no other tenure of petitioner. Even in the aforesaid tenure, petitioner has only one half share and remaining one half share belongs to Jagdish Saran, son of Siya Ram. It was also pleaded that land shown in draft notice is agricultural land and therefore not liable to be declared as excess vacant land under Act 1976 as said Act does not apply to agricultural land. In the land proposed to be declared as excess-vacant land, there situate a boring, well and jack fruit trees which have not been considered while issuing draft notice to petitioner. Subsequently, petitioner filed an application dated 25.9.1981, praying therein that he be granted benefit contemplated under section 20 of Act 1976 and accordingly land of petitioner be exempted from ceiling proceedings. However, inspite of the fact that petitioner filed his objections to draft statement, but his counsel did not appear before Competent Authority (Urban Land Ceiling) on the date of hearing. Consequently, respondent-1, Competent Authority (Urban Land Ceiling) Bareilly, vide order dated 30.12.1981, declared an area of 8258.21 sq-meters of land, belong to petitioner, as excess-vacant land. It was further directed that notice under section (9) of Act 1976 be issued to petitioner followed by publication in terms of section 10 of Act 1976. The notification to be published in Official Gazette regarding excess-vacant land of petitioner was prepared by Competent Authority (Urban Land Ceiling), Bareilly, on 21.5.1982 and sent to State Government for publication, vide office memorandum dated 29.9.1983. The same was published in Official Gazette on 30.11.1985. Notice dated 23.1.1986 under section 10 (5) was issued to petitioner by respondent no.1, Competent Authority (Urban Land Ceiling) Bareilly, asking petitioner to hand over possession of land declared as excess-vacant land within a period of 30 days from the date of receipt of notice dated 23.1.1986. Perusal of aforesaid notice goes to show that same has not been served upon Tenure Holder as no endorsement to that effect is contained therein. Thus the notice under section 10 (5)

of Act 1976 was neither directly served upon petitioner/Tenure Holder nor by way of substituted service. There is no notice under section 10 (6) of Act 1976 on record. What is there on record is a possession memo dated 26.2.1986 containing signatures of two witnesses namely Brij Bihari Gupta and Ashok Kumar Pathak and the person who took possession. The signature of person who gave possession and also of Tenure Holder are conspicuous by their absence. Ultimately notice dated 24.1.2000 under section 11 (8) of Act 1976 which provides for payment of compensation in lieu of land declared as excess vacant land was issued by Competent Authority (Urban Land Ceiling), Bareilly, after 18 years from the passing of order dated 30.12.1982. We have not found any document in original record regarding payment of compensation to petitioner in lieu of land declared as excess-vacant land.

6. It may be noticed here that order dated 30.12.1981, passed by respondent No.1, Competent Authority (Urban Land Ceiling), under section 8 (4) of Act 1976 is appealable under section 33 of Act 1976, but as no appeal was filed by petitioner, consequential proceedings subsequent to an order passed under section 8 (4) of Act 1976 came into motion. Accordingly, a notice dated 24/25.1.2000 purported to be under section 11 (8) of Act 1976 came to be issued by respondent no.1, Competent Authority (Urban Land Ceiling) Bareilly, to petitioner asking him to file his objections, if any, alongwith evidence before the Competent Authority itself on or before 3.2.2000 to the proposed compensation, in lieu of the land of petitioner declared as excess-vacant land. Thus, the aforesaid notice has been issued to petitioner after a gap of 18 years from date of order dated 30.12.1981.

7. The controversy involved in present writ petition is confined within the parameters of section 10 of Act 1976. For ready reference Section 10 of Act 1976 is reproduced herein below:-

*"**10. Acquisition of vacant land in excess of ceiling limit.**-(1) As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that-*

(i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all person interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land,

to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1) the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land

referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)-

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to begiven to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.

Explanation.-In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to-

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government."

(Emphasis added)

8. In order to give effect to the provision of section 10 (5) and section 10 (6) of Act 1976, State Government in exercise of powers under section 35 of Act 1976 issued directions for taking possession of land declared as excess-vacant land by Competent Authority. The same are reproduced herein under:-

"The Uttar Pradesh Urban Land Ceiling (Taking of Possession Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976):

"In exercise of the powers under Section 35 of the Urban Land (Ceiling and Regulation Act, 1976 (Act No.33 of 1976), the Governor is pleased to issue the following directions relating to the powers and duties of the Competent Authority in respect of amount referred to in Section 11 of the aforesaid Act to the person or persons entitled thereto:

***1. Short title, application and Commencement** -These directions may be called the Uttar Pradesh Urban Land*

Ceiling (Taking of Possession Payment of Amount and Allied Matters Directions, 1983)

(2). The provisions contained in this direction shall be subjected to the provisions of any directions or rules or orders issued by the Central Government with such directions or rules or orders.

(3). They shall come into force with effect from the date of publication in the gazette.

2. Definitions:-

3. Procedure for taking possession of vacant Land in excess of Ceiling Limit- *(1) The Competent Authority will maintain a register in From No.ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the Gazette.*

4. (2) An order in Form No.ULC-II will be sent to each landholder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service ***of the order will be entered in Column 8 of Form No.ULC-1.***

(3) ***On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6)*** *of Section 10 of the Act,* ***entries will be made in a register in Form ULC-III*** *and also in Column 9 of the Form No.ULC-1. The Competent Authority shall in token of verification of the entries, put his signatures in column 11 of Form No.ULC-1 and Column 10 of Form No.ULC-III.*

Form No.ULC-1

Register of Notice under Section 10-(3) and 10(5)

1	2	3	4	5	6	7	8	9	10	11
Sl. No.	Sl. No. of register of receipt Sl. No. of register of taking possession	Case number	Date of Notification under Section 10(3)	Land to be acquired Village Mohali	Date of taking over possession	Remarks	Signature of competent authority			

Form NO. ULC-II
Notice order u/s 10(5)
(See clause (2) of Direction (3)
In the Court of Competent Authority

U.L.C. .....
No..... Date .....
Sri/Smt.....T/o .....

In exercise of the powers vested under section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976, you are hereby informed that vide Notification No..... dated ..... under section 10 (1) published in Uttar Pradesh Gazette dated ..... following land has vested absolutely in the State free from all encumbrances as a consequence Notification under section 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect

from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District authorised in this behalf under Notification1 No.324/II-27- U.C.77 dated 9-2-1977, published in the gazette, dated 12-3-1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of Vacant Land

Location	*Khasra No. indentification*	*Area*	*Remarks*
1	*2*	*3*	*4*

Competent Authority

.....

.....

Dated.....

No.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with copy of the certificate to verify.

Competent Authority

.....

....."

(Emphasis added)

9. Act 1976 came to be repealed by "The Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act 15 of 1999)" (hereinafter referred to as "Act 1999"). Repeal Act protected rights of Tenure Holders whose land was declared as excess-vacant land provided possession thereof had not been taken. Act 1999 reads as under:-

"THE URBAN LAND (CEILING AND REGULATION) REPEAL ACT, 1999

(No 15 of 1999)

[18th March, 1999]

An Act to repeal the Urban Land (Ceiling and Regulation) Act 1976.

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows:-

1. Short title, application and commencement. *(1) This Act may be called the UrbanLand (Ceiling and Regulation) Repeal Act, 1999.*

(2) It applies in the first instance to the whole of the State of Haryana and Punjab and to all the Union territories; and it shall apply to such other State which adopts this Act by resolution passed in that behalf under clause (2) of article 252 of the Constitution.

(3) It shall be deemed to have come into force in the States of Haryana and Punjab and in all the Union territories on the 11th day of January, 1999 and in other other State which adopts this Act under clause (2) of article 252 of the Constitution on the date of such adoption; and the reference to repeal of the Urban Land (Ceiling and Regulation) Act, 1976 shall, in relation to any State or Union territory, mean the date on which this Act comes into force in such State or Union territory.

2. Repeal of Act 33 of 1976- *The UrbanLand (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the principal Act) is hereby repealed.*

3. Savings.- *(1) The repeal of the principal Act shall not affect-*

(a) the vesting of any vacant land under sub-section (3) of section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of section 20.

(2) Where-

(a) any ***land is deemed to have vested in the State Government*** *under* ***sub-section (3) of section 10*** *of the principal Act* ***but possession of which has not been taken over by the State Government or any person duly authorised by the State Government*** *in this behalf or by the competent authority; and*

(b) ***any amount has been paid by the State Government with respect to such land,***

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of legal proceedings.- *All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:*

Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, ***possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.***

5. Repeal and saving *(1) The UrbanLand (Ceiling and Regulation) Repeal Ordinance, 1999 (Ord. 5 of 1999) is hereby repealed.*

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act."

10. Instant writ petition was filed on 01.03.2000. It came up for admission on 03.03.2000 and this Court passed following interim order;-

"Heard Sri Shyam Narain, learned counsel for the petitioner as well as learned Standing Counsel.

Learned counsel for the petitioner has pointed out that the land which was declared to be surplus cannot be acquired in view of section 5 of the UrbanLand (Ceiling And Regulation) Act, 1976.

Let the counter affidavit be filed by the respondents within six weeks.

List this case after six weeks.

In the meantime, if the petitioner has not already been dispossessed from the surplus land, his possession thereon shall not be disturbed."

11. In compliance of interim order dated 03.03.2000, affidavits were exchanged between the parties. The writ petition came to be heard by a Division Bench of this Court on 31.5.2019, where it passed following order:-

"Sri Mohan Ji Srivastava, learned Standing Counsel, has produced the original record before us.

*"**The original record does not show that the notice under Section 10(5) of the**UrbanLand (Ceiling and Regulation) Act, 1976* ***was issued to the petitioner as there is no remark about the service of notice.*** *It has also been pointed out that in* ***the counter affidavit the respondents have not made any assertion regarding service of notice under Section 10(5) and 10(6) of the said Act.***

Learned Additional Advocate General Sri M.C. Chaturvedi has pointed out that the land in question has been transferred to the Bareilly Development Authority but the petitioner has not impleaded the Bareilly Development Authority as one of the respondents in the writ petition.

Although we do not find any document in the original record to indicate that the State has transferred the land to the Bareilly Development Authority, but in the interest of justice we grant time to the learned counsel for the petitioner to implead the Bareilly Development Authority as one of the respondents.

Learned counsel for the petitioner submits that the petitioner is still in possession.

Needless to say that the interim order dated 03rd March, 2000 shall continue until further orders.

Put up this case on 10th July, 2019 in the additional cause list.

The original record is returned to Sri Mohan Ji Srivastava, learned Standing Counsel." (Emphasis added)

12. In compliance of order dated 31.5.2019, B.D.A was duly impleaded as respondent No. 3 in the writ petition.

13. Mr. Vijay Bahadur Singh, learned senior counsel appearing for petitioner has fairly conceded that he does not wish to press the writ petition in respect of prayers 1 and 2. The writ petition be confined to prayer No. 3 alone in view of Repeal Act of 1999.

14. According to learned Senior Counsel, petitioner being in actual physical possession of entire tenure held by him, cannot be dispossessed from part of the same which has been declared as excess-vacant land. Reliance is placed upon section 3 (2) (a) of Repeal Act, 1999, which saves the possession of such Tenure Holders whose land has been declared as excess-vacant land, but possession thereof has not been taken. He further submits that section 10 (3) of Act 1976 speaks of vesting but the possession of land so vested is provided under section 10 (5) and 10 (6) of Act 1976. Mere vesting of land under section 10 (3) by itself is not sufficient to deprive Tenure Holder of his right to possession of land declared as excess-vacant land. Until and unless possession of land declared as excess-vacant land has been voluntarily surrendered by Tenure Holder in terms of section 10 (5) or forcibly taken under section 10 (6) of the Act 1976, Tenure Holder cannot be deprived of his right to retain possession of land declared as excess-vacant land. He further submitts

that there is nothing on record to show that petitioner has been dispossessed from land declared as excess-vacant land or the land of petitioner declared as excess-vacant land has been transferred to B.D.A., at any point of time.

15. It is the submission of learned Senior Counsel that from pleadings exchanged between the parties, it is clear that Competent Authority (Urban Land Ceiling), Bareilly, vide order dated 30.12.1981 declared an area of 8258.21 square metre of land belong to petitioner as excess-vacant land. However, notice under section 10 (5) of Act 1976 was issued to petitioner/Tenure Holder on 23.1.1986, but the same does not contain any endorsement regarding service of same upon petitioner directly or by substituted service. There is no notice under section 10 (6) of Act, 1976 on record. As such, he submits that no notice under section 10 (6) of Act, 1976 was ever issued to petitioner. He thus concludes that neither petitioner voluntarily surrendered possession of land declared as excess-vacant land nor possession thereof was forcibly taken from petitioner.

16. However, respondents have relied upon a possession memo dated 26.2.1986 to allege that possession of land declared as excess-vacant land was taken by Competent Authority on 26.2.1986. Perusal of possession memo goes to show that it has been signed by the person who has taken possession and two witnesses namely, Brij Bahadur Gupta and Ashok Kumar Pathak. However, name of the person who gave possession is neither mentioned nor the possession memo bears his signature. It does not even contain signatures of petitioner. The parentage and address of two witnesses have also not been mentioned. As such possession of land declared as excess-vacant land was never forcibly taken from petitioner. He thus submits that petitioner is entitled to retain possession of land declared as excess-vacant land as possession of same was never taken from petitioner. As such, prayer-3 made in the writ petition, whereby a writ of mandamus has been prayed commanding respondents not to dispossess petitioner from land in dispute is liable to be allowed.

17. Mrs. Subhash Rathi, learned Additional Chief Standing Counsel, opposing the contentions raised by learned Senior Counsel has submitted that under scheme of Act 1976, once vesting has taken place in favour of State Government under section 10 (3) of Act 1976, then in that event by operation of law, State Government becomes absolute owner of land declared as excess-vacant land. In such eventuality, question of possession is only symbolic. She further submits that part of land belong to petitioner was declared as excess-vacant land, vide order dated 30.12.1981. The writ petition has been preferred in the year 2000 i.e. after 19 years from the date of passing of order dated 30.12.1981, but there is nothing on record to establish continuous physical possession of petitioner over land declared as excess-vacant land. She further submits that once land declared as excess-vacant land, has vested in State free from all encumbrances, possession if any of petitioner over the land already declared as excess-vacant land will be in nature of adverse possession. It is well settled that plea of adverse possession cannot be pleaded against State and on this ground also the petitioner is not entitled to relief

No. 3 prayed for in the writ petition. Lastly, she submits that possession memo dated 26.2.1986 clearly proves that possession of land declared as excess-vacant land has already been taken. Placing reliance upon a Division Bench judgement of this Court in **Shiv Ram Singh Vs. State of U.P. And others, 2015 (5) AWC 4918,** she submits that irrespective of the fact whether possession has been taken rightfully or wrongfully, it will make no difference. Once petitioner whose land has been declared as excess-vacant has been dispossessed from the same, he cannot claim benefit of section 3 (2) (a) of Repeal Act, 1999; as such petitioner is not entitled to any relief prayed for.

18. Mr. Tejaswi Misra, Advocate holding brief of Mr. Vineet Pandey, learned counsel for respondent no.3, B.D.A. has submitted that land of petitioner which was declared as excess-vacant land, vide order dated 30.12.1981 was never transferred to Bareilly Development Authority.

19. On the basis of respective arguments made by counsel for the parties, following issues arise for determination.

(a) Whether vesting of land declared as excess-vacant land under section 10 (3) of Act 1976 is complete, and question of possession is immaterial.

(b) What is the combined effect of Act 1976 and 1983 directions issued by State Government.

(c) Whether a Tenure Holder is entitled to retain possession of land declared as excess-vacant land, if no possession of same has been taken by Competent Authority in terms of Section 10 (5) or Section 10 (6) of Act 1976.

20. All the three issues arising for consideration are inter linked and therefore, being dealt with together. We have already referred to the scheme of Act 1976. Section 10 (3) of the Act speaks of acquisition by State Government and upon publication of such declaration, such land shall be deemed to have vested absolutely in State Government free from all encumbrances with effect from the date so specified. Admittedly, in the present case, gazette notification was made on 30.11.1985. Thus, the question which emerges for consideration is, whether on 30.11.1985, the excess vacant land of petitioner stood vested in State Government free from all encumbrances or possession of same was required to be taken by competent authority in terms of section 10 (5) and 10 (6) of Act 1976 and in case possession was not taken whehter the petitioner is entitled to retain possession.

21. The issue involved is no longer res-integra,. The same came to be considered in ***State of U.P. Vs. Hariram, 2013 (4) SCC 280.*** Mr. V.B. Singh, learned Senior Advocate, has heavily relied upon aforesaid judgement in support of his submission that possession of excess vacant land if not taken under section 10 (5) or 10 (6) of Act 1976, then the Tenure Holder is entitled to benefit of Repeal Act 1999. Court in paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 42 has said:

21. Let us test the meaning of the expressions "deemed to have been acquired" and "deemed to have been vested absolutely" in the above legal

settings. The expressions "acquired" and "vested" are not defined under the Act. Each word, phrase or sentence that we get in a statutory provision, if not defined in the Act, then is to be construed in the light of the general purpose of the Act. As held by this Court in Organo Chemical Industries v. Union of India [(1979) 4 SCC 573 : 1980 SCC (L&S) 92] that a bare mechanical interpretation of the words and application of a legislative intent devoid of concept of purpose will reduce most of the remedial and beneficial legislation to futility. Reference may also be made to the judgment of this Court in Directorate of Enforcement v. Deepak Mahajan [(1994) 3 SCC 440 : 1994 SCC (Cri) 785] . Words and phrases, therefore, occurring in the statute are to be taken not in an isolated or detached manner, they are associated on the context but are read together and construed in the light of the purpose and object of the Act.

22. This Court in S. Gopal Reddy v. State of A.P.[(1996) 4 SCC 596 : 1996 SCC (Cri) 792] held: (SCC p. 607, para 12)

"12. It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary."

23. In Jugalkishore Saraf v. Raw Cotton Co. Ltd. [AIR 1955 SC 376] , S.R. Das, J. stated: (AIR p. 381, para 6)

"6. ... The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation."

24. The expression "deemed to have been acquired" used as a deeming fiction under sub-section (3) of Section 10 can only mean acquisition of title or acquisition of interests because till that time the land may be either in the ownership of the person who held that vacant land or to possess such land as owner or as a tenant or as mortgagee and so on as defined under Section 2(1) of the Act. Theword "vested" has not been defined in the Act, so also the word "absolutely". What is vested absolutely is only the land which is deemed to have acquired and nothing more. The word "vest" has different meaning in different context; especially when we examine the meaning of "vesting" on the basis of a statutory hypothesis of a deeming provision which Lord Hoffmann in Customs and Excise Commissioners v.Zielinski Baker and Partners Ltd. [(2004) 1 WLR 707 : (2004) 2 All ER 141 (HL)] , All ER at para 11 described as "heroic piece of deeming".

25. The word "vest" or "vesting" has different meanings. Legal Glossary, published by the Official Language (Legislative) Commission, 1970 Edn. at p. 302:

"Vest.-(1) To give a person a legally fixed, immediate right or personal or future enjoyment of (an estate), to grant, endow, clothe with a particular

authority, right of property, (2) To become legally vested; (TP Act)

Vesting order.-An order under statutory authority whereby property is transferred to and vested, without conveyance in some person or persons;

26.Black's Law Dictionary (6th Edn.), 1990 at p. 1563:

"Vested.-Fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not continue 'vested right'. Vaughn v. Nadel [228 Kan 469 : 618 P 2d 778 (1980)] . See also Accrue; Vest, and specific types of vested interests, infra."

27.Webster's Third New International Dictionary, of the English Language unabridged, Vol. III S to Z at p. 2547 defines the word "vest" as follows:

"'vest' vest ... To place or give into the possession or discretion of some person or authority [the regulation of the waterways ... to give to a person a legally fixed immediate right of present or future enjoyment of (as an estate) (a deed that vests a title estate in the grantee and a remainder in his children)

(b) to grant, endow, or clothe with a particular authority right or property ... to put (a person) in possession of land by the feudal ceremony of investiture ... to become legally vested (normally) title to real property vests in the holder of a property executed deed.]"

28. "Vest"/"vested", therefore, may or may not include "transfer of possession", the meaning of which depends on the context in which it has been placed and the interpretation of various other related provisions.

29. What is deemed "vesting absolutely" is that "what is deemed to have acquired". In our view, there must be express words of utmost clarity to persuade a court to hold that the legislature intended to divest possession also, since the owners or holders of the vacant land are pitted against a statutory hypothesis. Possession, there is an adage is "nine points of the law". In Beddall v. Maitland[(1881) 17 Ch D 174 : (1881-85) All ER Rep Ext 1812] Sir Edward Fry, while speaking of a statute which makes a forcible entry an indictable offence, stated as follows: (Ch D p. 188)

"... This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance."

30. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to

impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in the hands of a few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary surrender

31. The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in Maharaj Singh v.State of U.P. [(1977) 1 SCC 155] , while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of slippery import and has many meanings and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan [(2000) 8 SCC 99] held as follows: (SCC p. 114, para 28)

"28. ... We do find some contentious substance in the contextual facts, since vesting shall have to be a 'vesting' certain. 'To "vest", generally means to give a property in.' (Per Brett, L.J. Coverdale v. Charlton [(1878) 4 QBD 104 (CA)] :Stroud's Judicial Dictionary, 5th Edn., Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without anyauthorisation cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executory devise. Be it noted however, that 'vested' does not necessarily and always mean 'vest in possession' but includes 'vest in interest' as well."

32. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

33. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question

of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

34. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says that where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorised by the State Government.

35. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) of Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) of Section 10. Surrendering or transfer of possession under sub-section (3) of Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) of Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualises a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession

36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) of Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force-as may be necessary-can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted to only in a situation which falls under sub-section (6) and not under sub-section (5) of Section 10. Sub-sections (5) and (6), therefore, take care of both the situations i.e. taking possession by giving notice, that is, "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), then "forceful dispossession" under sub-section (6) of Section 10.

37. The requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word "may" has been used therein, the word "may" in both the sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 11 is that it might result in the landholder being dispossessed without notice, therefore, the word "may" has to be read as "shall".

39. The abovementioned directives make it clear that sub-section (3) takes in only de jure possession and

not de facto possession, therefore, if the landowner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, under Section 10(5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land.

42. The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18-3-1999. The State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the landowner or holder can claim the benefit of Section 4 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 4 of the Repeal Act.

22. The State Government issued a Government Order No. 2228/आठ–6–15–124 यूसी/13 dated 29th September, 2015 accepting judgment of in ***State of Uttar Pradesh Vs. Hari Ram (Supra***) and necessary directions were issued to take steps for compliance and decision in terms of the directions in the case of ***State of Uttar Pradesh Vs. Hari Ram (Supra***). Copy of the said Government Order dated 29.9.2015 is quoted herein below:-

संख्या –
2228/आठ–6–15–124 यूसी/13

प्रेषक,
पनधारी यादव
सचिव,
उत्तर प्रदेश शासन।

सेवा मे,

जिलाधिकारी,
गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर
आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।
आवास एवं शहरी नियोजन अनुभाग–6
लखनऊ : दिनांक 29 सितम्बर 2015

विषय नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 ततक्रम में निर्गत शासनादेश तथा मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 के सम्बन्ध में।

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महोदय,

उपयुर्क्त विषय पर मुझे यह कहने का निर्देश हुआ है कि भारत सरकार के अधिनियम संख्या–15/1999 दिनांक 18.03.1999 द्वारा नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम 1976 को निरसित करते हुए नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम 1999 प्राख्यापित किया गया जिसके क्रम में शासनादेश संख्या– 502/9– न0 भू0–99–21यू0 सी0/99, दिनांक 31.03.1999 द्वारा उक्त निरसन अधिनियम को उत्तर प्रदेश राज्य में अंगीकृत किया गया। निरसन अधिनियम 1999 की धारा–3 मे यह प्राविधान है कि मूल अधिनियम का निरसन निम्नलिखित को प्रभावित नहीं करेगा–

(1) (क) धारा–10 की उपधारा– (3) के अधीन ऐसी रिक्त भूमि का निहित होना, जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से अधिकृतक किसी व्यक्ति या सक्षम प्राधिकारी ने ले लिया है।

(ख) धारा– 20 की उपधारा– (1) के अधीन छूट देने संबंधी किसी आदेश या उसके

अधीन की गयी किसी कार्यवाही की किसी न्यायालय के किसी निर्णय में उसके विरूद्ध किसी बात के होते हुए भी विधिमान्यताः

(ग) धारा– 20 की उपधारा– (1) के अधीन प्रदान की गयी छूट की शर्त के रूप मे राज्य सरकार को किया गया कोई संदायः

(2) जहां–

(क) मूल अधिनियम की धारा–10 की उपधारा (3) के अधीन किसी भूमि को राज्य सरकार मे निहित होना मानी गयी है किन्तु जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से प्राधिकृत किसी व्यक्ति या सक्षम प्राधिकारी द्वारा नही लिया गया : और

(ग) ऐसी किसी भूमि के बाबत जिसके लिए राज्य सरकार द्वारा किसी रकम का संदाय कर दिया गया है तब तक प्रत्यावर्तित नही की जाय और जब तक कि राज्य सरकार को संदाय की गयी रकम का यदि कोई हो, प्रतिदाय नही कर दिया जाता।

उक्त के क्रम मे शासनादेश संख्या–777/9न0भू0–135 यू0 सी0/99 दिनांक 09.02.2000, शासनादेश संख्या –1623/9–न0भू0–2000 दिनांक 09.08.2000 एवं शासनादेश संख्या– 190/9–आ–6– 2001 दिनांक 24.01.2001 निर्गत किये गये जिसमे मुख्य रूप से यह व्यवस्था की गई कि मूल अधिनियम धारा –8 (4) के अन्तर्गत जो भूमि रिक्त घोषित की गई थी और धारा–10 (3) के अन्तर्गत राज्य मे निहित हो चुकी थी एवं धारा–10 (5) की कार्यवाही का आदेश हो चुका था परन्तु इस भूमि पर राज्य सरकार का कब्जा प्राप्त नही हो सका था, ऐसी भूमि के सम्बन्ध मे मूल भूधारक को अदा की गई धनराशि भूधारक द्वारा वापस करने पर भूमि मूल भूधारक को प्रत्यावर्तित की जा सकती है किन्तु अदा की गई धनराशि भू– धारक द्वारा वापस न करने की दशा में भूमि पर कब्जा किये जाने के सम्बन्ध मे विधि अनुसार अग्रिम कार्यवाही अमल मे लायी जाय। यह भी व्यवस्था की गई कि जिस भूमि के सम्बन्ध मे धारा–10 (5) की कार्यवाही के उपरान्त धारा–10 (6) की कार्यवाही पूर्व हो चुकी है और भूमि पर राज्य सरकार द्वारा कब्जा लिया जा चुका है वह सरप्लस भूमि अन्तिम रूप से राज्य सरकार में निहित मानी जायेगी।

3. नगर भूमि सीमारोपण– गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर मे लम्बित अर्बन सीलिंग प्रकरणों का समुचित रूप से निस्तारण ने होने की स्थिति मे भू–धारकों/वादियों द्वारा मा0 उच्च न्यायालय में अधिक संख्या मे रिट याचिकाये योजित की जा रही है। नगर बस्ती कार्यालयो द्वारा रिट याचिकाओ मे विभागीय पक्ष समयान्तर्गत साक्ष्यो सहित प्रबलता से प्रस्तुत न किये जाने के कारण मा0 न्यायालय द्वारा पारित आदेशों के क्रम मे शासन को असमंजसपूर्ण स्थिति का सामना करना पड़ रहा है।

4. अर्बन सीलिंग के अन्य प्रकरण मे राज्य सरकार द्वारा मा0 उच्चचम न्यायालय नई दिल्ली मे विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम योजित की गयी। कालान्तर मे अन्य जनपदों के अर्बन सीलिंग से संबधित प्रकरणों मे योजित विशेष अनुमति याचिकाये उक्त विशेष अनुमति याचिका से क्लब की गयी। उक्त विशेष अनुमति याचिका संख्या–12960/2008 तथा उससे क्लब अन्य विशेष अनुमति याचिकाओ में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 मे अर्बन सीलिंग से संबधित प्रकरणों मे मार्गदर्शक सिद्धान्त प्रतिपादित किये गये है। निर्णय दिनांक 11.03.2013 का महत्वपूर्ण एवं क्रियात्मक अंश निम्नवत हैः–

प्रस्तर– 39

The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub section (5) of Section 10 or forceful dispossession under sub section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal At. The Stage Government in this appeal could not establish any of those situations and hence the High Court is right in holding

that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

प्रस्तर– 40

We, therefore, find no infirmity in the judgment of the High Court and the appeal is, accordingly dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no ore as to cost.

5- नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 में विहित प्राविधान तथा तत्क्रम मे निर्गत शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 स्वतः स्पष्ट है। विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम तथा उससे क्लब अन्य विशेष अनुमति याचिकाओ मे पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्त/आदेश भी स्वतः स्पष्ट है।

6- कृपया नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 तथा उक्त शासनादेश दिनांक 09.02.2000 , शासनदेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01. 2001 मे विहित व्यवस्था, विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम मे पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्तो/आदेशों के आलोक मे लम्बित प्रकरणों मे स्महंस पदहतमकपमदजे देखते हुए आवश्यक कार्यवाही की जाय।

भवदीय

ह0 अपठनीय
(पनधारी यादव)
सचिव

संख्या एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. निदेशक नगर भूमि सीमारोपण , उ0 प्र0 जवाहर भवन– लखनऊ

2. सक्षम प्राधिकारी नगर भूमि सीमारोपण गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

3. मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय, इलाहाबाद

4. गार्ड फाईल।

आज्ञा से

(कल्लू प्रसाद द्विवेदी)
उप सचिव।"

23. We could not find any material in original record which could establish that actual possession of excess vacant land was taken from petitioner as per procedure provided under G. O. Dated 29.09.2015. Thus, when the case in hand is examined in the light of proposition laid down in State of U.P. Vs. Hariram (supra); Apex Court, 1983 directions and Government Order dated 29.9.2015, the inevitable conclusion is that possession of land declared as excess-vacant land was never taken from petitioner, either under section 10 (5) or section 10 (6) of Act 1976. Consequently, we have no hesitation to hold that petitioner is entitled to retain possession of land declared as excess-vacant land.

24. As noted above, the alleged possession memo dated 26.2.1986, relied upon by State-respondents in proof of the fact that possession of land declared as excess-vacant land has already been

taken, we find from record that neither there is ULC Form-2 or ULC Form 3 on record, which is condition precedent under the 1983 directions. Furthermore, a Division Bench of this **Court in Mohammad Suhaif and Another. V/s. State of U.P. And Others, 2019 (5) ADJ 764(DB)** has held that under the Rules, it is only Collector, who has been authorized to take possession. No authority for further sub delegation is vested in the Collector either under Act 1986 or under the 1983 directions issued by State Government. The Division Bench further observed that it is well settled that a delegatee cannot sub delegate his power without there being specific authority, as held in **State of Bombay Vs. Shivabalak, AIR 1965 SC 661 and N.G.E.F. Vs. Chandra, 2005 (8) SCC 219**. In the present case, possession memo does not bear signature of Collector, as there is no description of Authority who is alleged to have taken possession.

25. From the discussion made herein above, it is explicitly clear that part of land belong to petitioner was declared as excess-vacant land vide order of Competent Authority (Urban Land Ceiling) Bareilly dated 30.12.1981. but pursuant to aforesaid order, possession of land declared as excess-vacant land was neither voluntarily surrendered by petitioner in terms of section 10 (5) of the Act, nor forceful possession of same was taken by Collector, Bareilly under section 10 (6) of Act 1976.

26. Record further shows that there is no ULC Form-2 and ULC Form-3, which further goes to establish that no exercise to take possession as per the 1983 directions were initiated by State-respondents. The alleged possession memo relied upon by the State, cannot be of any help as the same is contrary to principles laid down in **Banda Development Authority, Banda Vs. Motilal Agarwal and Others, 2011 (5) SCC 394.** Thus, petitioner being in continuous actual physical possession of land declared as excess-vacant land is clearly entitled to the benefit of Repeal Act of 1999.

27. There is another aspect of the matter which requires to be dealt with. The word 'acquired' used in Section 10 (3) and taking of 'possession' as contemplated under section 10 (5) and 10 (6) of Act 1976 came to be considered by a Division Bench in **Rashid Vs. State of U.P. and Other, 2017 (1) ADJ 425.** The following was observed by Division Bench in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21:-

"8. Before discussing relevant material on record in the light of question, there was actual possession taken by respondents of disputed land. It would be appropriate to have a bird's eye view as to how it should be determined whether possession of land actually has been taken or not.

9. In context of Land Acquisition Act, 1894 (hereinafter referred to as 'Act, 1894'), the question as to when it can be said that actual possession of land has been taken by State, has been considered by Courts time and again.

10. In the chain of precedents we first come to the Supreme Court's authority in Balwant Narayan Bhagde Vs. M.D. Bhagwat and others, 1976 (1) SCC

700. It is a three Judges judgment. The majority view is the opinion expressed by Hon'ble Bhagwati, J. for himself and Hon'ble Gupta, J. while contrary view was expressed by Hon'ble Untwalia, J. His Lordship Untwalia, J. observed that taking possession means taking of possession on the spot. It is neither a possession on paper nor symbolical possession. The Act is silent on the point as to what is the mode of taking possession. Unless possession is taken by written agreement of party concerned, the mode of taking possession obviously would be for the authority to go upon the land and to do some act which would indicate that authority has taken possession on land. It may be in the form of declaration by beat of drum or otherwise or by hanging a written declaration on the spot. Presence of owner or occupant of land to effectuate taking of possession is not necessary. When possession has been taken, owner or occupant of land is dispossessed. Once possession has been taken land vests in Government.

11. The majority judgment delivered by Hon'ble Bhagwati, J. disagreeing with Hon'ble Untwalia, J. said that when State proceeds to take possession of land acquired, it must take actual possession of land since all interests on land are sought to be acquired by it. There can be no question of taking symbolical possession in the sense understood by judicial decisions under the Code of Civil Procedure (hereinafter referred to as the "CPC"), nor would possession merely on paper be enough. The Court further said:

"What the Act contemplates as a necessary condition of vesting of the Land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the 'pot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was laying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it."

(emphasis added)

12. In General Manager, Telecommunication and another Vs. Dr.

Madan Mohan Pradhan and others, 1995 Supp.(4) SCC 268 it was claimed on behalf of State that possession was taken on 12.04.1976 and handed over to Union of India. With regard to mode and manner of possession the Court said:

"It is common knowledge that possession would always be taken under a memo and handing over also would be under a memo. It is a recognized usual practice in all the acquisition proceedings."

13. In State of Tamil Nadu and another Vs. Mahalakshmi Ammal and others, 1996(7) SCC 269 the Court said:

"Possession of the acquired land would be taken only by way of a memorandum, Panchanama, which is a legally accepted norm. It would not be possible to take any physical possession. Therefore, subsequent continuation, if any, had by the erstwhile owner is only illegal or unlawful possession which does not bind the Government nor vested under Section 16 divested in the illegal occupant."

14. The question as to how physical possession of land is to be taken, then was considered in Balmokand Khatri Educational and Industrial Trust Vs. State of Punjab, 1996(4) SCC 212, wherein the Court said in para 4 of the judgment as under:

"4. It is seen that the entire gamut of the acquisition proceedings stood completed by 17-4-1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well-settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession".

(emphasis added)

15. The majority opinion of Balwant Narayan Bhagde (supra) was considered in Tamil Nadu Housing Board Vs. A. Viswam, 1996 (8) SCC 259 wherein also a dispute of actual possession was raised. The Court relying on memorandum of Panchnama prepared by Land Acquisition Officer for taking possession of acquired land and also the letter written by respondent wherein he admitted title of respondent but sought for allotment of an alternative site, held that there was no question of requesting for alternative site if according to respondents the title still vested in him and has not been vested in the State by taking possession. Paras 9 and 10 of the judgment relevant for our purpose is reproduced as under:

"9. It is settled law by series of judgement of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or Panchanama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not co-operate in taking possession of the land.

10. It is seen that in a letter written by the respondent himself, admitting the title of the Board to the land

in the said survey number, he sought for allotment of alternative site. In other words, unless possession is taken and he is divested of the title and the same is vested in the appellant, he cannot make request to the appellant for providing him alternative site. It is not his case that at that stage he was still continuing to have title to the land in dispute. The admission is inconsistent with and incongruous to his interest. He was also aware that award was made and the possession obviously should have been taken thereunder....."

16. The next authority is Larsen and Toubro Ltd. Vs. State of Gujrat and others, 1998 (

4) SCC 387. Therein Court referred to Panchnama prepared by Deputy Collector showing that possession was taken and found it sufficient to hold that possession of land in question in that case was taken as contemplated under Act, 1894.

17. In P.K. Kalburqi Vs. State of Karnataka, 2005(12) SCC 489, Court referred to the observations of Hon'ble Bhagwati, J. in Balwant Narayan Bhagde (supra) and said, when there is no crop or structure on the land only symbolic possession would be taken.

18. In Sita Ram Bhandar Society, New Delhi Vs. Lt. Governor, Government of N.C.T. Delhi and others, 2009(10) SCC 501, Court after referring earlier decisions said that while taking possession, symbolic and notional possession is not envisaged under the Act but the manner in which possession is taken must of necessity depend upon the facts of each case. Where a large area of land with a large number of owners is subject matter of possession, Court said, that, it would be impossible for Collector or Revenue officials to enter each bigha or biswa and take possession thereof. Pragmatic approach has to be adopted by Court. It further said:

"...one of the methods of taking possession and handing it over to the beneficiary department is the recording of a Panchnama which can in itself constitute evidence of the fact that possession had been taken and the land had vested absolutely in the Government."

19. Similarly in Brij Pal Bhargava and others Vs. State of U.P. and others, 2011(5) SCC 413 accepting possession Court upheld the issue of possession on the basisof possession receipts and said that mere fact that in revenue record there is no mutation or that erstwhile owner actually is still occupying acquired land would make no difference.

20. After having a retrospect of earlier authorities, in Banda Development Authority, Bana Vs. Moti Lal Agarwal and others, 2011(5) SCC 394, Court crystallized certain principles to determine when possession taken would be held to be actual physical possession by authorities and it reads as under:

"37. The principles which can be culled out from the above noted judgments are:

(i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3-A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken."

21. In Jagdish and others Vs. State of U.P. and others, 2008(5) ADJ 5, (a Division Bench judgment of this Court) wherein one of us (Hon'ble Sudhir Agarwal, J.) was a member, Court referred to an authority letter of Special Land Acquisition Officer containing endorsement of Executive Engineer taking possession. It was held that possession was taken by revenue authorities."

28. Accordingly, the present writ petition succeeds and is allowed. The Ceiling proceedings initiated against petitioner, stood abated. Part of land of petitioner declared as excess vacant land would continue to belong to petitioner. Respondents are restrained from interfering with possession of petitioner over disputed land and from dispossessing petitioner from disputed land. In the facts and circumstances of the case, petitioner is entitled to cost which we quantify at Rs. 50,000/- payable by respondent nos. 1 and 2, within a period of one month from today.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

TRADE TAX REVISION NO. 645 of 2004
AND
TRADE TAX REVISION NO. 646 of 2004

M/S Beltek India Ltd. ...Petitioner
Versus
The Commissioner of Trade Tax U.P. at Lucknow ...Respondent

Counsel for the Petitioner:
Sri Praveen Kumar.

Counsel for the Respondent:
C.S.C.

A. Section 4-A U.P. Trade Tax Act. Neither the assessing authority nor the first appellate authority can sit in judgment over the Eligibility Certificate issued by the Divisional Level Committee.

Assessing authority and First Appellate Authority adjudicated upon the Eligibility Certificate issued u/s 4A and altered the entitlement of exemption. Tribunal confirmed the same. Allowing the present revisions, the High Court. Held:-The assessing authority is legally bound to give full effect to the eligibility certificate in assessment proceedings. In absence of any statutory intent, it does not appeal to reason and consequently it was never open either to the assessing authority or to the first appeal authority to either decline, alter or modify the exemption granted to the assessee.

(Para 15)

B. Jurisdiction can neither be conferred with the consent of the parties nor by a superior Court.

The application filed by the assessee before Divisional Level Committee after grant of Eligibility Certificate was wholly *non est.* It did not confer jurisdiction on the Divisional Level Committee to review or to re-examine or modify the entitlement to exemption, already granted. (Para 17)

Precedent followed: -

1. Jagmitter Sain Bhagat and others Vs. Director, Health Services, Haryana and others, (2013) 10 SCC 136 (Para 21)

2. United Commercial Bank Ltd. Vs. Workmen, AIR 1951 SC 230 (Para 20)

3. M/s Gurunanak Surgical Pvt. Ltd., Meerut and another Vs. Divisional Level Committee, Sales Tax

4. M/s Newage Printing Ink Co., Meerapur, Allahabad and another Vs. State of U.P. and others 1995 UPTC 952 (Para 10, 19)

5. Vasudev Dhanji Modi Vs. Rajabhai Abdul Rehman and others, (1970) 1 SCC 670 (Para 18)

6. Kiran Singh and others Vs. Chaman Paswan, AIR 1954 SC 340 (Para 17)

7. Sarup Singh and another Vs. Union of India and another, (2011) 11 SCC 198 (Para 11)

8. M/s Precise Laboratories Ltd. Vs. The Divisional Level Committee and another, 1997 UPTC 635 (Para 10)

9. M/s Kumar Fuels, Pucca Bagh, Purana Ganj, Rampur Vs. State of U.P. and another, 1986 UPTC 357 (Para 6, 8)

10. Precedent distinguished:Mentha Oil and Allied Product Vs. State of U.P., (1996) 103 STC 316 (Para 5, 22, 23)

Revisions against order dated 14.01. 2004 by Trade Tax Tribunal, Ghaziabad for AY 1999-2000

(Delivered by Hon'ble Saumitra Dayal Singh J.)

1. The present revisions have been filed by the assessee against the common order of the Trade Tax Tribunal, Ghaziabad dated 14.01.2004 in Second Appeal Nos. 64 of 2003 and 65 of 2003, for A.Ys. 1999-2000 (UP and Central respectively). By that order, the Tribunal has confirmed the order passed by the First Appellate Authority that had, in turn, confirmed the assessment orders whereby the claim of exemption made by the assessee on strength of the Eligibility Certificate dated 05.02.1998, issued under section 4-A of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the Act), had been declined. Also, the finding of rejection of books of account and best judgment assessment have been affirmed. By order dated 15.11.2018, the present revision had been admitted on the following questions of law:-

"(i) Whether the Trade Tax Tribunal is legally justified in law in ignoring the Eligibility Certificate issued to Revisionist by competent Authority

dated 5.2.1998, which provide rate of tax payable in each Assessment years during the period of exemption?

(ii) Whether the Trade Tax Tribunal is legally justified in law in confirming the orders passed by Authorities below rejecting the books of account of revisionist without any incriminating material available to him?"

2. Heard Sri Praveen Kumar, learned counsel for the applicant-assessee and Sri B.K. Pandey, learned counsel for the revenue.

3. During A.Y. 1999-2000, the assessee manufactured black & white and colour television sets. It set up a "new unit" within the meaning of that term under Section 4-A of the Act, at Ghaziabad. It applied to the Divisional Level Committee to grant exemption in terms of twin exemption notifications nos. 780 and 781 (both issued by the State Government on 31.3.1995) under Section 4-A of the Act, and section 8(5) of the Central Sales Tax Act 1956, respectively. Also admittedly, on 05.02.1998, the Divisional Level Committee, Noida granted the Eligibility Certificate to the assessee in relation to the aforesaid "new unit" set up by it, for a period of eight years from the date of its first sale, being 14.06.1996. According to Clause 10 of the said certificate, the assessee was granted full exemption from tax for the first two years. For the third and fourth years, it was granted exemption to the extent of 75% of the tax liability. For the fifth and the sixth years, it was granted exemption up to 50% of the tax liability and for the seventh and the eighth years, it was granted exemption up to the extent of 25% of the tax liability.

4. It is a fact that the assessment proceeding of the assessee for the A.Y. 1999-2000 (U.P. & Central) came to be completed much thereafter, on 20.02.2003. Therein, the assessee relied on the Eligibility Certificate dated 05.02.1998, and thus claimed exemption up to 75% of the tax liability, treating A.Y. 1999-2000 to be the third/fourth year of exemption. Perusal of the assessment order further reveals, that the Assessing Authority, though acknowledged the entitlement to exemption claimed by the assessee under the Eligibility Certificate dated 05.02.1998, however, strangely, he treated A.Y. 1999-2000 to be the fourth/fifth year of exemption. Accordingly, he only allowed exemption from tax liability up to the extent of 50%. The assessee being aggrieved, preferred first appeals against the assessment orders, being first appeal nos. 93 of 2002 and 94 of 2002. These came to be dismissed by the order dated 16.01.2003 passed by the Joint Commissioner (Appeal), Noida. The First Appellate Authority made out a new case against the assessee. He reasoned that the exemption claimed by the assessee would fall under Part-II of the exemption notifications nos. 780 and 781, both dated 31.03.1995. Thus, according to the first appellate authority, the assessee was a manufacturer of electronic goods, and therefore, his claim for exemption could arise only under Part-II of those notifications and not under Part I (as had been considered by the Divisional Level Committee). Consequently, the assessee was held entitled to 100% exemption for the first two years; to exemption up to 75% of tax liability for the third year whereas for the next four years being fourth to seventh years, it would be entitled to exemption

only up to 50% of it's tax liability while for the last year, it would be entitled to exemption only upto 25% of its tax liability. Another difference that would arise on such reasoning would be, though according to the Divisional Level Committee, the assessee was entitled to exemption up to the monetary limit computed at 175% of the fixed capital investment expended by it to set up the "new unit", yet, according to the first appeal authority, under Part-II of the exemption notification, it would be entitled to exemption from tax without reference to any monetary limit.

5. Thus, the entitlement to exemption was completely altered by the first appellate authority. The assessee being aggrieved, carried the matter in appeal to the Tribunal, that has been dismissed by the impugned order on the reasoning - the entitlement to exemption flows from the exemption notification and not from the Eligibility Certificate. Since, Part-II to the exemption notifications had been added by the amendment made thereto with effect from 16.11.1995, notwithstanding a contrary recital of rights contained in the Eligibility Certificate, the assessee being a manufacturer of electronic goods would remain entitled to exemption under Part-II of Annexure 1 to the exemption notifications. In that regard, the Tribunal has relied on a decision of this Court in ***Mentha Oil and Allied Product Vs. State of U.P. (1996)103 STC 316.*** Thus, the Tribunal has further reasoned, the amendment made to the exemption notification would automatically attach to and have the effect of amending the Eligibility Certificate granted by the Divisional Level Committee.

6. As to the rejection of books of account, the Tribunal has again affirmed the finding of the first appellate authority. Learned counsel for the assessee has first relied on the Annexure No.1 Part-I Clause-3 of the exemption notifications and Clause 3(1) of Part-II of that notification. He would submit while issuing the exemption notifications, the State Government had provided for separate schemes for grant of exemption to "new units" engaged in manufacture of electronic goods and those engaged in manufacture of other goods. However, upon filing its application for grant of exemption, the Divisional Level Committee i.e. the only competent authority granted exemption to the assessee vide Eligibility Certificate dated 05.02.1998. There under, the exemption was made available to the assessee under Part-I Clause 3(1) of of Annexure 1 to the exemption notification as a general "new unit". Reliance has been placed on the principle - once Eligibility Certificate had been granted, it was not open for the Assessing Authority to deny its benefit in the assessment proceedings, as propounded by the Division Bench decision of this Court in ***M/S. Kumar Fuels, Pucca Bagh, Puranaganj, Rampur Vs. State of U.P. & Another, 1986 U.P.T.C. 357, f***ollowed by other Division Bench in ***M/S. Paras Furnishers, Deoband, Saharanpur Vs. State of U.P. & Others 1987 (2) U.P.T.C. 1131; M/S Pan Tyres Vs. State of U.P. & Others 1996 (1) U.P.T.C. 569*** and ***Anil Kumar Ramesh Chandra Glass Works, Firozabad & Another Vs. State of U.P. & Another, 2000 U.P.T.C. 383***. Thus, it has been submitted, the Assessing Officer as also the first appeal authority could not sit in judgment over the Eligibility

Certificate, rather, they were bound to fully comply with it.

7. In any case, it has been submitted, the Assessing Authority did not disturb the terms of the Eligibility Certificate, but had only misapplied the same by treating A.Y. 1999-2000 to be the fourth/fifth year of exemption, whereas on a plain reading of the Eligibility Certificate it was clear, since exemption had been granted with effect from A.Y. 1996-1997 (from 14.06.1996), hence A.Y. 1999-2000 would always remain the third/fourth year of exemption.

8. In such circumstances, the First Appellate Authority is claimed to have acted wholly outside its jurisdiction in culling out a completely new, non-existent, objection. The jurisdiction of the first appellate authority being co-extensive with that of the Assessing Authority and nothing more. In an appeal against assessment order, it could not sit in judgment over the Eligibility Certificate granted by the Divisional Level Committee. The principle of law laid down in ***M/S. Kumar Fuels, Pucca Bagh, Puranaganj, Rampur Vs. State of U.P.& Another (supra)*** would bind the first appellate authority as well.

9. Next, it has been submitted, owing to the difficulties created by the Assessing Authority and the Appellate Authority, the assessee had been forced to approach the Divisional Level Committee to seek clarification with respect to the exemption granted to it. The Divisional Level Committee, by it's order dated 20.02.2003 made an observation that the assessee was entitled to exemption in terms of Part-II, Clause 3(1) of the exemption notifications i.e. treating the assessee to be a manufacturer of electronic goods. This order passed by the Divisional Level Committee is claimed to be wholly without jurisdiction and a nullity, inasmuch as, neither the assessee had any right to file any application seeking such clarification or modification nor the Divisional Level Committee had any jurisdiction to modify the Eligibility Certificate already granted by it.

10. The power, if any, would have remained with the Commissioner [under Section 4-A(3) of the Act], to cancel or to amend the Eligibility Certificate already granted, if that authority had formed a view, that the assessee was entitled to lesser exemption than that granted by the Divisional Level Committee. However as to its power, the another Division Bench of this Court in ***M/S Gurunanak Surgical Pvt. Ltd., Meerut & Another Vs. Divisional Level Committee, Sales Tax, Meerut, 1991 U.P.T.C. 620,*** had specifically held that the Divisional Level Committee had no power to cancel the Eligibility Certificate already granted. That decision of the Division Bench has been followed in ***M/S Newage Printing Ink Company Meerapur, Allahabad & Another Vs. State of U.P. & Others, 1995 U.P.T.C. 952,*** wherein a modification made by the Divisional Level Committee to reduce the period of exemption, from five years (originally granted) to three years was quashed following the ratio in the case of ***M/S Gurunanak Surgical Pvt. Ltd., Meerut &Another Vs. Divisional Level Committee, Sales Tax, Meerut (supra).*** Similar view has been taken by yet another decision of this Court in ***M/S Precise Laboratories Ltd. Vs. The Divisional Level Committee And Another, 1997 U.P.T.C. 635.*** Thus, it has been submitted the Divisional Level

Committee had no jurisdiction or competence to modify its order dated 05.02.1998 / Eligibility Certificate, granting exemption for a period of eight years from 14.06.1996 in terms of Clause 3 of Part-I of Annexure No.1 to the exemption notifications dated 31 March, 1995.

11. As to the legal consequence of the above principle being applied, further reliance has been placed on a decision of the Supreme Court in ***Sarup Singh & Another Vs. Union of India & Another reported in 2011 (11) SCC 198,*** to submit (consequentially), the order 20.02.2003 being without jurisdiction, would be a nullity and such plea may be raised and examined in the present proceedings as well. Thus, it has been submitted, the fact that an order had been passed by the Divisional Level Committee on 20.02.2003 and the same came to be unsuccessfully challenged in a writ petition which was dismissed, leaving it open to the assessee to pursue his remedies in the present revision, it would have no impact and no legal consequence may flow from the order dated 20.02.2003.

12. Responding to the above, learned Standing Counsel would submit, it is too late in the day for the assessee to turn around and claim entitlement to exemption in terms of Clause 3, Part-I of Annexure 1 to the exemption notifications, as the assessee had itself made the application to the Divisional Level Committee seeking clarification, as to its entitlement to exemption. Having succumbed to the jurisdiction of the Divisional Level Committee, the assessee cannot escape the consequences of the order dated 20.02.2003 passed on its own application. Further, it has been submitted, no remedy having been availed by the assessee against that order, inasmuch as the assessee did not file any appeal before the Tribunal, it cannot resist the direct legal consequences of the order dated 20.02.2003, which has attained finality.

13. Having heard learned counsel for the parties and having perused the record, under Section 4-A of the Act, Annexure 1, Part-I Clause-3 of the exemption notifications and Clause 3(1) of Part-II of that notification read as under:-

ANNEXURE-I

S.No.	Location of Unit	Year	Total period of exemption/reduction in the rate of tax	Exemption from or reduction in the rate of tax[denoted as percentage of the rate of tax payable under the UP Act to the goods concerned][Omitted] In case of units with a fixed capital investment exceeding 50 crores In Case of other units	Monetary limit upto which the benefit of exemption from or reduction in the rate of tax under the Act together with the benefit of exemption from or reduction in the rate of tax under the Central Sales Tax Act, 1956 is admissible
1	2		3	4	5
		A	B	C	

PART-I CLAUSE-3
ANNEXURE-D

3.	The district ofAgra Taj Trapezium Area), Aligarh (excluding Taj Trapezium Area), Allahabad(excluding the area in south of rivers Jamuna and confluent Ganga but including the area included under Municipal Corporation, Allahabad), Bareilly, Bhadohi, Bijnor, Firozabad (excluding Taj TrapeziumArea), Ghaziabad (excludingthe Greater NOIDA Industrial Development Area),	Eight years	1st year 2st year 3st year 4st year 5st year 6st year 7st year 8st year	100% 100% 100% 100% 100% 100% 100% 100%	100% 100% 75% 75% 50% 50% 25% 25%	75% of the fixed capital investment or as the case may be, 175 percent of additional fixed capital investment in case of small scale units and 150% of the fixed capital investment or 150 percent of additional fixed capital investment in case of otherg units.		Gorakhpur, Haridwar, Kanpur (Nagar), Lakhimpur-kheri, Lucknow, Maharajganj, Meerut, Mirzapur, Muzaffarnagar, Saharanpur, Sonbhadra and Varanasi.					

Clause 3(1) of Part-II

३.(१) जिला आगरा (ताज ट्रापेजियम क्षेत्र को छोड़कर) अलीगढ (ताज ट्रापेजियम क्षेत्र को छोड़कर) इलाहाबाद (जिसमेद क्षिण का क्षेत्र शामिल नहीं है किन्तु इलाहाबाद नगर निगम के अंतर्गत आने वाला क्षेत्र शामिल है) बरेली, भदोही, बिजनौर, फ़िरोज़ाबाद, (ताज ट्रापेजियम क्षेत्र को छोड़कर) ग़ाज़ियाबाद(बृहत्तर नोएडा औद्योगिक विकास क्षेत्र को छोड़कर) गोरखपुर, हरिद्वार, कानपूर (नगर), लखीमपुर खीरी, लखनऊ, महराजगंज, मेरठ, मिर्ज़ापुर, मुज़फ्फर नगर, सहारनपुर, सोनभद्र और वाराणसी के जिले	आठ वर्ष	पहला वर्ष दूसरा वर्ष तीसरा वर्ष चौथा वर्ष पांचवा वर्ष छठा वर्ष सातवां वर्ष आठवां वर्ष	१०० प्रतिशत १०० प्रतिशत ७५ प्रतिशत ५० प्रतिशत ५० प्रतिशत ५० प्रतिशत ५० प्रतिशत २५ प्रतिशत	कोई सीमा नहीं

14. Then a "new unit" could claim exemption subject to the terms and conditions of the Act read with the U.P. Trade Tax Rules, 1948 (hereinafter referred to as the Rules) and the exemption notifications that came to be issued by the State Government. The plain scheme of the Act (as may be culled out from Section 4-A(5) read with Rule 25 of the Rules) unequivocally provides, for a claim of exemption to arise, the application must be made by the "new unit" in the prescribed form before the appropriate committee constituted by the State Government in terms of Rule 25. Undisputedly, under Rule 25(2) of the Rules that authority in the present case, was the Divisional Level Committee. Then, under section 4-A(2)(d) of the Act read with clause 4(iv) of the exemption notifications dated 31.03.1995, the exemption from tax became available to the assessee only upon his production of the Eligibility Certificate before his assessing authority and not before. The exemption notification/s, by itself only constituted the law whereunder any "new unit" could claim exemption. However, the right to exemption from tax arose only upon issuance of the Eligibility Certificate dated 05.02.1998 by the Divisional Level Committee.

15. Further, upon production of that Eligibility Certificate the assessing authority remained legally bound to give full effect to it in the assessment proceedings. He had no authority or jurisdiction to make any adjudication whether the assessee was or was not entitled to claim exemption from tax. He was similarly bereft of any jurisdiction to enter judgement as to the extent of exemption from tax granted to the assessee. He was only to measure and deliver to the assessee exemption from tax, to the extent the assessee had been held entitled to by the Divisional Level Committee, vide order dated 05.02.1998. Therefore, in absence of any other statutory intent, it does not appeal to reason and consequently it was never open either to the assessing authority or the first appeal authority to either decline or alter or modify the exemption granted to the assessee. Those authorities could not have read a clause in the exemption notifications differently, so as to over ride the specific order passed by the competent authority, when that order had itself been passed after a conscious application of mind to those notifications itself.

16. Then, against an order that may be passed by the Divisional Level Committee either granting or refusing to grant exemption, a remedy had been provided under Section 10(2) of the Act by filing appeal before the Tribunal. Thus, at the relevant time, the revenue had a remedy of appeal against the grant of Eligibility Certificate to the assessee on 05.02.1998. However, admittedly, that order was never assailed in appeal by the revenue. Other than that, in the case of the assessee/applicant, if his application had been rejected, an additional remedy under Rule 25(3)(c) of the Rules would have been available - to file a review application before the same committee. That situation never arose. Third, upon amendment made to the Act, sub-section (3) was introduced where under the Commissioner was given the power to cancel or amend the Eligibility Certificate, if in his opinion, the facility of exemption or reduction from the rate of tax had been obtained upon any legal or factual error or if the assessee was found not entitled to facility of exemption or

was found to be entitled to that facility for a lesser period from a different date. Other than the above three contingencies, neither the Act nor the Rules nor the notifications, would allow for any alteration or modification or cancellation in the Eligibility Certificate, once granted.

17. Clearly, in the facts of the case, since the original exemption application filed by the assessee had been allowed (and not rejected), by the Divisional Level Committee, by its order dated 05.02.1998, there never arose any remedy to the assessee to apply for review in terms of Rule 25(3)(c) of the Rules. Therefore, the application that came to be filed by the assessee after grant of Eligibility Certificate was wholly non est. It did not confer jurisdiction on the Divisional Level Committee to review or to re-examine or modify the entitlement to exemption, already granted. In the context of lack of jurisdiction as to the subject matter of proceedings, in **Kiran Singh And Others v. Chaman Paswan, AIR 1954 SC 340** the Supreme Court **reasoned** "6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties".

18. Again, in V**asudev Dhanji Modi v. Rajabhai Abdul Rehman And Others, (1970) 1 SCC 670,** the Supreme Court held: "7.When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. InJnanendra Mohan Bhaduriv.Rabindra Nath Chakravarti[LR 60 IA 71] the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction".

19. Same position of law inheres in the ratio of the Division Bench

pronouncements of this Court in the case of **M/S Gurunanak Surgical Pvt. Ltd., Meerut & Another Vs. Divisional Level Committee, Sales Tax, Meerut (supra)** as specifically applied in the case **M/S Newage Printing Ink Company Meerapur, Allahabad & Another Vs. State of U.P. & Others (supra**). It that case, the Divisional Level Committee had reduced the period of exemption from five years (under the Eligibility Certificate), to three years by subsequent order of the Divisional Level Committee. It was found to have done so without any power to cancel or modify the order granting Eligibility Certificate. The same principle would govern the present case and no different conclusion may be drawn herein.

20. The consequence of the above would be - the order passed by the Divisional Level Committee dated 20.2.2003 would remain a nullity, it being an order passed in proceedings without inherent jurisdiction. Hence, the fact that the assessee did not directly challenge that order or that order had been passed on the application of the assessee cannot be cited as a ground to contend that the assessee is estopped from assailing that order as without jurisdiction or authority. That principle is also well entrenched in our jurisprudence to doubt its applicability - being once the order was found to be without jurisdiction or a nullity, acquiescence may never be found to confer jurisdiction. In **United Commercial Bank Ltd. v. Workmen, AIR 1951 SC 230,** the Supreme Court held: "15. The final contention that the sittings in the interval constituted only an irregularity in the proceedings cannot again be accepted because, in the first place, an objection was raised about the sitting of the two members as the Tribunal. That objection, whether it was raised by the appellants or the other party, is immaterial. *The objection having been overruled, no question of acquiescence or estoppel arises. Nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. No acquiescence or consent can give a jurisdiction to a court of limited jurisdiction which it does not possess. In our opinion, the position here clearly is that the responsibility to work and decide being the joint responsibility of all the three members, if proceedings are conducted and discussions on several general issues took place in the presence of only two, followed by an award made by three, the question goes to the root of the jurisdiction of the Tribunal and is not a matter of irregularity in the conduct of those proceedings. The absence of a condition necessary to found the jurisdiction to make the award or give a decision deprives the award or decision of any conclusive effect. The distinction clearly is between the jurisdiction to decide matters and the ambit of the matters to be heard by a Tribunal having jurisdiction to deal with the same. In the second case, the question of acquiescence or irregularity may be considered and overlooked. When however the question is of the jurisdiction of the Tribunal to make the award under the circumstances summarized above, no question of acquiescence or consent can affect the decision."*

21. Relying on the aforequoted principal, the Supreme Court in **Jagmittar Sain Bhagat And Others v. Director, Health Services, Harayana And Others, (2013) 10 SCC 136, h**eld: 9. Indisputably, it is a settled legal

proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. In such eventuality *the doctrine of waiver also does not apply. (VideUnited Commercial Bank Ltd.v.Workmen[AIR 1951 SC 230] ,Nai Bahuv.Lala Ramnarayan[(1978) 1 SCC 58 : AIR 1978 SC 22] ,Natraj Studios (P) Ltd.v.Navrang Studios[(1981) 1 SCC 523] andKondiba Dagadu Kadamv.Savitribai Sopan Gujar[(1999) 3 SCC 722]."*

22. nsofar as the decision relied upon by learned Standing Counsel in ***Mentha Oil and Allied Product Vs. State of U.P. (1996)103 STC 316*** is concerned, the same is wholly distinguishable. That was a case where a recognition certificate holder under section 4-B of the Act, engaged in the manufacture of notified goods, claimed exemption from tax on purchase of raw materials under an earlier notification issued by the State Government providing for such exemption. The precise argument of the petitioner in that case was, since its recognition certificate under Section 4-B of that Act had been renewed for the period upto 1995-96, the subsequent notification dated 21.05.1994 imposing tax on purchase of raw materials (by persons engaged in manufacture of notified goods), would not apply to the petitioner. That submission had been rejected by the Division Bench on the reasoning, the rate of tax on purchase of raw materials would continue to be governed by the notifications issued by the State Government and the fact that the petitioner may have held a valid recognition certificate, would only imply that it would remain eligible to exemption or concession from tax if such exemption or concession were provided by the State Government. Insofar as the subsequent notification dated 21.05.1994 had imposed tax on the purchase of raw materials, the exemption that was earlier available under a pre-existing notification, would cease to exist. To that extent and in that context the claim of exemption was held to be founded on the notification and not the recognition certificate.

23. The above principle has no application in the facts of the present case, inasmuch as, here, the notification only provided for the enabling law under which an eligibility certificate may be obtained. However, the actual exemption became available to the assessee not by virtue of that declaration of law but upon the claim made by the assessee (in the shape of an application for grant of exemption), being allowed by the Division Level Committee, by its order dated 05.02.1998. Thus, the claims arising under Sections 4-B and 4-A of the Act being based in entirely different statutory schemes, reliance placed by the Tribunal on the decision of the Division Bench in **Mentha Oil (supra)**, is wholly erroneous.

24. The only power that may have remained with the revenue would have been

under Section 4-A(3) of the Act, whereunder the Commissioner may have modified the Eligibility Certificate issued by the Divisional Level Committee vide its order dated 05.02.1998. That power having not been exercised, it was neither for the assessing authority nor for the first appellate authority to sit in judgement over the same or to deprive the assessee of any part of the exemption already granted by the Divisional Level Committee. In that context and regard, the assessing authority as also the first appellate authority, were purely executing authorities, that had to give full effect to the Eligibility Certificate duly granted by the competent authority namely Divisional Level Committee. Consequently, question of law no.1 is answered in the negative i.e. completely in favour of the assessee and against the revenue.

25. Insofar as the second question is concerned, plainly, the books of account had been rejected for varied reasons that have been noted and considered by the Tribunal as well. That being a question of fact and findings recorded thereon being based on material and evidence on record, it does not call for any interference by this Court in exercise of revisory jurisdiction. The question of law no. 2 is answered in the affirmative i.e. in favour of the revenue and against the assessee.

26. Accordingly, both revision applications are **partly allowed.**
